UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

RUSTY HARROD — PLAINTIFF

v. — CIVIL ACTION NO. 3:97CV-165-S

PHILIP MORRIS Inc.
and ANDY FRAIN SERVICES, Inc. — DEFENDANTS

MEMORANDUM OPINION

This matter comes before the court on a motion by the defendant, Philip Morris, Inc. ("Philip Morris") to reassert its motion for summary judgment and a renewed for summary judgment. In this case, the plaintiff claims defamation as a result of incident reports prepared by security personnel employed by the defendant, Andy Frain Services, Inc. The defendant removed this case from Jefferson Circuit Court. For the reasons below, we will grant the defendant's motion to reassert its motion for summary judgment and grant the defendant's motion for summary judgment.

FACTS

In February 1995, the plaintiff, Rusty Harrod, began working at Philip Morris through Marie Humphreys Consultants, Inc. ("Humphreys"), a nursing registry which supplied Philip Morris with contract nurses to staff its medical department in the Louisville manufacturing facility during the third shift. Harrod was an employee of Humphreys, but was subject to the control and direction of Philip Morris. Andy Frain Services, Inc. ("Andy Frain") provided security services to Philip Morris as an independent contractor.

While working at Philip Morris, Harrod began a sexual relationship with Joe Bell, a production line Philip Morris employee. They began eating lunch together in the medical department with the door locked. In 1996, Harrod approached Mary McGarvey, manager of

Philip Morris's medical department, to complain that she was begin harassed because of her relationship with Bell, an African-American. McGarvey suggested that they cease having private lunches behind locked doors to stop the rumors.

In July 1996, Harrod and Bell were alone in Philip Morris's medical department with the door locked. Although she was required to be available throughout her shift, including breaks, Harrod had forwarded calls to the main number in the medical department to the security desk. Harrod asserts that, in an emergency, there were four open telephone lines to the nurse's stations and "red" telephones available to report an emergency to the medical department. Harrod's pager was not activated. A cafeteria worker lacerated her finger and needed medical attention. Dan Higdon, a security guard was unable to contact Harrod by telephone or by pager. James McGrath, supervising security guard, eventually obtained a key to the medical department and informed Harrod that an injured worker needed her assistance.

McGrath and Higdon prepared incident reports. These stated that, approximately thirty seconds after Harrod exited the medical department, a black male exited the medical department, tucking in his shirt on the way. After the reports were forwarded to Philip Morris's personnel department, Harrod had a meeting with McGarvey and Hines, McGarvey's immediate supervisor. Harrod admitted that she continued to have lunch with Bell behind locked doors in the medical department two or three times a week but denied that he was tucking in his shirt on the night in question. Hines informed Harrod that she was not to have non-medical staff guests in the medical department for lunch. Philip Morris asserts that, despite this directive, Harrod continued to have lunch with Bell in the medical department with the door locked.

Harrod alleges that, in September 1996, Higdon telephoned Harrod to apologize for writing the report and to inform her that McGrath had told him to falsify parts of it. Harrod alleges that Higdon wrote and signed to letters to this effect. Higdon denied this in his

deposition. In January 1997, Philip Morris began contracting with Healthcare Associates, rather than Humphreys, for its nurses. Philip Morris did not hire Harrod through Healthcare.

Harrod has brought this action against both Philip Morris and Andy Frain, alleging defamation as a result of the incident reports prepared by Andy Frain security guards. Harrod asserts that McGrath falsely stated that Bell was tucking in his shirt as he exited the medical department which falsely implied that they were having a sexual encounter. Philip Morris has now brought a motion for summary judgment.

DISCUSSION

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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). A party's failure to establish an element of proof essential to his case and upon which he will bear the burden of proof at trial constitutes a failure to establish a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d. 265 (1986). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The alleged defamatory statements in the incident reports were written by Andy Frain employees. Both Harrod and Philip Morris agree that Andy Frain worked as an independent contractor for Philip Morris. A corporation "is liable for defamatory statements made by its employees, if the statements are made within the scope of employment." *Brewer v. American Nat'l Insurance Co.*, 636 F.2d 150, 154 (6th Cir. 1980). However, corporations cannot be held liable for torts committed by their independent contractors. *Price v. Taasaas*, 774 F.2d 1163 (6th Cir. 1985). Therefore, Philip Morris cannot be held liable for the alleged defamation committed by Andy Frain, its independent contractor.

Accordingly, we will grant Philip Morris's motion to reassert its motion for summary judgment and grant Philip Morris's renewed motion for summary judgment by separate order.

This _____ day of _____, 1998.

_____
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

RUSTY HARROD PLAINTIFF

v. CIVIL ACTION NO. 3:97CV-165-S

PHILIP MORRIS Inc.
and ANDY FRAIN SERVICES, Inc. DEFENDANTS

ORDER

Motions having been made and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED**, that the motion of the defendant, Philip Morris, Inc., to reassert its motion for summary judgment is **GRANTED** and the renewed motion of the defendant, Philip Morris, Inc., for summary judgment is **GRANTED**. The plaintiff's complaint against Philip Morris, Inc. is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED this _____ day of _____, 1998.

_____
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

In order to establish a claim for defamation under Kentucky law, the plaintiff must prove: (1) defamatory language; (2) about the plaintiff; (3) which is published; and (4) which injured the plaintiff's reputation. *Smith v. Westlake PVC Corp.*, 132 F.3d 34, 1997 WL 764489, **3 (6th Cir. 1997) (*citing Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 272 (Ky. Ct. App. 1981)). Harrod has established all elements of her defamation claim. No question that the incident report was referring to Harrod.

Was this defamatory? Did it injure her reputation? This is a claim for defamation *per se*. In such a case, damages are presumed. *CMI, Inc. v. Intoximeters, Inc.*, 918 F.Supp. 1068 (W.D. Ky. 1995). To constitute defamation per se, the alleged defamatory speech "must tend to expose the plaintiff to public hatred, ridicule, contempt or disgrace, or to induce an evil opinion of him in the minds of right-thinking people and to deprive him of their friendship, intercourse and society. But it is not necessary that the words imply a crime or impute a violation of laws, or involve moral turpitude or immoral conduct." CMI at 1083 (*quoting Sweeney &Co. v. Brown*, 60 S.W.2d 381 (Ky. Ct. App. 1933)). Specifically, the court should consider "if [the words] directly tend to the prejudice or injury of a person in his profession, trade or business." *CMI* at 1083 (*quoting White v. Hanks*, 255 S.W.2d 602 (Ky. Ct. App. 1953)).

In determining whether a writing is defamatory per se, the court must only consider the "four corners" of the writing and must not consider "innuendos and explanations." CMI at 1084. The defendant argues that the plaintiff's claim is based "purely on innuendo" because she is inferring that stating that Bell was tucking in his shirt as he left the medical department implied that the plaintiff had engaged in sexual conduct with Bell in the medical department.

We conclude that the report did not contain defamatory language per se. However, even if it had, Harrod would still be unable to prove her claim because . Or--we decline to decide this issue because we do not need to and assume Harrod established her claim.

The report was published. Publication requires that "the words were intentionally or negligently communicated so as to be heard by an understanding third party." at **3. Communications from one supervisor to another are publications. *Brewer v. American Nat'l Insurance Co.*, 636 F.2d 150, 153 (6th Cir. 1980) (???????relying on *Louisville & Nashville R.R. Co. v. Marshall*, 586 S.W.2d 274 (Ky. Ct. App. 1979)).

But this publication was not made BY Philip-Morris; it was made by Andy Frain. Imputed to Philip Morris? Assume agent of Philip Morris? Writing the report about a Philip Morris employee for Philip Morris. Acting within the scope of their employment.

Truth is a complete defense to a defamation claim. at **3 (*citing Bell v. Courier-Journal & Louisville Times Co.*, 402 S.W.2d 84 (Ky. Ct. App. 1966)). Contents of report are disputed here so truth cannot be used as a defense. Question of fact remains on this issue.

Qualified privilege is a defense to a defamation claim. at **3 (*citing Tucker v. Kilgore*, 388 S.W.2d 112, 114 (Ky. 1964)). A communication is protected by a qualified privilege if it is made in good faith and without actual malice by a person who believes he has a duty or interest to a person with a corresponding duty or interest. Brewer at 154. "Intracorporate communications necessary to the company's functioning, such as performance appraisals, enjoy a qualified privilege that can be defeated only by a showing of malice." *Parrish v. Ford Motor Co.*, 909 F.2d 1484, 1990 WL 109188, **6 (6th Cir. 1990) (*citing Caslin v. General Electric Co.*, 608 S.W.2d 69, 70-71 (Ky. Ct. App. 1980)). Incident report necessary to company's function. Therefore, this communication was subject to a qualified privilege.

Philip Morris conducted investigation after the incident. Interviewed the plaintiff. plaintiff must prove actual malice to get past SJ---if guards included false information, this is malice---parties dispute it so a question of fact remains. But--maybe not for Philip Morris if this takes it outside the scope of employment.

-abuse of privilege? malice standard--knowing or reckless disregard of truth of statement

-abuse by agent imputed to principal?