

2003

Holly Wayment v. Clear Channel Broadcasting, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

HOLLY WAYMENT,

Plaintiff and Appellant,

vs.

CLEAR CHANNEL BROADCASTING,
INC., a Texas corp., dba KTVX CHANNEL
FOUR; JON FISCHER, an individual; and
PATRICK BENEDICT, an individual,

Defendants and Appellees.

BRIEF OF APPELLEES

Appeal No. 20030854
District Court No. 020906919

Oral Argument Priority No. 15

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE STEPHEN L. HENRIOD, DISTRICT JUDGE**

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LIST OF PARTIES

All parties to this appeal and to the proceedings below are listed in the case caption.

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INTRODUCTION

Plaintiff appeals a decision by the district court granting summary judgment in favor of defendants on her claim for defamation. Plaintiff initiated this lawsuit after she was allegedly “forced to resign” her employment as the KTVX Channel 4 Health Reporter. At the time of her resignation, Plaintiff was an at will employee who could have been terminated for any reason, with or without cause under Utah law.

Plaintiff was given the choice of resigning or being terminated after she revealed to KTVX management that she had, without obtaining prior permission as required by station policy, approached the Huntsman Cancer Institute (one of the health care organizations on whom she routinely reported) and solicited the Institute’s monetary and other support for a non-profit foundation she desired to establish.

This obvious conflict of interest with her duties as the station’s health reporter resulted in her termination by defendant Jon Fisher, the KTVX news director. Because of Plaintiff’s concern that her being “fired” might adversely affect her previously undisclosed employment discussions with a competing TV station, KUTV, Channel 2, Fischer agreed to allow Plaintiff to “resign” and take two weeks “vacation” so she could conclude her discussions with her prospective employer before her departure became public. During this “vacation” period, there was speculation and gossip among some in the KTVX newsroom staff about the reasons for her absence, such speculation being fueled, in part, by Plaintiff’s own comments and actions to her fellow workers.

Defendants Jon Fischer and Patrick Benedict, the KTVX assistant news director, made no comments about the reasons for her departure from the station. This was in keeping with the station policy to not comment on terminated employees and consistent

with a commitment Jon Fischer made to Plaintiff when he terminated her that he would not discuss the reasons for her departure in the newsroom.

Following her termination, Plaintiff filed suit asserting claims for breach of contract, defamation, intentional interference with economic relations and injunctive relief. She subsequently amended her claims and narrowed them to wrongful termination and defamation. After discovery showed no basis for her wrongful termination claim, she amended her complaint to assert a single claim for defamation. In search of factual support for her defamation claim, Plaintiff deposed seventeen current and former KTVX employees and other interested parties. Tellingly, Plaintiff could not find a single witness who heard the Defendants make any of the allegedly defamatory statements.

Given Plaintiff's lack of any direct evidence, as well as the applicability of legal privileges that protect the type of speech allegedly made in this case, Defendants moved for summary judgment. In opposing summary judgment, Plaintiff relied on inadmissible double and triple hearsay, conjecture, speculation, and circumstantial evidence; none of which was sufficient to withstand dismissal. The district court correctly rejected Plaintiff's novel, yet incorrect legal arguments, and in the absence of any material factual dispute, granted summary judgment. For the numerous reasons outlined below, any of which alone would require affirmance, this Court should uphold the decision of the district court.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (2004) (appeals from judgments over which Court of Appeals lacks original jurisdiction).

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

Appellees Clear Channel Broadcasting, Inc., dba KTVX Channel Four, Jon Fischer, and Patrick Benedict (collectively “Appellees” or “Defendants”) offer the following statement of issues in lieu of that contained on page viii of Appellant’s Opening Brief (hereinafter, “Br. of Appellant”). This formulation of the issues more accurately captures the arguments presented to the district court, the basis for the court’s decision below, as well as an additional basis for affirming the district court’s judgment. Each of the following issues was raised before the district court both in Defendants’ memoranda in support of their motion for summary judgment (R. 248-265; R. 450-460.) and at oral argument on the motion.

ISSUE # 1

Was the district court correct to grant summary judgment in Defendant’s favor on Ms. Wayment’s defamation claim on the basis that Ms. Wayment was a public figure who was required to show actual malice on the part of Defendants to overcome the privilege protecting speech related to public figures?

Defendants agree with Ms. Wayment that summary judgment is an issue of law, which is to be reviewed for correctness. Additionally, the applicability of the privilege is a legal issue to be reviewed for correctness. See Price v. Armour, 949 P.2d 1251, 1254 (Utah 1997) (“The existence of a privilege is a question of law for the court, which we review for correctness, giving no deference to the trial court’s determination.”); Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 900 (Utah 1992).

ISSUE # 2

Was the district court correct to grant summary judgment in Defendants' favor on Ms. Wayment's defamation claim on the basis that there was no admissible evidence linking Jon Fischer to any of the allegedly defamatory statements?

Defendants agree with Ms. Wayment that generally summary judgment is an issue of law, which is to be reviewed for correctness. However, even at summary judgment, a trial court's decision to exclude evidence is reviewed for both correctness and abuse. Utah v. Horton, 848 P.2d 708, 713-14 (Ut. Ct. App. 1993) (excluding affidavit on hearsay grounds and photograph for lack of authentication); In re: Gen. Determination of Rights to Use of All Water, 982 P.2d 65, 71-72 (Utah 1999) (excluding affidavits made without first hand knowledge). First, it is determined if the trial court was correct in its selection, interpretation, and application of a rule of evidence. Horton, 848 P.2d at 714. Next, an abuse of discretion standard is applied to whether the trial court reasonably determined that the excluded evidence failed to satisfy evidentiary requirements. Id.

ISSUE # 3

Was the district court correct to grant summary judgment in Defendant's favor on Ms. Wayment's defamation claim on the basis that none of the alleged statements made by Patrick Benedict are the defamatory statements Ms. Wayment pled in her Amended Complaint?

Defendants agree with Ms. Wayment that summary judgment is an issue of law, which is to be reviewed for correctness.

ISSUE # 4

Should this Court affirm the district court's grant of summary judgment on Ms. Wayment's defamation claim on the alternative basis that she failed to offer any evidence

of common law malice on the part of Defendants which is required to overcome the qualified privilege attached to employer-to-employee communications?

Defendants agree with Ms. Wayment that summary judgment is an issue of law, which is to be reviewed for correctness. Additionally, the applicability of the privilege is a legal issue to be reviewed for correctness. See Price, 949 P.2d at 1254; Russell, 842 P.2d at 900.

DETERMINATIVE PROVISIONS ON APPEAL

This appeal turns upon issues of constitutional and common law rather than the upon interpretation of statutes, ordinances, rules or regulations. However, the determination of this appeal could involve interpretations of Rule 801(c), Rule 801(d)(2)(B), and Rule 801 (d)(2)(D) of the Utah Rules of Evidence as well as Rule 8(a)(1) and Rule 9(b) pf the Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Proceedings Below

On July 26, 2002, Plaintiff filed a Verified Complaint in this matter. In that Complaint, Plaintiff sued Defendants asserting four claims for relief: breach of contract, defamation, intentional interference with economic relations and injunctive relief.

On November 13, 2002, Plaintiff subsequently filed an Amended Complaint which eliminated the contract and injunctive claims and added a wrongful termination claim. After discovery demonstrated that her intentional interference with economic relations and wrongful termination claims were without merit, Plaintiff filed a Second Amended Complaint on February 6, 2003, leaving a single claim for defamation.¹

¹ The Second Amended Complaint purports to set forth a second cause of action for “Malice.” However, this claim does not constitute an independent, substantive cause of

On April 22, 2003 Defendants filed a Motion for Summary Judgment and supporting memorandum and exhibits. (R. 237-304.). Plaintiff filed an Opposition Memorandum on May 28, 2003. (R. 305–446.) On June 16, 2003 Defendants filed a Reply Memorandum and Notice to Submit for Decision. (R. 447-464.)

On August 15, 2003, the matter came before the Court for hearing and, after oral argument, was taken under advisement. (R. 470.) On August 25, 2003, a Memorandum Decision issued from the Court granting Defendants’ Motion for Summary Judgment. (R. 484-489.) On September 12, 2003, the Court entered an Order of Dismissal with Prejudice. On October 29, 2003, the Court entered final judgment pursuant to Rule 54(b) URCP. (R. 495-496.) On October 9, 2003, Plaintiff filed her Notice of Appeal.

B. Statement of Facts

The Parties

1. Plaintiff is an experienced journalist, having received a Masters Degree in journalism from Northwestern University and having been employed in the TV news profession for 9 years. (Supplemental Record “Sup. R.” at 561; Resume of Holly Wayment, attached as Exhibit 7 to Plaintiff’s deposition.) Plaintiff was the KTVX Health Reporter from March, 1999 until her termination in May of 2001. (*Id.*) Plaintiff was an at-will employee at the time of her termination and a well known public figure in Salt Lake City and the State of Utah. (R. 268 ¶ 7.)

2. Defendant Jon Fischer is an experienced journalist, having worked in the TV news profession for 25 years. (R. 267-68 at ¶ 2.) Fischer has been the news director

action. The claim merely alleges that Defendants acted with malice toward Plaintiff in making their alleged defamatory statements, thus entitling Plaintiff to an award of punitive damages if she recovers on her defamation claim.

of KTVX from October of 2001 to the present. (R. 268 at ¶ 4.) Fischer was Plaintiff's boss and had regular contact with her during her employment at KTVX. (Id. at ¶¶ 5, 6.)

3. Defendant Patrick Benedict was the assistant news director at the time of Plaintiffs termination, although he had been employed at KTVX for only approximately one month prior to Plaintiffs termination. (R. 275 at ¶ 1.)

4. Defendant Clear Channel Broadcasting, Inc. does business in the State of Utah as KTVX Channel 4, having acquired KTVX in October of 2001. (R. 268 at ¶ 3.)

Plaintiff's Termination for Conflict of Interest

5. KTVX has a policy that requires its reporters and anchors to obtain prior management approval before undertaking any significant or publicly visible involvement or contact with community or charitable organizations. (R. 268-69 at ¶ 10.)

6. Plaintiff was terminated in May of 2002 after she revealed to Defendant Fischer in a meeting on May 3, 2002 that she had approached, without prior approval of Mr. Fischer, the Huntsman Cancer Institute ("HCI") (one of the healthcare organizations she routinely covered as a reporter) and solicited HCI's support for a non profit organization she wanted to establish to help kids with cancer. (R. 268-69 at ¶¶ 8, 12.)

7. Fischer believed such actions (a) were in violation of the KTVX policy described above and (b) constituted a conflict of interest with her duties as the KTVX Health Reporter, even if no final agreements had yet been reached between HCI and Plaintiff regarding her foundation. (R. 269-70 at ¶¶ 16, 17.)

8. At Fischer's request, Plaintiff sent Fischer a memorandum describing her contacts with HCI after Fischer expressed his shock and concern in the May 3, 2002 meeting about what she had done. (R.269 at ¶ 13.)

9. The requested memorandum (R. 278.) was prepared by Plaintiff and was truthful and accurate in its contents. (R. 243 at ¶ 12, uncontested at R. 309.)

10. Dr. Joseph Yost (the primary person at HCI with whom Ms. Wayment discussed her proposal) had detailed conversations with Plaintiff in which HCI's support of the foundation, both monetary and in other ways, was discussed. (R. 279-83.) However, Dr. Yost was advised by the Senior Director of Public Affairs at HCI that his dealings with Ms. Wayment raised a serious concern regarding a conflict of interest because as a health reporter, Ms. Wayment regularly covered HCI and other health care organizations. (R. 281-82 at ¶ 9.)

11. Plaintiff was terminated by Fischer on May 14, 2002. (R. 270-71 at ¶ 19.) Because of Plaintiff's expressed concern that her being "fired" might adversely affect her previously undisclosed discussions she had been having about employment with KUTV, Channel 2, Fischer gave Plaintiff the option to "resign" and allowed her to take two weeks "vacation" to finalize her discussions with Channel 2 before her departure became public. (*Id.*) Plaintiff submitted a letter of resignation dated May 14, 2002 which letter was accepted by Fischer. (*Id.*)

12. Because of Plaintiff's expressed concern to Fischer that her being fired for a conflict of interest might adversely affect her future in the broadcast news business, Fischer promised Plaintiff he would not discuss or comment on the reasons for Plaintiff's departure. (R. 271 at ¶ 21.)

The Alleged Defamatory Statements

13. Plaintiff alleges that Defendants Jon Fischer and Pat Benedict made certain defamatory statements regarding Plaintiff following Mr. Fischer's decision to terminate

Plaintiff's employment. The alleged statements made are that Plaintiff was terminated because:

- (a) "She was taking money from the Huntsman Cancer Institute";
- (b) "Was in bed with the Institute"; and
- (c) "Had used her reporting contacts to try to set up a foundation for her benefit."

(R. 228 at ¶ 48; Sup. R. 557 at lines 7-20.)

14. Plaintiff is very specific in pleading her defamation claim based only on these three statements. (R. 228 at ¶¶ 45, 48.) No other statements, either generally or specifically, are alleged to have been made by the Defendants. (Id.)

15. The corporate Defendant, KTVX, is alleged to have defamed Plaintiff through the statements of its agents—Fischer and Benedict. No other basis for liability against KTVX is asserted. (R. 228-29 at ¶¶ 47-54.)

16. The Second Amended Complaint does not allege which statements were made by which Defendant or to whom the statements were allegedly made. (R. 288-29 at ¶¶ 47-54.)

17. Discovery demonstrated the following:

- (a) Plaintiff admits that neither Fischer nor Benedict made any of the alleged defamatory statements to her. (Sup. R. 558 at lines 3-25; 559 at lines 1-5.)
- (b) Plaintiff admits that she never personally overheard Jon Fischer or Pat Benedict make any of the alleged defamatory statements to others. (Id.)
- (c) Fellow employees reported to Plaintiff that there was newsroom gossip and speculation about the reasons for her termination. (Sup. R. 559-60, 562.)

- (d) Of the 17 current and former KTVX employees deposed by Plaintiff none of them (including Adam Rodriguez and Jeremy Castellano) have first hand knowledge that Jon Fischer made any of the challenged statements. (Compare R. 245-46 to R. 308-11; Plaintiff does not contest this fact.)
- (e) Of the 17 current and former KTVX employees deposed by Plaintiff only one person, Jeremy Castellano, purports to have first-hand knowledge of what Defendant Pat Benedict said about why Plaintiff was terminated. (Compare R. 245-46 to R. 308-311; Plaintiff does not contest this fact.)
- (f) Castellano testified that he approached Benedict to find out “what happened” with Plaintiff and the only statements he heard Mr. Benedict say were: (1) “she abused her contacts as a reporter to start this foundation;” (2) “she was in charge of a large sum of money;” (3) “it’s unethical” (4) “you can’t do stories on a place that you receive money from” and (5) “The worst thing is that she doesn’t even understand what she did was wrong.” (R. 336 at pp. 10, 35-36.)

Plaintiff’s Public Figure Status

18. Ms. Wayment was an on-air TV news personality for over three years at KTVX Channel 4. (R. 286 at ¶ 4.) During that time, Plaintiff was the KTVX Health Reporter where she appeared in news broadcasts almost every day doing either live or taped news stories on health-related topics. (Id. at ¶¶ 5 and 6.) Plaintiff produced and presented at least one health report five days a week. Her reports included a two-minute “4 Utah Health Headlines” presentation and/or a “health package,” which was a longer, more in-depth story on health issues. (Id. at ¶ 7.)

19. Plaintiff's stories (which often aired on all three KTVX newscasts each day) would run between one minute, 30 seconds and four minutes in length. (R. 286-87 at ¶¶ 8-10.)

20. In addition to her daily health stories, Plaintiff was also featured in several half hour Special Reports regarding health matters and public safety issues. She was part of an award-winning, highly promoted special titled "The Truth About Tobacco" which aired twice in 2001. (R. 287 at ¶ 13.)

21. Ms. Wayment also reported live from various highly promoted special events in the Utah community, including Utah AIDS Foundation's annual Oscar Night Gala benefit which was attended by hundreds of people. Ms. Wayment would report live from the celebration during the evening newscast directly following the Oscars, a newscast that is watched by tens of thousands of viewers. (R. 287 at ¶ 14).

22. Plaintiff did 63 stories about the HCI or its employees during her employment at KTVX. (R. 288 at ¶ 16.)

23. KTVX's geographic broadcast coverage area extends to the entire State of Utah and to portions of five neighboring states. Ms. Wayment's weekday health reports during the years 1999-2001 were seen by an average of 49,000-59,000 viewers during the KTVX 5:30 p.m. evening news program; an average of 38,000-50,000 viewers during the KTVX 6:00 p.m. evening news program and an average of 51,000 to 75,000 viewers when her stories were rebroadcast in the 10:00 p.m. evening news. (R. 288 at ¶ 17.)

24. On occasion, Plaintiff's stories broadcast on KTVX would be picked up by the ABC Network and broadcast nationally or by other ABC affiliates around the country. (R. 287 at ¶ 15.)

25. Plaintiff was the subject of various KTVX promotions in 2000 and 2001 during each of the four annual ratings periods or “sweeps.” During these sweeps periods, Plaintiff and her stories were promoted on KTVX and other television stations in 15-30 second commercials prior to the broadcast of her particular story. These commercials totaled over 500 in number. (R. 291-92 at ¶¶ 3-4.)

26. Ms. Wayment maintained a highly visible public presence in the greater Salt Lake area through extensive community and volunteer work. She was a member of the Board of Directors of the Candlelighters for Childhood Cancer, a Utah non-profit organization. She acted as the celebrity Master of Ceremonies for the Utah Diabetes Center Annual Gala in March of 2002. She was the March of Dimes WalkAmerica Spokesperson in the spring of 2001 and she was a celebrity runner in the Race for the Cure Fun Runs in 2000 and 2001. (R. 312 at ¶ 4.)

27. Ms. Wayment was featured in a fashion segment of Oprah Winfrey’s Magazine “O”, which included a full body photograph and reference to her as a TV reporter in Salt Lake City. (Sup. R. 560 at lines 10-24.)

28. Ms. Wayment described herself as a “local celebrity.” (R. 278 at last paragraph.)

29. The local media did stories about the filing of her lawsuit against defendants. *See, e.g., Deseret News* Story dated July 27, 2002, titled “Former KTVX Reporter Sues Company” (R. 293-94.)

Plaintiff’s Lack of Evidence Regarding Ill-Will or Hostility

30. Defendant Benedict had never spoken to Ms. Wayment before beginning his employment at KTVX only two weeks prior to Plaintiff’s termination. (R. 275 at ¶¶ 1-3.) Benedict believed Ms. Wayment was a competent employee, had a pleasant

working relationship with her and harbored no ill will or animosity towards her. (Id. at ¶ 4.)

SUMMARY OF ARGUMENT

In this case, there are three compelling basis for affirming the summary judgment granted by the district court.

First, (as addressed in Sections I and II of this brief), the undisputed evidence establishes Plaintiff was a “public figure.” Plaintiff failed in her effort to affirmatively produce any evidence (let alone the clear and convincing evidence the law requires) to prove that Defendants made the alleged statements with the “actual malice” required to overcome the privilege protecting speech about public figures.

Second, (as set forth in Section III herein), despite extensive discovery, including the depositions of 17 current and former KTVX employees, Plaintiff has discovered no admissible evidence that the alleged defamatory statements were made by Defendant Fischer (as opposed to idle gossip and speculation by others whom she has chosen not to sue). Similarly, Plaintiff has produced only one witness that purports to have heard Patrick Benedict make any statements about her. These statements (as discussed in Section IV herein), are not the ones Plaintiff has sued upon in her Second Amended Complaint.

Third, (as set forth in Section V herein), Plaintiff has failed to produce any evidence that Defendants Fischer or Benedict (even if one assumes they made the alleged defamatory statements) acted with the requisite “common law malice” to overcome the protections afforded employer-to-employee communications (or communications to a interested third parties).

Any one of these reasons, standing alone, is sufficient grounds for affirming summary judgment. All together, they provide overwhelming justification for dismissal of the case and impose an insurmountable barrier to Plaintiff's claims on appeal.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT PLAINTIFF WAS A PUBLIC FIGURE WHO WAS REQUIRED TO PROVE ACTUAL MALICE ON THE PART OF DEFENDANTS IN ORDER TO AVOID DISMISSAL OF HER DEFAMATION CLAIM.

The District Court was correct in determining that Plaintiff was a public figure who needed to prove actual malice on the part of defendants in order to avoid dismissal of her defamation claim. Despite Plaintiff's arguments on appeal that she was not a public figure, her position lacks any factual or legal support and must be rejected for the following reasons:

A. A Public Figure Is One Who Has Assumed a Role of Prominence in Society, Occupies a Position of Influence, or Who Has Invited Public Attention And Comment.

Under both U.S. and Utah constitutional law, persons attain public figure status in one of three ways. They are persons who either have "assumed roles of especial *prominence in the affairs of society*" or who occupy "a *position of persuasive power and influence*" or who "*invite attention and comment.*" Seegmiller v. KSL, Inc., 626 P.2d 968, 972 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)) (emphasis added); see also Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1294 n. 15 (D.C. Cir. 1980) (public figure's broad influence allows [her] to capitalize on general fame by *lending [her] name to* products, candidates and *causes*) (emphasis added). To achieve public figure status, Ms. Wayment's prominence or fame need not have been gained on a national basis, but merely within her community. Gertz,

418 U.S. at 351-52 (general fame and notoriety in community or among local population is required); Waldbaum, 627 F.2d at 1295 n. 22 (D.C. Cir. 1980) (“We therefore conclude that nationwide fame is not required”). See also SARO Corp. v. Waterman Broad. Corp., 595 So.2d 87, 89 (Fla. Ct. App. 1992) (only fame or notoriety in community required for general purpose public figure).

Further, this Court has noted that a person who “. . . forsakes the anonymity of private life and enters the limelight of the public arena . . . must accept the attendant personal risks.” Seegmiller, 626 P.2d at 974; see also Waldbaum, 627 F.2d at 1294-95 (“When someone steps into the public spotlight . . . [s]he must take the bad with the good”); San Antonio Express News v. Dracos, 922 S.W. 2d 242, 255 (“As a journalist and self-described public commentator, [Plaintiff] cannot hold himself out as a popular television personality and yet deny he is a public figure for purposes of the New York Times standard and the First Amendment”). Consistent with these pronouncements, the voluntary nature of a person’s ascent into the limelight will be a determinative factor in finding her a public figure. Seegmiller, 626 P.2d at 972 (citing Gertz, 418 U.S. at 342, 345) (vigor and success with which person seeks public attention is one determinative factor in achieving public figure status).

As set forth in Section C below, the record before the trial court unequivocally demonstrates that Plaintiff meets not one, but all three criteria for public figure status — she was “prominent” within our state, she occupied a position of “influence” and she voluntarily sought “public attention.”

B. Reporters, Journalists and Media Personalities Such As Plaintiff Are Public Figures.

Plaintiff fails to cite a single case where a news reporter, journalist or other media personality was not found to be a public figure. In contrast, there are numerous cases holding that media personalities, such as Ms. Wayment, are public figures. See, e.g., Dracos, 922 S.W.2d 242, 253 (Tex. Ct. App. 1996) (finding defamation Plaintiff, a television reporter, was a public figure and citing ten additional cases where journalists, authors, columnists, publishers, and radio personalities were found to be public figures); Cole v. Westinghouse Broad. Co., Inc., 435 N.E.2d 1021, 1024-25 (Mass. 1982) (finding defamation Plaintiff, a television reporter, was a public figure in lawsuit against his former station for statements made regarding the reasons for his termination; “the circumstances surrounding his dismissal were a matter of public interest, as evidenced by the newspaper articles published concerning his dismissal”).²

In Dracos, a case very similar to the instant one, a television reporter sued a newspaper for defamation arising out of a column regarding the reasons for his termination from his station. 922 S.W.2d 242. The court found that Plaintiff was a public figure, stating: “[W]e note that journalists and television reporters like Dracos, as well as other individuals who regularly comment on public affairs, have often been considered public figures.” Id. at 252. The court continued, “Like other journalists, reporters, and media personalities, *[Plaintiff] has vigorously sought and achieved publicity for his journalistic efforts.*” Id. at 253 (emphasis added).

² See also Stolz v. KSFM 102 FM, 30 Cal. App. 4th 195, Cal. Rptr.2d 740, 745-46 (1994) (general manager and owner of radio station found to be general purpose public figure based, in part, on his “voluntary exposure to public scrutiny”).

In the instant case, and as demonstrated in the following section, the situation is no different for Plaintiff.

C. As a Well Recognized Health Reporter for KTVX News Who Reported Daily on Health Issues of Vital Importance to the Public and Who Covered the Activities of Major Health Care Providers and Insurers Throughout the State, Plaintiff Attained Public Figure Status.

Plaintiff's extensive local and national news broadcasts on matters of public importance, her public appearances in support of charities and local causes, and her own admitted celebrity status evidence her status as a public figure for all purposes, or at least for purposes related to her termination as a reporter. Tellingly, Plaintiff never disputed at the summary judgment stage any of the material facts establishing her "prominence," her "influence" or the fact she "invited public attention" in the Salt Lake community.³ Nor, on appeal, is she able to marshal any evidence negating her public figure status.

Some of the many undisputed facts demonstrating her public figure status include the following:

Plaintiff was the KTVX Channel 4 Health Reporter for three years (R. 286 at ¶ 4) and was featured in daily health reports as well as several half-hour segments regarding health matters and public safety issues. (R. 246 at ¶ 18; 286 at ¶ 5-7.) During this time, she broadcast more than a thousand news stories and other TV specials. (R. 287 at ¶ 11-12.) Ms. Wayment often reported live from highly promoted special events such as the Utah AIDS Foundation Annual Oscar Night Gala benefit. (R. 287 at ¶ 14.) Some of her stories were picked up by the ABC Network and broadcast nationally or by other ABC

³ In Plaintiff's Memorandum in Opposition to Summary Judgment, her Statement of Material Facts admits paragraphs 18-29 of Defendants' Statement of Facts by not disputing them. (R. 308-317.) These undisputed paragraphs (18-29) all relate to Plaintiff's status as a public figure. (R. 246-248.)

affiliates around the country. (R. 287 at ¶ 15.) Her stories were seen by over a hundred thousand viewers each evening. (R. 288 at ¶ 17.) Ms. Wayment reported on the activities of Utah's major health care providers, such as the Huntsman Cancer Institute, various hospitals, etc. (R. 268 at ¶ 8.) These facts, alone, demonstrate that Ms. Wayment was "prominent" throughout the state, occupied a "position of influence" in our community and "invited public attention and comment."

Additionally, Ms. Wayment herself, acknowledged that she was a "local celebrity." (R. 278—last paragraph.) In fact, she voluntarily utilized her celebrity status by lending her name to many high-profile charities and events. (R. 247 at ¶ 21; R. 248 at ¶ 26; R. 312.) For example, she acted as the celebrity Master of Ceremonies for the Utah Diabetes Center Annual Gala in March of 2002. (R. 248, 312, 413.) She was the March of Dimes WalkAmerica Spokesperson in the spring of 2001 and she was a celebrity runner in the Race for the Cure Fun Runs in 2000 and 2001. (R. 248, 312, 412.) She was a member of the Board of Directors of the Candlelighters for Childhood Cancer, a Utah non-profit organization. (R. at 248, 312, 406.) Further indicative of Plaintiff's public figure status is the fact that the filing of her lawsuit generated stories in the Utah media. (R. 248, 293.) As such, the record is clear that the district court made the correct determination that Plaintiff was a public figure.

D. Contrary to Plaintiff's Arguments, the Defendants' Media or Non-Media Status and the Medium Through Which the Challenged Statements Were Made Does Not Negate Her Status As a Public Figure And She Had Sufficient Access to the Media As a Public Figure.

Rather than dispute the fact of her prominence, influence or notoriety, Plaintiff seeks to strip herself of her public figure status by asking the Court to adopt a novel and never-before-recognized approach. Plaintiff argues misguidedly that she is not a public

figure because: (1) no media of any sort was involved in publishing the allegedly defamatory remarks about her so there are no “freedom of the press” issues (Br. of Appellant at 11-12); (2) the controversy between the parties was a “private employer-employee” issue (Br. of Appellant at 11, 13-14); and (3) she lacked access to the media and did not intentionally invite attention or comment (Br. of Appellant at 15).

1. The Relevant Inquiry for Determining A Public Figure Is Not Based on the Status of Defendants or the Medium Through Which the Alleged Defamation Is Published.

Plaintiff’s principal rationale for challenging her public figure status is premised on two inconsequential factors. First, Plaintiff contends that Defendants were not true “media defendants” since her case involves a private employment dispute. Second, Plaintiff argues that the alleged defamatory statements were not published through the channels of media news. (Br. of Appellant at 12.) As such, Plaintiff posits that all of the cases relied upon by Defendants, in which media personalities were found to be public figures, are inapplicable because such cases involved actual media defendants and the challenged statements in those cases were published through the media. (*Id.*) In other words, Plaintiff does nothing to distinguish these cases or challenge the underlying legal principles. Rather, she argues that since they involved media defendants and defamatory statements published through a media outlet they are irrelevant.

Plaintiff patently misunderstands the relevant inquiry for analyzing public figure status. In direct contradiction to Plaintiff’s position, it is always the status of the Plaintiff, and never the status of the defendants or the medium, that determines if the Plaintiff is a public figure. See e.g., Van Dyke v. KUTV, 663 P.2d 52, 54-55 (Utah 1983) (analyzing public official status of Plaintiff without any consideration of defendants’ status or the nature of the medium); Cox, 761 P.2d at 556, 559-61 (same).

Beyond that, Plaintiff has failed to cite a single case, within Utah or any other state, that predicates public figure status on whether or not the speaker of the alleged defamatory statement was acting as a media entity. Likewise, Plaintiff has provided no cases which adopt her novel argument that public figure status turns on whether the media was the medium for publication. The whole notion that Plaintiff can somehow avoid being a public figure merely because the alleged defamation was not published in print or on-air is nonsensical. Accepting Plaintiff's argument would lead to the illogical and undesirable result of increasing protection to libelous statements which are widely distributed through a paper, on radio or television. By taking this position, Plaintiff is effectively arguing that the challenged statements about her would be granted more protection had Mssrs. Fischer and Benedict broadcast a story about the reasons for her termination rather than allegedly make the statements within the KTVX newsroom.

A final reason Plaintiff's argument must fail is the well-established doctrine that application of public figure status is not limited to cases where the defendants are media entities. Dun & Bradstreet Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 784, 105 S. Ct. 2939, 2958, 86 L. Ed. 2d 593 (1985); Cox, 761 P.2d at 560. In fact, one state supreme court overruled a trial court's decision to treat a non-media defendant differently from a media defendant on issues related to public figures. Anderson v. Low Rent Hous. Comm'n of Muscatine, 304 N.W.2d 239 (Iowa 1981).⁴ As such, it is irrelevant whether or not the speakers of the alleged defamatory statements are considered "media defendants" or the alleged defamation took place in the context of an employment

⁴ See also Anderson v. Low Rent Housing Commission of Muscatine, 304 N.W.2d 239 (Iowa 1981) (citing Iowa law and several cases from other states recognizing there is no distinction between media and non-media defendants). In Anderson, the court overruled the lower court's distinction between media and non-media defendants.

dispute. Plaintiff's status, not the status of the defendant, is the controlling determination.

2. Plaintiff Had Access to the Media And Sought Attention Through Her Job As a Television Journalist.

Another reason Plaintiff contends that she should not be considered a public figure is that she lacked sufficient access to the media and never thrust herself into the forefront of the public eye. (Br. of Appellant at 15.) As addressed previously, Plaintiff's fame and prominence as a television reporter were clearly voluntary. Thus, to say that she did not welcome her notoriety is disingenuous. Moreover, the record contradicts Plaintiff's assertion that she did not have sufficient access to the media to counteract the challenged statements. For example, a local newspaper published an article regarding the filing of her lawsuit.

In that article, Plaintiff had a chance to express her perspective on the alleged statements had she chosen to do so. Under similar circumstances, the Dracos court noted, "As a successful and well-known journalist, [Plaintiff] enjoyed access to the media—and the self remedy of rebuttal—which is not available to the ordinary citizen." 922 S.W.2d at 253. In this case, that Plaintiff chose not to seek rebuttal more actively in a public forum does not diminish the access she had to the media even after her termination.

In summary, once a person such as Ms. Wayment becomes a public figure, they cannot escape, for their own convenience, the highly visible status they sought out to begin with. This is true regardless of whether Defendants acted as "media defendants" or whether the allegedly defamatory statements were made through the media.

E. Plaintiff Was Not a Limited Purpose Public Figure, But Even If She Were, The Public's Interest in Reporter Bias, Conflicts of Interest or Misconduct Requires Plaintiff to Show Actual Malice on the Part of Defendants to Avoid Dismissal of Her Defamation Claim.

Plaintiff, alternatively, argues that a public controversy is required to establish public figure status and there was no public controversy at issue in this case. As set forth below, a public controversy analysis is only applicable where an otherwise private individual gains notoriety regarding a limited issue of public interest. Seegmiller, 626 P.2d at 972. That person then becomes a “limited-use” or “limited-purpose” public figure. Gertz, 418 U.S. at 352. Plaintiff’s two-page analysis of this subject is unnecessary because the undisputed facts already demonstrate that Ms. Wayment was a general purpose public figure. However, even if Plaintiff were not a general purpose public figure, she would still qualify as a “limited purpose” public figure.

1. Plaintiff Also Qualifies As a Limited-Purpose Public Figure.

Even using the criteria outlined in the Brief of Appellant for determining a limited-purpose public figure (Br. of Appellant at 13-14), Plaintiff satisfies each relevant requirement to be considered as such. See Waldbaum, 627, F.2d 1287, 1296-1298 (Plaintiff is a limited-purpose public figure if he voluntarily thrusts himself into a public controversy, or involuntarily finds himself in public controversy but does not reject his role, and the alleged defamation relates to his role in the public concern). To begin with, the alleged defamation relates precisely to what Plaintiff is publicly famous for (her reporting). Next, there were two specific public controversies or concerns in which Plaintiff became involved; namely, the caring for terminally ill children with cancer and reporter bias or conflict of interest.

- a. Because Plaintiff Voluntarily Thrust Herself to the Forefront of the Public Concern over Assisting Children with Cancer, She Qualifies as a Limited-Use Public Figure.

Plaintiff is a limited-use public figure because of the public interest in assisting children who were terminally-ill with cancer. To Plaintiff's credit, much of the local public interest and concern was generated by her own stories and reports over a three year period detailing the plight of these children and their families. With regard to helping them, Plaintiff clearly "thrust herself to the forefront" of the issue by: (a) airing numerous stories about these children, including her own efforts to support one young cancer victim, (b) by joining the Board of Candlelighters for Childhood Cancer, and (c) by trying to establish her own foundation for assisting these children. Given her position as a high-profile health reporter at a major television network, she achieved "special prominence" in this public concern. Finally, the alleged defamation is directly related to Plaintiff's proposed foundation and the issue of caring for children with cancer.

- b. Because Plaintiff Voluntarily Injected Herself into Activities Constituting a Conflict of Interest, the Public Concern over Reporter Ethics Qualifies Her as a Limited-Use Public Figure.

Plaintiff is also a limited-purpose public figure because of the great public interest in news reporter conduct. One need not look too far back in time to realize the firestorm of local and national concern over the media's ability to report fairly and without bias. For example, Utah's local media came under much public scrutiny after the terminations of Salt Lake Tribune reporters Michael Vigh and Kevin Cantera for selling false information to a tabloid regarding the Elizabeth Smart ordeal. Likewise, on a national level, the public interest in media bias and reporter ethics has been extremely high after the resignation of New York Times editors over the plagiarism scandal surrounding their

reporter, Jason Blair, and after New Republic reporter Stephen Glass revealed he fabricated entire news stories.

Based on Plaintiff's own written explanation to Jon Fischer of her actions which led to her termination (See R. 278), it is undisputed that KTVX had the right to fire Plaintiff for a conflict of interest. Indeed, Ms. Wayment could have been terminated for any reason, with or without cause, as she was an employee at will. (R. 268 at ¶ 7.) By voluntarily engaging in the acts which led to her termination (and which are undisputed), it was at least foreseeable that she or the station would come under public scrutiny or criticism. Indeed, public attention was drawn to the issue of media ethics by the filing of her lawsuit, which was subsequently covered in local newspapers and detailed the reasons for her termination. Finally, the alleged defamation is directly related to the perception of Plaintiff's ability to report fairly and the public's concern over media ethics and misconduct.

2. Plaintiff Is Not a Private Figure Like the Plaintiffs in the Firestone and Seegmiller Cases.

Plaintiff is not a true "private figure" who enjoyed anonymity and who no one would listen to in the press if she wished to challenge what was supposedly being said about her. In her Opening Brief Plaintiff likens her case to that of the Plaintiff in Time, Inc. v. Firestone, 424 U.S. 448, 457, 96 S. Ct. 958, 966, 47 L. Ed. 2d 154 (1976), whom the court found to be a private figure (Br. of Appellant at 16.) However, the Firestone Plaintiff was an otherwise private person who was drawn involuntarily into the public eye due to her well-publicized divorced proceeding. Id. at 96 S. Ct. 967. The same absolutely cannot be said about Plaintiff in this case. Unlike the Firestone Plaintiff, Holly Wayment for years sought out the limelight and the attendant benefits of being a "local

celebrity” and public figure. She cannot now turn back the hands of time and arbitrarily label herself a private figure for the purposes of this litigation after she has enjoyed the fruits of her popularity for many years.

Similarly, Ms. Wayment is not at all like the Plaintiff in Seegmiller who was found to be a private figure. In Seegmiller, the Plaintiff was a resident of a small-town who, without seeking any attention, became the subject of a television reporter’s investigative piece. 626 P.2d at 970-71. In that report, Plaintiff was blamed for mistreating certain horses he was raising. Id. The unflattering report caused his other businesses in the small town to suffer. Id. at 971. In finding Plaintiff a private figure, this Court noted that he did not occupy a position of persuasive power or influence and “was plucked from the anonymity of private life and thrust against his will into the limelight.” Id. at 972.

In contrast, Ms. Wayment occupied a position of great persuasive power and influence in the community as a well known television journalist and was not thrust against her will into the public eye. Indeed, it was Plaintiff’s own conduct (soliciting financial support for her private foundation from an organization she regularly reported on as part of her newsbeat) which resulted in her termination and her own decisions (filing a lawsuit with detailed allegations without sealing portions of the complaint) that brought the specific alleged defamatory statements to the public’s attention. Thus, neither the Firestone nor the Seegmiller cases, relied upon by Ms. Wayment are applicable to the instant case.

II. SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE PLAINTIFF FAILED TO OFFER ANY EVIDENCE, MUCH LESS THE REQUISITE CLEAR AND CONVINCING EVIDENCE, OF ACTUAL MALICE TO OVERCOME THE PROTECTIONS ATTACHED TO SPEECH PERTAINING TO PUBLIC FIGURES.

Plaintiff has failed to offer any evidence, much less the requisite clear and convincing evidence, of actual malice to overcome the constitutional privilege protecting speech related to public figures.⁵ Where a defamation Plaintiff is either a “public official” or a “public figure” the Plaintiff must show that the defendant published the false statement with a state of mind known as “actual malice.” Russell v. Thomson Newspapers, Inc. 842 P.2d 896 (Utah 1992); Cox v. Hatch, 761 P.2d 556, 559 (Utah 1988). Both at summary judgment and in her appeal, Plaintiff misconstrues the type of malice required to overcome the protections related to speech regarding public figures as well as her burden of proving such malice with clear and convincing evidence.⁶

A. Actual Malice Defined.

Actual malice is not to be confused with common law malice or malicious or evil intent. Masson v. The New Yorker Magazine, 501 U.S. 496, (1991).⁷ Actual malice focuses on the state of mind of the defendant and whether the defendant had a subjective awareness the defamatory statements were false. Bose Corp. v. Consumer Union of U.S.,

⁵ Limited-use public figures must also establish actual malice. Waldbaum, 627 F.2d 1287, 1298 (Plaintiff is limited use public figure and cannot establish actual malice; thus, summary judgment was appropriate).

⁶ The malice Plaintiff tries to establish is actually for her exemplary damages claim. (R. 321.)

⁷ Cox v. Hatch, 761 P.2d 556 (Utah 1988). As the United States Supreme Court has noted, “the phrase ‘actual malice’ is unfortunately confusing in that it has nothing to do with bad motive or ill will.” Harte-Hanks v. Connaughton, 491 U.S. 657, 105 L. Ed. 2d 562, 576 fn. 7. “We have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputation.” Masson, 501 U.S. 496 (1991). Some courts and commentators have referred to the heightened standard as “constitutional malice.” See, e.g. Cox, 761 P.2d at 560.

Inc., 466 U.S. 485 (1984); St. Amant v. Thompson, 390 U.S. 727 (1968). In the seminal case of New York Times v. Sullivan, 376 U.S. 254 (1964), the Supreme Court defined actual malice as the publication of a statement “with knowledge of its falsity or with reckless disregard of its truth or falsity.”⁸ Thus, actual malice has two prongs: (a) knowledge that a statement is false; or (b) reckless disregard for whether a statement is false or not.

The actual malice standard is a subjective, not objective, standard and requires an inquiry into the speaker’s state of mind at the time of publication. As noted by the Tenth Circuit in Hardin v. Santa Fe Reporter, Inc., 745 F.2d 1323, 1325 (1984), the standard is “difficult” to satisfy. Only where the defendant “actually knew” the statement was false or “subjectively entertained serious doubts” as to its truth or “purposefully avoided” the truth, can the actual malice standard be met. Id. at 1326. This constitutional hurdle is made even more difficult to overcome by virtue of the high burden of proof a Plaintiff is required to meet in establishing actual malice. Appellate Courts conduct independent appellate review to determine whether sufficient evidence of actual malice exists. Bose.

B. Clear And Convincing Evidence of Actual Malice Is Required.

In a series of decisions following New York Times v. Sullivan, the U.S. Supreme Court has held that the importance of a free press requires that proof of actual malice be made by *clear and convincing evidence*. See, e.g., Bose, 466 U.S. 485 (1987); Masson, 501 U.S. 446, supra. This high burden of proof is necessary because “our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of breathing space.” Gertz, 418 U.S. at

⁸ The Utah Supreme Court adopted the New York Times definition of actual malice in Seegmiller, 626 P.2d 968; See also Cox v. Hatch, 761 P.2d at 559 (same).

342 (quoting NAACP v. Bulton, 371 U.S. 415, 433 (1963)). This requirement of “clear and convincing evidence” extends to state courts as well.⁹ Utah has not yet expressly adopted the “clear and convincing standard.” As such, Defendants respectfully request this Court to do so consistent with the decisions of the United States Supreme Court and other states.

C. Summary Judgment Is Appropriate in the Absence of Clear and Convincing Evidence.

In 1986, the United States Supreme Court, in Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), settled a long-standing dispute over the proper role summary judgment should play in libel cases. The Court held that a Plaintiff in a public figure case could not defeat a defendant’s motion for summary judgment without affirmatively producing clear and convincing evidence of actual malice. The Court held that:

Thus, where the factual dispute concerns actual malice, clearly a material issue in a New York Times [public figure] case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding—either that the Plaintiff has shown actual malice by clear and convincing evidence or that the Plaintiff has not.

Id. at 2514.

Actual malice is thus a question of law in the first instance, Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). On appeal, courts will independently review the record to determine whether clear and convincing evidence of

⁹ See e.g., Anderson v. Low Rent Hous. Comm’n of Muscatine, 304 N.W.2d 239 (Iowa 1981) (citing many other states’ adoption of the clear and convincing standard). The Anderson court further noted: “In New York Times the Court held that the provisions of the first amendment apply to the states through the due process clause of the fourth amendment, and, *consequently, state laws must require clear and convincing evidence of actual malice*” when a public figure is involved. Id. (citing New York Times, 376 U.S. 254 at 276-77, 283-86, 84 S. Ct. at 724, 727-29, 11 L. Ed. 2d at 704, 708-10).

actual malice existed. Bose, 466 U.S. at 508; see also Piper v. Mize, 2003 WL 21338696, *7 (Tenn. Ct. App. 2003) (stating “[I]t is incumbent on this Court, in reviewing this grant of summary judgment as to the issue of actual malice, to determine, not whether there is material evidence in the record supporting Plaintiffs, but whether or not the record discloses clear and convincing evidence upon which a trier of fact could find actual malice”).

This independent search for clear and convincing evidence assures that First Amendment rights are protected. Bose, 466 U.S. at 508 (“We must make an independent examination of the whole record, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.”) (internal citations omitted).¹⁰ Given this heightened evidentiary standard, appellate courts routinely affirm summary judgment dismissing public figure defamation claims for failure to affirmatively produce evidence of actual malice by clear and convincing evidence.¹¹ In fact, this Court has recognized that even in non actual malice cases, there exists “. . . a First Amendment interest in disposing of libel cases on motion and at an early stage when it appears that a reasonable jury could not find for the Plaintiffs.” Cox, 761 P.2d at 561.

¹⁰ Eastwood v. National Enquirer, 123 F.3d 1249, 1252 (9th Cir. 1997) (“The purpose of [this Court’s] review is to satisfy ourselves that plaintiff proved malice by clear and convincing evidence, which we have described as a heavy burden, far in excess of the preponderance sufficient for most civil litigation”) (internal citations omitted).

¹¹ See, e.g., Peterson v. New York Times Co., 106 F.Supp.2d 1227 (D. Utah 2000) (applying Utah law); Revell v. Hoffman, 309 F.3d 1228 (10th Cir. 2002); Cobb v. Time, Inc., 278 F.3d 629 (6th Cir. 2002); Worrell-Payne v. Gannett, 49 Fed. App. 105 (9th Cir. 2002); Carafamo v. Metrosplash, 207 F. Supp. 2d 1055 (C.D. Cal. 2002); McFarland v. Sheridan Square Press, Inc., 91 F.3d 1501 (D.C.Cir. 1996); El Deeb v. Univ. of Minn., 60 F.3d 423 (9th Cir. 1995); Underwager v. Salter, 22 F.3d 730 (7th Cir.), Cert. denied, 513 U.S. 943 (1994); Meisler v. Gannet Comp., 12 F.3d 1026 (11th Cir.), cert. denied, 512 U.S. 1222 (1994).

D. Plaintiff Has Not and Cannot Establish Actual Malice By Clear And Convincing Evidence Based on Fischer's Inaction Nor Circumstantial Evidence (Based on Double And Triple Hearsay).

The trial court properly rejected Plaintiff's argument that she could establish actual malice by clear and convincing evidence based on Fischer's inaction or on circumstantial evidence that consists of double and triple hearsay. Plaintiff argued in the court below that Fischer's refusal to quell the newsroom rumors about her and the testimony of witnesses who allegedly heard Fischer's secretary make some of the challenged statements, were sufficient proof for establishing actual malice. (See R. 322.)

Plaintiff's reliance on these facts is misplaced. Fischer's silence does not establish a subjective awareness in his mind that the statements he is accused of making were false and Plaintiff offers no case authority where silence has been so applied. Indeed, Fischer testified that he did not respond to any rumors or speculation about why Plaintiff had been terminated because (i) it was station policy not to discuss personnel matters (R. 271 at ¶ 22.) and (ii) Plaintiff had requested Fischer not divulge the reasons for her termination (R. 271 at ¶ 21.) Neither does the purported fact that Fischer's secretary made some of the challenged statements establish any improper state of mind as to Fischer. This is underscored by Plaintiff's failure to cite a single case that allows such marginal, circumstantial evidence to defeat summary judgment on the actual malice issue. Plaintiff's evidence is insufficient to raise a material dispute at any level of proof, much less at the heightened clear and convincing evidentiary standard applied to determining actual malice.

In sum, Plaintiff is a public figure who failed to meet the heightened constitutional and evidentiary burden of showing, by clear and convincing evidence, that defendants made the allegedly defamatory statements with "actual malice." Plaintiff's failure to

meet her burden of proof is a sufficient and independent basis for this Court to affirm the decision of the District Court.

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT PLAINTIFF FAILED TO PRODUCE ADMISSIBLE EVIDENCE THAT LINKED DEFENDANT JON FISCHER TO ANY OF THE STATEMENTS ALLEGED IN PLAINTIFF'S SECOND AMENDED COMPLAINT.

The District Court correctly determined that Plaintiff failed to produce admissible evidence that Defendant Jon Fischer made any of the statements alleged in Plaintiff's Second Amended Complaint.

A. Plaintiff Must Establish Defamation with Facts That Would Be Admissible in Evidence.

Under well-established Utah law, a witnesses' testimony offered in opposition to summary judgment must set forth facts that be would be admissible in evidence. Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983) (finding Plaintiff's affidavit insufficient for opposing summary judgment where it lacked specificity required to be admissible). To be admissible, this evidence must be based on the personal knowledge of the witness. In Re: Gen. Determination of Rights to Use of All Water, 982 P.2d 65, 72 (Utah 1999) (affirming exclusion of affidavit testimony in opposition to summary judgment where many facts asserted in affidavit were not based on personal knowledge and contained hearsay).¹²

B. Double Hearsay Statements Are Not Admissible to Establish Defamation on the Part of Defendants.

Double or multiple hearsay cannot support a defamation claim. A witness' testimony that merely re-states what another individual has said is inadmissible hearsay

¹² See also GNS P'ship v. Fullmer, 873 P.2d 1157, 1164-65 (Utah Ct. App. 1994) (affidavits not based on personal knowledge were properly stricken).

that cannot be relied upon in opposition to summary judgment. Western States Thrift & Loan Co. v. Bloomquist, 504 P.2d 1019, 1020-21 (Utah 1972) (affirming summary judgment where non-moving party based his opposition on his own affidavit; affidavit excluded because it contained hearsay testimony merely recounting what another witness told affiant).¹³

Utah courts have not specifically addressed this evidentiary issue in the context of a defamation claim. However, it is well accepted in other jurisdictions that a Plaintiff opposing summary judgment on a defamation claim cannot rely on testimony that merely recounts what another person allegedly heard regarding a challenged statement. See, Starr, 54 F.3d at 1555 (finding summary judgment appropriate on defamation claim where the only evidence was deposition testimony of witness recounting what a third person allegedly heard from defendant; testimony amounted to inadmissible hearsay); Molenda v. Hoechst Celanese Corp., 60 F. Supp. 2d 1294, 1303 (S.D. Flor. 1999) (citing 5th and 11th Circuit authority and granting summary judgment on former employee's defamation claim because he offered no more than his "double-hearsay" testimony of

¹³ Accord Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1555 (10th Cir. 1995) (adopting "unanimous weight of authority" from other jurisdictions that a court may not consider hearsay evidence in depositions submitted to defeat summary judgment; citing U.S. Supreme Court, 5th Circuit, 9th Circuit, and 7th Circuit law as well as legal commentators).

what others had allegedly witnessed); Dull v. St. Lukes Hospital of Duluth, 21 F. Supp. 2d 1022, 1028 (D. Minn. 1998) (citing 8th Circuit precedent and holding that former employee's defamation action could not survive summary judgment when she offered merely her own testimony that another witness overheard allegedly defamatory statements; her testimony constituted inadmissible "double hearsay").¹⁴

¹⁴ See also Hauteur v. Cowles Publ'g Co., 811 P.2d 231, 239 (Wash. Ct. App. 1991) (granting summary judgment on libel claim because "inadmissible hearsay evidence cannot be considered in ruling on a motion for summary judgment"); Franzon v. Massena Mem'l Hosp., 89 F. Supp. 2d 270, 276-77 (N.D.N.Y. 2000) (granting summary judgment and finding affidavit of plaintiff's wife inadmissible hearsay when it only related another woman's testimony of what she overheard); Marshall v. Planz, 13 F. Supp. 2d. 1246, 1255-56 (M.D. Ala. 1998) (holding that defamation plaintiff cannot survive summary judgment by relying upon his own deposition testimony that others informed him of what defendant said; such testimony constitutes inadmissible hearsay); Bush v. Barnett Bank of Pinellas County, 916 F. Supp. 1244, 1256 (M.D. Fla. 1996) (granting summary judgment in defamation action where only evidence proffered was affidavit of a manager that she was told by another manager that an announcement was made accusing plaintiff of theft; affidavit constituted inadmissible hearsay); Baker v. McDonald's Corp., 686 F. Supp. 1474, 1485 (S.D. Fla. 1987) (granting summary judgment on defamation claim because plaintiff's deposition testimony was inadmissible hearsay when it consisted of what his brother-in-law heard from defendant); Barber v. Daly, 185 A.D.2d. 567, 570 (N.Y. App. Div. 1992) (finding summary judgment warranted where plaintiff's assertion that other witnesses personally told him of slanderous statements made by defendant is mere hearsay and insufficient to raise a triable issue of fact); Land v. Delta Airlines, Inc., 250 S.E.2d 188, 189 (Ga. Ct. App. 1978) (summary judgment on defamation claim affirmed where plaintiff relied solely on her own deposition testimony that she was told by a third person that defendant had made defamatory statement; statement constituted inadmissible hearsay); Humiston v. ATOTECH USA, Inc., 1995 WL 708660, 4 (D. Mass. 1995) (granting summary judgment on defamation claim because plaintiff's only evidence was his deposition testimony that another person told him that a third person had heard challenged statement by defendant; statement is double hearsay and fails to show existence of genuine issue of material fact); Martinez v. U-Haul Co. of Illinois, 2001 WL 648637, 17 (N.D. Ill. 2001) (finding plaintiff's defamation claim cannot survive summary judgment when her only evidence that defamatory statements were made constituted inadmissible double hearsay); Interstate Commercial Bldg. Serv. v. Bank of America Nat'l Trust and Sav. Assoc., 23 F. Supp. 2d 1166, 1176 (D. Nev. 1998) (granting summary judgment on defamation claim where plaintiff relied on testimony that defendants' representatives made allegedly defamatory statements to others who in turn repeated them to vendors that finally reiterated such words to plaintiff; such testimony is inadmissible "double hearsay"); Albert v. Loksen, 239 F.3d 256, 267 (2nd Cir. 2001) ("When challenged on a motion for summary judgment a plaintiff may not rely solely on hearsay or conclusory allegations that slanderous comments were made");

In defamation cases, this type of inadmissible hearsay testimony, sometimes referred to as “double or multiple hearsay,” is inherently unreliable in contrast to the testimony of a first-hand witness who directly hears publication of an allegedly defamatory statement. See Martinez v. U-Haul Co. of Illinois, 2001 WL 648637, 17 (N.D. Ill. 2001) (recognizing potential admissibility of witness’ own first-hand testimony if such evidence had been presented; but defamation claim could not survive summary judgment because only evidence presented was “double hearsay”); Molenda, 60 F. Supp. 2d at 1303 (same).

In the Molenda case, which is strikingly similar to the case at bar, the court granted summary judgment on a defamation claim brought by a former sales employee. The court held:

In this case, Plaintiff has failed to present any evidence, other than his own deposition testimony, that the alleged defamatory statements were in fact made. *As to all of the alleged statements, however, Plaintiff concedes that he has no personal knowledge as to the statements—he only learned of the comments from others.* Clearly, Plaintiff’s testimony constitutes double-hearsay and, as such, cannot be used to defeat summary judgment.”

Snyder v. Sony Music Entm’t, Inc., 252 A.D.2d 294, 299 (N.Y. App. Div. 1999) (finding summary required where plaintiff relied on inadmissible hearsay testimony that slanderous comments were made); Schwartz v. Soc’y of New York Hosp., 232 A.D.2d. 212, 213 (N.Y. App. Div. 1996) (defamation claim dismissed summarily; evidence constitutes inadmissible hearsay); Davis v. Household Int’l, 1991 WL 110042, *2 (Tex. Ct. App. 1991) (affirming summary judgment where witnesses’ statements relied upon by plaintiff were no more than inadmissible double hearsay that related what another individual allegedly heard from defendant); McMillian v. Johnson, 88 F.3d 1573, 1583-85 (11th Cir. 1996), *aff’d* 520 U.S. 781, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997) (deposition testimony constituting double hearsay cannot defeat summary judgment); Courtney v. Canyon Television & Appliance Rental, Inc., 899 F.2d 845, 851 (9th Cir. 1995) (affirming summary judgment against defamation claim where only evidence that defamatory statements were made was inadmissible hearsay).

Id. at 1303 (emphasis added). Similarly, as one court explained, a description of another person's testimony "is not suitable grist for the summary judgment mill." Gross v. Burgraff Const. Co., 53 F.3d 1531, 1546 (10th Cir. 1995) (internal cites omitted).

C. It Is Undisputed That Plaintiff Failed to Produce A Single Witness That Heard Jon Fischer Make Any of the Challenged Statements.

In the instant case, Plaintiff has failed to produce any admissible evidence that Defendant Fischer uttered any of the three claimed defamatory statements. These alleged statements were that Plaintiff was terminated because: (a) "She was taking money from the Huntsman Cancer Institute;" (b) "Was in bed with the Institute"; and (c) "Had used her reporting contacts to try to set up a foundation for her benefit." (R. 228 at ¶ 48.)

Plaintiff, herself, admits she never heard any defamatory statements made by Mr. Fischer. (See Sup. R. 557 line 7 through 559 line 5.)¹⁵ Moreover, of the seventeen witnesses Plaintiff deposed in this case, not a single one personally heard any defamatory statements uttered by Mr. Fischer. (R. 245.) Plaintiff argues on page 23-24 in her Opening Brief that several statements from various individuals (including Ms. Degering, Ms. McKane, Ms. Miller and Mr. Hertzke) are proof of Fischer's culpability. (Br. of Appellant at 23-24.) However, these statements are all merely re-statements of "rumors" overheard by these witnesses who, during their depositions, could not remember or identify either the persons from whom they heard the rumor or to whom the source(s) of the rumor was attributed. (See e.g., Degering Depo.; Sup. R. 551 lines 7-9.) More

¹⁵ Plaintiff's own testimony provides no support for her claim. In her deposition, she initially identifies seven individuals who reported to her hearing defamatory statements from "the Defendants." (Sup. R. 559 at lines 21-25.) On its face, such testimony constitutes inadmissible "double hearsay." Moreover, after an examination regarding each of the seven individuals, Plaintiff admits that none of them actually heard Mr. Fischer make a single defamatory comment. (As evidenced by her crossing out the initials "JF" next to each purported witness; see Sup. R. 560 lines 1-9 and Sup. R. 562.)

importantly, every one of these witnesses testified definitively in their depositions that they never heard Jon Fisher make any of the allegedly defamatory remarks.¹⁶ In the absence of any direct evidence linking Fischer to the challenged statements, Plaintiff attempts to meet her burden based on three impermissible sources.

1. Plaintiff Relies on Improperly Vague Testimony.

Plaintiff first attempts to rely on improperly vague testimony. In her opening brief, she cites statements from KTVX employee Jeremy Castellano¹⁷ who states, “They made up the story about how she was receiving money and how she was unethical when it wasn’t true,” and “A lot of management pushed the story she was taking money from Huntsman. . . Like Pat Benedict.” (Br. of Appellant at 18)¹⁸ Likewise, at summary judgment, Plaintiff cited former employee Christina Flores-McKane as saying, “Everybody was talking about it.” (R. 318.)

Even assuming these statements were intended to refer to Fischer, they are insufficient on their face to establish that he published them. Testimony attributing challenged statements to unspecified persons or groups is inadmissible. See e.g., Glenn v. Scott Paper Co., 1993 WL 431161, 10 (D.N.J. 1993) (“where declarants are identified as ‘they’ and ‘several people’ the Court is simply not satisfied that the trustworthiness

¹⁶ See (Hunsaker Depo. at Sup. R. 546 line 6 through 547 line 11); (Degering Depo. at Sup. R. 552 line 3 through 553 line 4); (Flores-McKane Depo. at Sup. R. 543 lines 14-25); (Rodriguez Depo. at Sup. R. 540 lines 16-23); (Miller Depo. at Sup. R. 537 lines 3-10); (Castellano Depo. at Sup. R. 534 lines 1-7); (Smith Depo. at Sup. R. 531 lines 3-7).

¹⁷ Mr. Castellano, aside from being a close friend of Plaintiff, is a disgruntled employee who quit employment at KTVX, a Clear Channel television station, on his own and due to unsatisfactory working conditions. This occurred sometime after Plaintiff’s termination.

¹⁸ Plaintiff tries to improperly bootstrap the testimony of Clear Channel Executive Steve Minium who, in a totally different context, defined management as including Fischer and Benedict. (Br. of Appellant at 22, 23.)

requirements are being met); see also Etzel v. The Musicland Group, 1993 WL 23741, 10 (D. Kan. 1993) (summarily dismissing defamation claims because allegations do not “state with specificity which agents made what statements to whom”).

2. Plaintiff Relies on Improper Double Hearsay Testimony.

Plaintiff also tries to establish publication by Fischer through inadmissible double hearsay testimony. For instance, Plaintiff offers the testimony of KTVX employee Adam Rodriguez who testified that Jon Fischer’s secretary, Melissa Holt, purportedly told him that Fischer allegedly communicated one of the defamatory remarks to her. As set forth above, this statement by Mr. Rodriguez violates fundamental hearsay rules because his testimony is being offered for the truth of the matter asserted (specifically, that Ms. Holt heard Jon Fischer make the purported statement).

Plaintiff tries to justify Rodriguez’s testimony by embarking on a lengthy summary of hearsay law. (Br. of Appellants at 18, 19, 23-25.) While Plaintiff fairly accurately sets forth general hearsay principles, she misconstrues their application to this case. Ultimately, her recitation of hearsay cases and authorities is to no avail. All the supporting authorities she cites recognize simply that testimony is admissible where a person witnesses, *by first hand knowledge*, an allegedly defamatory utterance even if that testimony is hearsay. (See, Id.) In other words, had Adam Rodriguez overheard Jon Fischer, first hand, make a defamatory comment, Mr. Rodriguez’s testimony of that fact could be admissible (in contrast to his double hearsay testimony of what Ms. Holt allegedly overheard Fischer say). However, Rodriguez admits that he did not hear Fischer make any of the claimed defamatory statements (Sup. R. 540 at lines 16-23.)

The only statement offered by Plaintiff that is made with first hand knowledge is that of Barbara Smith, a co-worker of Plaintiff’s at KTVX. Ms. Smith testified that,

when she inquired of Jon Fischer why Plaintiff was gone, Mr. Fischer told her it was due to a “conflict of interest.”¹⁹ (R. 399 at p. 20 lines 8-12.) This statement, although admissible by hearsay standards, fails to establish publication of any of the disputed statements. In fact, this statement is entirely consistent with the very reason Fischer told Plaintiff she was being terminated—for a conflict of interest. Thus, none of the statements, including Ms. Smith’s, are admissible for establishing publication of the claimed defamatory statements.

3. Plaintiff Relies on Improper and Insufficient Circumstantial Evidence.

Plaintiff also tries to use insufficient circumstantial evidence to prove defamation against Fischer. For example, Plaintiff cites as circumstantial evidence of Fischer’s defamation, the testimony of Adam Rodriguez and his accusation that Ms. Holt attributed her knowledge of Plaintiff’s termination to Jon Fischer. Plaintiff also uses a quote from Jeremy Castellano to create the perception that Ms. Holt made similar remarks to others, “If Jon Fischer the News Director’s Secretary is going around telling people that Holly was receiving a salary. . .she obviously knows.” (Br. of Appellant at 22.) Plaintiff goes on to argue that this statement, along with Rodriguez’s creates sufficient circumstantial evidence of defamation by Fischer. (Br. of Appellant at 21-22.)²⁰

However, what Plaintiff fails to explain is that Castellano, himself, never heard Fischer or Holt make any such statements. In fact, Castellano based his whole statement about Ms. Holt on what Rodriguez had told him. (R. 341.) In any case, neither

¹⁹ Smith also testified that despite her inquiries, Fischer would not give her any details about the termination out of respect to Plaintiff. If Fischer were being vindictive, he could easily have cast aspersions at Ms. Wayment during this dialogue.

²⁰ Holt testified that Fisher told her Plaintiff’s departure was due to a “conflict of interest” and not due to any of the allegedly defamatory statements. (Sup. R. 524 at lines 1-16.)

Rodriguez's statement nor Castellano's, as only the most attenuated circumstantial evidence, can impute liability to Fischer. Without a single person who directly heard Jon Fischer make any of the disputed statements, Plaintiff's circumstantial evidence (that Fischer failed to stop rumors and that his secretary purportedly published a defamatory comment) amounts to no more than conjecture and speculation which cannot defeat summary judgment. See e.g., Corum v. Farm Credit Services, 628 F. Supp. 707, 717 (D. Minn. 1986) (without direct evidence, a discharged employee's mere suspicions and conjectural assertions are not sufficient to withstand summary judgment on his defamation claim).²¹

Thus, under Utah law and the great weight of persuasive authority cited above, Plaintiff has failed to demonstrate that Mr. Fischer made any of the allegedly defamatory statements. Based on this factor alone, this court should affirm summary judgment as to Defendant Jon Fischer.

D. In the Absence of Direct Evidence, Plaintiff Cannot Link the Challenged Statements to Jon Fischer by Characterizing Fischer's Silence as an "Adoptive Admission."

Plaintiff alleges that Fischer's failure to quell the rumors about Plaintiff's termination, in addition to providing circumstantial evidence of defamation, constitutes an admissible admission that he made the defamatory statements. There is no dispute that gossip circulated in the newsroom after Plaintiff's termination. Perhaps Mr.

²¹ See also Dunlap v. Wayne, 716 P.2d 842, 847 (Wash. 1986) (suggested inferences do not qualify as evidence. "A party must provide affirmative factual evidence to oppose summary judgment on defamation claim"); Jackson v. Boeing Co., 1992 WL 42913, *7 (D. Kan. 1992) (summary judgment must be granted where plaintiff, a terminated employee of the defendant, failed to produce admissible direct evidence of defamation by defendant); Cf Gildea v. Guardian Title Co. of Utah, 970 P.2d 1265, 1270 (Utah 1998) (upholding summary judgment because, without direct evidence that defendant communicated disputed information, conclusions of pure speculation and conjecture are not sufficient).

Fischer's decision to honor Plaintiff's request for silence may not have been the best policy from a standpoint of employee morale.²² However, it is by no means a sufficient basis for a defamation claim. In support of her adoptive admission argument, Plaintiff cites a single Utah case taken woefully out of context. Utah v. Carlsen, 638 P.2d 512 (Utah 1981)

In Carlsen, the defendant was accused of threatening, out of court, a witness who was going to testify against him. Id. at 513-514. While at a shopping mall, a defendant in a criminal trial and his accomplice crossed paths with the witness. Id. Urged by the defendant to call the witness offensive names and threaten him if he showed for court, the accomplice verbally threatened the witness that if testified the next day, "We'll kill you." Id. at 514. While the threats were being made, the defendant stood silently next to his accomplice. Id. At trial, on a charge of tampering with a witness, the judge allowed the witness to testify as to what the accomplice said as evidence against the defendant. Id.

Carlsen is completely distinguishable from the instant case. First, it is a criminal case and not a civil defamation case. More importantly, the Carlsen court allowed the limited hearsay testimony, in large part because there was clear evidence that in warning the witness not to testify, the accomplice was carrying out defendant's instructions. Id. at 514. In this case, there is no similar evidence that people were spreading rumors at KTVX or anywhere else at the behest of Jon Fischer.

Another reason the Carlsen court allowed the hearsay testimony was that the defendant was present at the time his accomplice purported to speak on behalf of both

²² Fischer asserts that he remained silent at the request of Plaintiff. (R. 271 at ¶ 21.) This is corroborated by testimony from Barbara Smith, a co-worker of Plaintiff, who explained that Fischer would not tell her the details surrounding the termination because of his commitment to Plaintiff. (R. 399 at p. 20 lines 8-12.) In addition, it was station policy not to talk about the details of such decisions. (R. 271 at ¶ 22.)

himself and defendant using terms such as “us” and “we.” Id. In the instant case, there is no evidence that Fischer was ever present when any potentially defamatory statements were made, much less that some person, in his presence, made defamatory remarks on behalf of Fischer impliedly or otherwise. Finally, applying use of the “adoptive admission” doctrine in a libel case as Plaintiff has suggested here carries terrible policy implications. Specifically, all who heard or read defamatory statements (whether in the form of gossip from another individual or stories in print or broadcast) would potentially be liable for defamation if they did nothing to stop or correct the statements. While this doctrine may apply in other contexts, it does not belong in a defamation case such as this.

E. The Alleged Statement By M'Lissa Holt Is Similarly Not Admissible as The Basis For Plaintiff's Defamation Claim.

Plaintiff improperly attempts to establish liability against Defendants based on an alleged statement from M'Lissa Holt, wherein she purportedly told Adam Rodriguez that Plaintiff “was getting paid by the Huntsman Institute.” (Br. of Appellants at 18, 19.) According to Rodriguez, when he asked Holt who had told her that, she responded “Jon told me.”²³ Like the other hearsay statements addressed above, Ms. Holt's alleged statement to Adam Rodriguez about what Jon Fischer supposedly said is inadmissible double hearsay.

1. Ms. Holt's Statement Cannot Be Used to Establish Liability on the Part of KTVX.

On appeal, and for the first time, Plaintiff argues that Ms. Holt's testimony, itself, should bind KTVX because she was an employee of the company. However, this argument is unavailing for several reasons. First, nowhere in the Second Amended

²³ Holt denies making the statement. (Sup. R. 527 line 25 through 528 line 14; Sup. R. 528 lines 18-21.)

Complaint does Plaintiff allege defamation against KTVX based on the statements of M'Lissa Holt. Plaintiff had a chance to amend her Complaint after discovery and chose to limit the basis of her defamation claim to the purported statements of Defendants Fischer and Benedict. In fact, it is an undisputed material fact that Plaintiff's defamation claim is based solely on the purported statements by Defendants Fischer and Benedict. (R. 228 at ¶45, 48.) This fact alone is dispositive of this issue.

Second, Plaintiff failed to even raise this argument at the trial court. The only reference to M'Lissa Holt in the summary judgment briefs was in the context of trying to establish what Jon Fischer said by way of double hearsay (what others claimed Ms. Holt told them that Jon Fischer said). Plaintiff cannot now, on appeal, raise new arguments that were never preserved at the District Court level. Smith v. Four Corners Mental Health Ctr., Inc., 2003 UT 23, ¶ 19, 70 P.3d 904, 911 (Utah 2003) (Supreme Court will not address any new arguments raised for the first time on appeal").

IV. THE DISTRICT COURT CORRECTLY DETERMINED THAT PLAINTIFF FAILED TO LINK DEFENDANT PAT BENEDICT TO THE STATEMENTS ALLEGED IN PLAINTIFF'S SECOND AMENDED COMPLAINT.

The District Court correctly determined that Plaintiff failed to link Defendant Pat Benedict to the statements alleged in Plaintiff's Second Amended Complaint. As a threshold matter, since the actual malice standard applies in this case, the Court already has a sufficient basis for upholding dismissal of the case and need not consider this issue. Nonetheless, this issue is similarly dispositive because Plaintiff failed to link Pat Benedict to the three statements alleged in her Second Amended Complaint.

A. Plaintiff's Second Amended Complaint Lacks the Requisite Specificity for A Defamation Claim Against Benedict.

On its face, Plaintiff's Second Amended Complaint lacks the requisite specificity as to pleading a claim against Benedict. For example, the Complaint does not specify when, where or to whom any defamatory statements were allegedly made by Benedict. See Boisjoly v. Morton Thiokol, 706 F. Supp. 795, 800 (D. Utah 1988) (finding portions of defamation complaint insufficient for lack of specific details). Indeed, the Complaint does not properly distinguish with particularity between Fischer or Benedict as the source of any of the alleged defamatory statements. See Herbert v. Lando, 603 F. Supp. 983, 991 n.6 (S.D.N.Y. 1985) (when a public figure Plaintiff sues the media for libel, he must allege the actionable words with precision or be non-suited).

B. The Allegedly Defamatory Statements Set Forth in Plaintiff's Second Amended Complaint Do Not Match What Mr. Castellano Allegedly Heard Pat Benedict Say.

The statements alleged in Plaintiff's Complaint do not match what Mr. Castellano allegedly heard Pat Benedict say. The Second Amended Complaint states that Fischer and Benedict "made false accusations that (a) she was terminated because she was taking money from the Huntsman Cancer Institute, (b) was in bed with the institute, and (c) had used her reporting contacts to try and set up a foundation for her benefit."

It is undisputed that there is only one witness, Jeremy Castellano, who purports to have heard Pat Benedict make any of the challenged statements. Taken from the Brief of Appellant, Benedict purportedly made the following statements to Castellano about Plaintiff: (1) that she abused her contacts as a reporter to start the foundation; (2) that she was in charge of a large sum of money; (3) that it is unethical; (4) That Holly was receiving money from Huntsman and that she was on their payroll; (5) that she was

receiving a salary; (6) she was unethical; and (7) that she abused her contacts.” (Id. at 17-18.)

There is no allegation in the Complaint about Plaintiff being “unethical,” “abusing her contacts” or being in charge of a large sum of money. Thus, statements 1, 2, 3, 6 and 7 cannot be the basis for Plaintiff’s defamation claim. As to statements, 4 and 5, while they are closer to the allegations contained in the Complaint, they are not exactly what is pled in the Complaint. While Plaintiff argues that the “words or words to that effect” language of Dennett v. Smith, 445 P.2d 983, 984 (Utah 1968) and Williams v. State Farm Ins. Co., 656 P.2d 966, 971 (Utah 1982) applies here, a more careful reading reveals that such language only applies to the adequacy of pleading the Complaint. It does not prevent a finding that the words, though adequately plead in the Complaint, do not match the testimony upon which Plaintiff bases her defamation claim.

V. AN INDEPENDENT BASIS FOR AFFIRMING THE DISTRICT COURT’S DISMISSAL OF THIS ACTION IS PLAINTIFF’S FAILURE TO PRODUCE EVIDENCE THAT DEFENDANTS ACTED WITH COMMON LAW MALICE SUFFICIENT TO OVERCOME THE PROTECTION FOR EMPLOYER-TO-EMPLOYEE COMMUNICATIONS.

Plaintiff’s failure to produce evidence that defendants acted with the “common law malice” required to overcome the privilege protecting employer-to-employee communications is a separate and independent basis for affirming summary judgment. Although this issue was briefed below, it was not addressed in the District Court’s Memorandum Decision (ostensibly, because the court found the other reasons for dismissal sufficient). Nevertheless, this Court may affirm the District Court’s summary judgment order on any ground appearing in the record, whether relied on by the District Court or not. Salt Lake County v. Bangerter, 928 P.2d 384, 386 (Utah 1996).

A. Any of the Alleged Defamatory Statements, Even If Made By Fischer or Benedict, Are Protected By the Qualified Privilege Attached to Employer to Employee Communications And Plaintiff Must Show Common Law Malice on the Part of Defendants to Avoid Dismissal of Her Defamation Claim.

All of the challenged statements, even if made by defendants, are protected as privileged employer-to-employee communications. Consequently, the alleged statements are non-actionable unless Plaintiff provides some evidence of “common-law malice” on the part of Defendants.

Under Utah law, a “qualified” or “conditional” privilege attaches to a communication between an employer and employee. Brehany v. Nordstrom, 812 P.2d 49, 58 (Utah Ct. App. 1991).²⁴ This is especially true when, as in this case, the communication relates to the reasons for termination of the Plaintiff. See Id. at 58, 59; Dubois v. Grand Central, 872 P.2d 1073, 1079 (Utah Ct. App. 1994) (recognizing privilege for employer to employee communication regarding reasons for Plaintiff’s termination); Combes v. Montgomery Ward & Co., 228 P.2d 272 (Utah 1951) (same).

To overcome this common law, qualified privilege, a defamation Plaintiff must demonstrate that a defendant was motivated to make the allegedly defamatory statement by common law “malice” toward the Plaintiff. Brehany, 812 P.2d at 59; Dubois, 872 P.2d at 1079. “Common law malice” (as distinct from constitutional or “actual malice”) is defined as “ill-will” or hostility” toward a person. Brehany, 812 P.2d at 59; Cox, 761 P.2d at 559 n. 1.

The recent Utah case of Dubois is instructive on this issue. 872 P.2d 1073. In Dubois, the defamation Plaintiff sued her former employer, a Fred Meyer department store, based on remarks the store manager made to two of Plaintiff’s non-supervisory co-

²⁴ This common law privilege has also been codified in Utah Code Ann. § 45-2-3(3).

workers regarding the reasons for her termination. The court found a qualified privilege existed as to these statements and cited the Utah Supreme Court pronouncement that:

This qualified privilege protects an employer's communication to employees and to other interested parties concerning the reasons for an employee's discharge... This privilege is recognized at common law and applies generally in defamation cases.

872 P.2d at 1079 (quoting Brehany, 812 P.2d at 58) (emphasis added).²⁵

In assessing whether the Plaintiff created a disputed factual issue regarding the existence of malice, the Dubois court held Plaintiff's allegations that Fred Meyer acted hastily and on incorrect information in terminating her did not demonstrate the hostility or ill-will required to overcome the qualified privilege. Id. at 1079. Consequently, the court upheld dismissal of her defamation claim. Id.

In the instant case, the circumstances surrounding Mr. Benedict's alleged statements to Jeremy Castellano are nearly identical to those involving the manager in Dubois. Both situations involved Plaintiffs who had not followed company procedures and who were terminated for exercising poor judgment. As the assistant news director of KTVX, any statements Benedict made to Castellano, an employee of KTVX, regarding the reasons for Plaintiff's termination would be covered by the privilege. Moreover, at summary judgment, the Plaintiff did not dispute that the common law privilege applies to

²⁵ The law also recognizes a statement to be privileged if made to: (a) protect a legitimate interest of the publisher, (b) protect a legitimate interest of the recipient or a third party, or (c) to advance a legitimate common interest between the speaker and recipient. Brehany, 812 P.2d at 58. Plaintiff has intimated that Defendants made defamatory statements to others outside KTVX. Tellingly, Plaintiff's Second Amended Complaint has not specifically alleged any such conduct and Plaintiff has produced no evidence supporting that notion. However, even if statements were made to persons outside KTVX, the statements are protected under the qualified privilege as long as they were made to protect the legitimate interests of KTVX, the third party, or a mutual interest.

this case.²⁶ Because it applies, Plaintiff was required to provide some evidence of “ill will” or “hostility” on the part of Defendants in order to avoid summary judgment.

B. Plaintiff Failed to Produce Evidence of Any “Ill-Will or Hostility” That Would Constitute Common Law Malice.

Ms. Wayment failed to provide evidence that Defendants made any of the challenged statements about her with “ill-will or hostility.” At the trial court, Plaintiff argued that she established the requisite malice to go forward on her claim. (Opposition at p. 22.) However, Plaintiff based her conclusion on an erroneous definition of malice that was not sufficient to overcome the qualified privilege in this case. Specifically, Plaintiff argues that the malice she was required to demonstrate “consists of the same proof that Defendants knew the utterances were false.”²⁷ (*Id.*) This definition is close to the definition of constitutional actual malice, but has absolutely nothing to do with common law malice or ill-will.

Plaintiff confuses the definitions of “common law malice,” and “constitutional or actual malice.” Common law malice is the type of malice required to overcome the

²⁶ Citing a single, out-of-state case, plaintiff implies that this qualified privilege should only extend to persons on a “need to know” basis. (R. 326-27.) However, this is not consistent with Utah law. For example, in Dubois v. Grand Central, the court recognized, without interjecting any “need to know” requirement, a blanket privilege protecting employer-employee communications concerning the reasons for an employee’s discharge. 872 P.2d 1073, 1079 (Utah Ct. App. 1994); see also Brehany v. Nordstrom, 812 P.2d 49, 58 (Utah Ct. App. 1991) (also recognizing qualified privilege for employer-employee communications without additional “need to know” requirement). In fact, in Dubois, the two employees to whom the disputed statements were made, were non-supervisory co-workers of the plaintiff who were most likely not on a “need to know” basis. 872 P.2d at 1079. In any case, Plaintiff ultimately retreats from her suggestion of a “need to know” requirement, relying instead on her assertions that the allegedly defamatory statements were made with malice. (R. 326-27.)

²⁷ Here Plaintiff erroneously argues that the same alleged proof that defendants knew the utterances were false (for the actual malice standard) overcomes the common law malice standard. However, the cases to which she cites do not stand for that proposition. See Combes v. Montgomery Ward & Co., 228 P.2d 272, 276-77 (Utah 1951); Johnson v. Cmty. Nursing Serv., 985 F. Supp. 1321 (D. Utah 1997).

employer-employee privilege in this case. Dubois, 872 P.2d at 1079, Brehany, 812 P.2d at 59. It is defined as “ill-will or hostility” toward a person. Brehany, 812 P.2d at 59; Cox, 761 P.2d at 559 n. 1. Common law malice is distinct from actual malice, discussed in Section II above, and not subject to the same analysis as actual malice. Id. Suspicion, surmise and accusation are not enough to establish common law malice. See e.g., Harris v. Alcan, 91 A.D.2d 830, 831 (N.Y. App. Div. 1982). Thus, under cases like Harris Ms. Wayment fails to overcome the employer-employee privilege if she “has not demonstrated that a history of hostility existed which would have precipitated a decision by the defendant to fabricate an excuse to terminate [her] employment . . . ”Id. at 831.

In an effort to establish some factual basis for a showing of malice (albeit the wrong type), Plaintiff emphasized only two points to the trial court. First, she alleged that Jon Fischer told Plaintiff he was going to bat for her with “corporate” regarding her job even though he had purportedly made up his own decision to fire her. (R. 327.) Even if true (though Fischer denies he offered to intervene), this demonstrates, at most, that Fischer did not want to be perceived as a “bad guy” by Plaintiff. Clearly though, no “ill will or hostility” toward Plaintiff is evidenced by such conduct and Plaintiff made no argument to that effect beyond simply concluding that malice existed.

Second, Plaintiff alleged that Fischer did not take an active role in quashing the speculation and newsroom rumors about her departure. (R. 327.) Here, Plaintiff attempt to decry Fischer’s silence as sinister simply because she had no direct evidence that he published any defamatory statements about her. The fact that Fischer followed company policy not to discuss personnel matters and honored his separate promise to Plaintiff that he would not discuss the reasons for her departure is insufficient evidence to establish

any type of malice, much less the “history or hostility” required here to overcome the conditional privilege.²⁸

Because Plaintiff has provided no facts from which a reasonable person could conclude that either Fischer or Benedict acted with ill will or hostility toward her, she cannot overcome the qualified privilege that protects their purported statements. As such, the qualified privilege protecting employer to employee communications is a separate and independent basis for this Court to affirm the District Court’s decision.²⁹

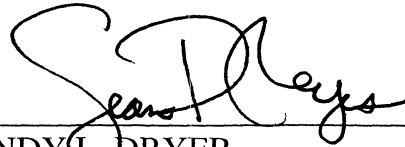
CONCLUSION

The district court properly dismissed Plaintiff’s Complaint in its entirety because Plaintiff is a public figure who failed to demonstrate a material issue of fact that would show by clear and convincing evidence Defendants acted with actual malice. The district court’s dismissal order was also correct because: (a) Plaintiff failed to put forth admissible evidence that Jon Fischer made any of the allegedly defamatory statements and (b) the statements Jeremy Castellano allegedly heard Patrick Benedict make do not match those alleged in Plaintiff’s Second Amended Complaint. Finally, the district court’s decision was correct because Plaintiff offered no evidence to prove that the Defendants, even if they made the allegedly defamatory statements, did so with the common law malice required to overcome privileged communications between employer

²⁸ Tellingly, in purporting to set forth the definitive facts establishing malice, Plaintiff cites no facts and makes no legal arguments regarding Patrick Benedict in her opposition to summary judgment. (See R. 327.) Except for one conclusory statement that “Defendants knew the utterances were false,” Plaintiff apparently concedes that Benedict did not possess the requisite “ill-will or hostility” to constitute common law malice. To the contrary, Benedict, who had worked with plaintiff less than two weeks before her termination, believed she was a competent employee, had a pleasant working relationship with her and harbored no ill-will or animosity towards her. (R. 275 at ¶ 4.)

²⁹ The qualified privilege protecting employer-to-employee communications would also protect any communications made by Jon Fischer, although there is no evidence any such communications occurred.

and employees (or interested third parties). Each of these grounds, standing alone, is sufficient to require affirmance and this Court should affirm the judgment below in all respects.



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CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing **BRIEF OF APPELLEES** was mailed this 9th day of April 2004 via U. S. First Class Mail, postage prepaid, to the following:

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ADDENDUM A

Only the Westlaw citation is currently available

United States District Court, D. Kansas

Elsancho Eugene JACKSON, Plaintiff,
v.

**The BOEING COMPANY, a Delaware
Corporation; and Rex Hessee,
Defendants.**

No. 90-1448-K.

Feb 10, 1992

William L. Fry, Wichita, Kan., for plaintiff

Mary Kathleen Babcock & Mikel L. Stout,
Foulston & Siefkin, Wichita, Kan., for
defendants

MEMORANDUM AND ORDER

PATRICK F. KELLY, District Judge

*1 This matter is before the court on defendants' motion for summary judgment. In this employment discrimination case, the plaintiff, Elsancho Jackson, asserts claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, against the defendant, The Boeing Company (Boeing), alleging racial discrimination and harassment, wrongful discharge and retaliation. In addition, plaintiff asserts a breach of contract claim against Boeing and a claim against the defendant, Rex Hessee, for tortious interference with his employment contract. Plaintiff further asserts violations of 42 U.S.C. § 1985(3) by both defendants for conspiracy to interfere with his civil rights, and against Boeing for failure to prevent such a conspiracy in violation of 42 U.S.C. § 1986. Plaintiff alleges Boeing violated 42 U.S.C. § 1981 in failing to rehire him when he reapplied for employment with Boeing in 1990. Finally, plaintiff asserts a claim against both defendants for defamation.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the court must resolve all disputed facts in favor of the party resisting summary judgment. *White v. General Motors Corp., Inc.*, 908 F.2d 669, 670 (10th Cir. 1990), *cert. denied* 59 U.S.L.W. 3441 (1991). Summary judgment shall be denied if the moving party fails to demonstrate its entitlement beyond a reasonable doubt. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing of an essential element of the case to which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), *cert. denied* 484 U.S. 1066 (1988). In resisting a motion for summary judgment, the nonmoving party may not rely upon mere allegations, or denials, contained in its pleadings or briefs. Rather, the party must come forward with specific facts showing the presence of a genuine issue for trial. *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1230 (10th Cir. 1990). One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex*, 477 U.S. at 323-24.

Plaintiff is a black male who began working for Boeing in March, 1987, as a sheet metal worker in the door shop. On May 27, 1989, defendant Hessee, manager of the door shop, informed plaintiff that he was discharged for excessive absenteeism. Plaintiff does not dispute the dates and times of his absences but contends the absences were excusable for medical reasons. He alleges that during his employment with Boeing his supervisor,

Hessee, treated him differently than other employees and was prejudice against plaintiff because he was black and living with a Caucasian woman. Plaintiff claims he was wrongfully discharged as a result of racial discrimination. In addition, plaintiff claims the alleged racial discrimination of Hessee constituted a tortious interference with his employment contract with Boeing and caused a breach of that employment contract by Boeing. Hessee's alleged racial prejudices are the basis for plaintiff's claims of violations of 42 U.S.C. § 1981, § 1985(3), and § 1986. Finally, plaintiff claims he can not obtain satisfactory employment since his discharge at Boeing because the defendants have made defamatory remarks regarding his employment.

Title VII Claims

*2 Plaintiff's first claim under Title VII is that he was wrongfully discharged for discriminatory reasons. Title VII prohibits discrimination by an employer "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin...." 42 U.S.C. § 2000e- 2(a)(1) (1982).

In order to establish a *prima facie* case of discriminatory discharge, the plaintiff must produce evidence of the following elements:

- 1) plaintiff is a member of a racial minority;
- 2) plaintiff is qualified for the job he was performing;
- 3) despite plaintiff's qualifications he was discharged; and
- 4) after his discharge the position remained available and the employer sought people with plaintiff's qualifications to fill the job.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *Pitre v. Wester Elec. Co., Inc.*, 843 F.2d 1262, 1265-66 (10th Cir.1988); *Friends v. Coca-Cola Bottling Co.*, 37 FEP Cases 1153, 1159 (D.Kan.1983). Once the plaintiff

establishes a *prima facie* case of discrimination, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's termination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). If the employer sustains this burden, the plaintiff may prevail only if he can show the reasons offered by the employer were not the real reasons for his discharge, but were a pretext for discrimination. *Id.*; *McDonnell Douglas*, 411 U.S. at 804.

In the instant case, plaintiff was discharged for excessive absenteeism. As a member of the International Association of Machinists and Aerospace Workers (IAM) plaintiff's employment was governed by the collective bargaining agreement between IAM and Boeing. Under the collective bargaining agreement, employees were paid for absences charged to their accumulated sick leave and were not penalized for such absences as long as they were reported to Boeing. Once an employee used all of his sick leave, Boeing's attendance policy allowed absences without penalty for verifiable medical reasons as long as the employee presented a note from the treating physician upon his return to work.

Plaintiff does not dispute he had an attendance problem, but argues that the absences attributed to him were caused by medical reasons and therefore were excusable. The facts reveal that when plaintiff provided notes from his physicians to his supervisors, his absences were excused. However, on July 22, 1987, plaintiff was orally warned that his attendance record was unacceptable and that further action would be taken if his attendance did not improve immediately. During the first half of 1988, plaintiff accrued 25 unexcused absences, was issued two corrective action memos, and was required to attend counseling sessions on ways to improve his attendance problem. In July, 1988, plaintiff received written notice that further occurrences of unexcused absence would result in his termination. During the final six months of 1988, plaintiff accrued an additional 20 unexcused absences and numerous unexcused absences in the first five months of 1989. Finally, on May 10, 1989, Boeing told

(Cite as: 1992 WL 42913, *2 (D.Kan.))

plaintiff he would be terminated if he did not produce, by May 12, physician notes for his absences on March 24, April 21 and April 27. Plaintiff failed to meet the May 12 deadline and was terminated for excessive absenteeism on May 27, 1989.

*3 In order to establish a *prima facie* case of discriminatory discharge, the plaintiff must show he was qualified for the job he was performing when discharged. In *Mitchell v. Safeway Stores, Inc.*, 624 F.Supp. 932 (D.Kan.1985), the court recognized that excessive absenteeism may render an employee unqualified for the purpose of establishing a *prima facie* case of discrimination. Thus, the court concluded that plaintiff's excessive absenteeism, as defined by the employment manual, prevented her from showing a *prima facie* case of racial discrimination and her claim was dismissed. *Id.* at 935.

Likewise, in this case, there is some doubt plaintiff has shown he was qualified for the position from which he was terminated based upon his undisputed numerous absences. Nevertheless, assuming plaintiff has met his burden of establishing a *prima facie* case, the court finds that Boeing has articulated a legitimate, nondiscriminatory reason for plaintiff's discharge. Plaintiff was repeatedly warned that his poor attendance would cost him his job and he was required to attend counseling for the problem on several occasions. Boeing's attendance policy allowed for absences in excess of an employee's sick leave if an absence was due to a medical reason and the employee presented a physician's verification to his supervisor. Whether Boeing's policy is good or bad, Title VII does not prohibit employment decisions based on that policy, provided the policy is applied equally to all employees. *Gilchrist v. Bolger*, 733 F.2d 1551, 1553 (11th Cir.1984).

Since Boeing has presented a legitimate, nondiscriminatory reason for terminating plaintiff, plaintiff can prevail on his Title VII claim only if he shows the reason articulated is a pretext for discrimination. Plaintiff has produced no evidence to show Boeing's

attendance policy was applied differently to other employees. Thus, no genuine issue of fact remains for trial and summary judgment of this claim is appropriate.

Plaintiff also claims he was racially harassed by his supervisor, Hessee, in violation of Title VII. Plaintiff contends Hessee yelled at him, spoke to him in a demeaning fashion, caused him embarrassment and humiliation by such treatment, called him "boy", and generally showed less respect for plaintiff than shown the white employees working in the same area. Plaintiff asserts he was treated differently by Hessee because he was black and lived with a white woman.

It is well established that a black employee forced to work in an environment dominated by racial hostility and harassment has a valid claim for a Title VII violation. *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1412 (10th Cir.1987); *Gilbert v. City of Little Rock, Arkansas*, 722 F.2d 1390, 1394 (8th Cir.1983), *cert. denied*, 466 U.S. 972 (1984). To establish a racially hostile work environment, however, the plaintiff must prove that more than a few isolated incidents of harassment occurred. *Moore v. Norfolk and Western Ry. Co.*, 731 F.Supp. 1015, 1020 (D.Kan.1990). Casual comments or accidental or sporadic conversation will not trigger equitable relief pursuant to the statute. *Snell v. Suffolk Co.*, 782 F.2d 1094, 1103 (2d Cir.1986). Instead, there must be excessive and opprobrious racial comment. *Hicks*, 833 F.2d at 1412. Thus, Title VII is violated only where the work environment is so heavily polluted with discrimination as to destroy the emotional and psychological stability of the minority employee. *Id.* at 1413.

*4 In this case, plaintiff has related several incidents wherein Hessee yelled at him and called him "boy". However, plaintiff has not offered any evidence to show Hessee's comments were made with racial animus. Nor does the evidence show that plaintiff suffered psychological problems from racial harassment. Since the record is devoid of any evidence to demonstrate the alleged incidents of harassment were racially motivated, the

court must find plaintiff's claim is insufficient to withstand defendants' motion for summary judgment.

Finally, plaintiff contends he was denied a transfer out of Hessee's department because of the supervisor's racial prejudices. In order to establish a *prima facie* case of disparate treatment as a result of an employer's failure to transfer an employee, the plaintiff must show (1) that he applied for an available position; (2) that he was qualified for an available position; and (3) that he was rejected under circumstances which gave rise to an inference of unlawful discrimination in that his failure to be transferred or promoted was more likely than not based on considerations of impermissible factors. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Payne v. General Motors Corp.*, 731 F.Supp. 1465, 1470 (D.Kan.1990).

Here, the evidence unequivocally shows plaintiff did not apply for an available position. Boeing has no record of a transfer request by plaintiff and plaintiff admits he never submitted such a request. Plaintiff asserts he did not officially request a transfer because it would not have done any good. This argument is mere speculation. Plaintiff cannot claim he was denied a transfer for racially motivated reasons when he never requested a transfer or gave Boeing a chance to consider the request. Accordingly, summary judgment on this issue is granted.

Breach of Employment Contract

In his second cause of action, plaintiff contends Boeing breached its employment contract with him by discharging him for racially discriminatory reasons. Plaintiff's claim fails for the following reasons.

Plaintiff's claim for breach of his employment contract is preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(3). The collective bargaining agreement between Boeing and plaintiff's union, the IAM, defines the terms of plaintiff's employment and his employment contract. Since plaintiff's claim for breach of contract

requires interpretation of the collective bargaining agreement, it is preempted by § 301.

Subsequent to his discharge, plaintiff filed a grievance with the IAM according to the exclusive grievance procedure of the collective bargaining agreement. The IAM investigated plaintiff's grievance and asked that he be reinstated. Boeing refused to reinstate plaintiff and the IAM notified plaintiff of that decision on June 30, 1989. At the same time, the IAM informed plaintiff that it would not pursue his grievance further.

*5 In general, an employee is bound by the result of a grievance procedure according to the finality provisions of the collective bargaining agreement. *DelCostello v. International Broth. of Teamsters*, 462 U.S. 151, 164 (1983). This is because the employee's rights are protected by the union's duty of fair representation. *United Food & Com. Workers Local No. 7R v. Safeway Stores, Inc.*, 889 F.2d 940, 944 (10th Cir.1989). However, when the union has breached its duty of fair representation by acting arbitrarily, discriminatorily, or in bad faith, the employee can bring a suit against the employer and the union, notwithstanding the outcome or finality of the grievance procedure. *DelCostello*, 462 U.S. at 164.

In this case, plaintiff claims the IAM breached its duty of fair representation because its representative gave him the "run around" and didn't pursue his grievance after Boeing refused to reinstate him. Plaintiff has failed, however, to produce any evidence to support his allegations of bad faith. Although the IAM was not successful in getting plaintiff reinstated at Boeing, the facts show that it did assist plaintiff in recovering unemployment benefits when Boeing opposed the action. The facts of this case reveal an ordinary situation wherein the union abandons or rejects an aggrieved employee's claim. Thus, without more, plaintiff's claim against the IAM for breach of the duty of fair representation must fail. Accordingly, plaintiff's claim for breach of his employment contract is barred.

Tortious Interference with Employment Contract

Plaintiff's third claim is that his former supervisor, Hessee, intentionally, negligently and wrongfully interfered with plaintiff's employment contract with Boeing. This claim is preempted by federal law and, alternatively, fails under state law.

Whether or not Hessee, an agent of Boeing, improperly interfered with plaintiff's employment contract requires an examination of the rights of the parties under the collective bargaining agreement. *Magerer v. John Sexton & Co.*, 912 F.2d 525, 530 (1st Cir.1990). As the court noted above, any interpretation of the collective bargaining agreement is preempted by § 301 of the Labor Management Relations Act, 42 U.S.C. § 185(3). Claims which arise under § 301 are subject to the requirement of exhaustion of the grievance procedure as provided in the collective bargaining agreement. *Allis- Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985). In the case at hand, there is no evidence that plaintiff submitted his claim against Hessee for tortious interference to any grievance or arbitration procedure, and therefore he is barred from raising the claim for the first time here. *Mergerer*, 912 F.2d at 531.

In addition, the court notes that plaintiff's claim fails substantively. An essential element to any claim for tortious interference with a contract is interference by the defendant, who must be an outsider to the contract. *Dow Chemical Corp. v. Weevil-Cide Co., Inc.*, 897 F.2d 481, 488-89 (10th Cir.1990); *Professional Investors Life Ins. Co. v. Roussel*, 528 F.Supp. 391, 403 (D.Kan.1981). Hessee, as an agent for plaintiff's employer, was a party to plaintiff's employment contract and could not interfere with the employment contract. Thus, because it was legally impossible for Hessee to interfere with plaintiff's employment contract, the claim fails substantively.

Conspiracy Claims

*6 Plaintiff's fourth cause of action alleges that Hessee, the union, and employees in the

decision-making chain of command at Boeing conspired to deprive him of his civil rights in violation of 42 U.S.C. § 1985(3) and that Boeing's failure to prevent the conspiracy violated 42 U.S.C. § 1986. He contends Boeing employees, in cooperation with the union, conspired to prevent plaintiff's transfer, to have him discharged, and in such a manner also retaliated against him for complaining about the alleged discriminatory conduct.

To successfully state a claim under 42 U.S.C. § 1985(3), the plaintiff must allege and prove that the defendants (1) conspired; (2) to deprive, directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) acted in furtherance of the conspiracy; (4) whereby another was injured or deprived of having and exercising any right or privilege of a citizen of the United States. *Griffin v. Brechenridge*, 403 U.S. 88, 102 (1971).

In *Great American Sav. & Loan Ass'n. v. Novotny*, 442 U.S. 366, 372 (1979), the United States Supreme Court determined that § 1985(3) created no substantive rights, but provided a remedy only for the violation of rights it designated. The Court further found that a claim for Title VII violations asserted through § 1985(3) bypassed the administrative processes crucial to the scheme of Title VII. *Id.* at 375. Thus, in order to protect the overall scheme of Title VII, the Court ruled that § 1985(3) could not be invoked to redress violations of Title VII. *Id.* at 378.

Pursuant to the ruling in *Novotny*, the court in *Drake v. City of Fort Collins*, 927 F.2d 1156 (10th Cir.1991), held that plaintiff's request for relief under § 1985(3) and § 1986 was not independent of his Title VII claims for racial discrimination, and therefore failed. Similarly, in the present case plaintiff's claim for request under § 1985(3) and § 1986 is based upon the identical facts he asserts as a basis for alleged Title VII violations. Plaintiff's claims that the defendants conspired to have him wrongfully discharged and prevented his transfer to another department are precisely the claims he raised

in his Title VII cause of action. Furthermore, claims for retaliation are not actionable under § 1985(3). *Long v. Laramie County Community College District*, 840 F.2d 743, 752 (10th Cir.), *cert. denied*, 488 U.S. 825 (1988).

Plaintiff has failed to show that his claim of conspiracy under § 1985(3) is sufficiently independent of his Title VII claims and therefore is barred. In addition, since plaintiff's § 1985(3) claim fails, his claim under § 1986 is also barred. *Drake*, 927 F.2d at 1163.

Refusal to Contract Claim

In plaintiff's fifth cause of action, he alleges Boeing violated 42 U.S.C. § 1981 in failing to rehire him upon his application in December, 1990.

42 U.S.C. § 1981 prohibits racial discrimination in the making and enforcement of contracts. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989); *Trujillo v. Grand Junction Regional Center*, 928 F.2d 973, 975 (10th Cir.1991). Section 1981, however, cannot to be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly forbids discrimination only in the making and enforcement of contracts. *Patterson*, 491 U.S. at 176. Thus, the statute does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations. *Id.* at 171. Failure to renew an employment contract or failure to rehire an employee in the same position from which he was vacated does not violate § 1981 where a new and distinct employment relation is not created. *Hull v. Cuyahoga Valley Bd. of Educ.*, 926 F.2d 505, 509 (6th Cir.) *cert. denied*, 111 S.Ct. 2917 (1991); *Vakharia v. Swedish Covenant Hosp.*, 765 F.Supp. 461, 470 (N.D.Ill.1991); *Eklof v. Bramalea Ltd.*, 733 F.Supp. 935, 937 (E.D.Pa.1989).

*7 After his discharge, plaintiff reapplied at Boeing for the same position from which he had been terminated. Plaintiff exchanged correspondence with the personnel department

at Boeing but was not hired. He asserts that Boeing refused to rehire him because of his race. Plaintiff, however, provides no factual support for his claim. Instead, the evidence shows that Boeing did not hire any new employees in its sheet metal department after plaintiff's discharge, although it did recall certain employees previously laid off.

Plaintiff's claim under § 1981 must fail as a matter of law. Plaintiff seeks reemployment with Boeing in the same position from which he was discharged with the same rights, duties, and obligations as under the old employment contract. Reinstatement of the identical employment relationship is not a new contract, and therefore is not actionable under § 1981.

Defamation Claim

Plaintiff's final claim is for defamation. He contends direct evidence of defamation is contained in Boeing's termination documents and in the records from his unemployment compensation proceedings. He alleges circumstantial evidence of defamation in his inability to get a job when Boeing is listed as a reference.

In order to successfully assert a claim for defamation the plaintiff must prove (1) false and defamatory words; (2) communicated to a third person; and (3) which resulted in harm to the reputation of the person defamed. *Gobin v. Globe Pub. Co.*, 232 Kan. 1, 6, 649 P.2d 1239 (1982). Publication of the defamatory words must be proven by direct, and not circumstantial, evidence. *Hall v. Hercules, Inc.*, 494 F.2d 420, 434 (10th Cir.1974).

Clearly, plaintiff's claim of defamation based upon alleged blacklisting by Boeing and Hessee is mere speculation. Furthermore, plaintiff's claim which relies upon circumstantial evidence for support fails as a matter of law. *Id.*

Plaintiff has also failed to produce admissible direct evidence to support his claim of defamation. First, plaintiff relies upon a referee's written decision in plaintiff's

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unemployment compensation hearing to demonstrate defamation. In the opinion, the referee determined there was no misconduct by plaintiff and held that plaintiff was entitled to the compensation. Plaintiff alleges the reference to misconduct demonstrates that Boeing falsely accused him of misconduct.

The statements which plaintiff attribute to Boeing cannot be relied upon by him as evidence of defamation because they are privileged. Statements given in the course of litigation which otherwise might serve as a basis for action in slander or libel are privileged communications. *Clear Water Truck Co., Inc. v. M. Bruenger Co., Inc.*, 214 Kan. 139 Syl. 1, 519 P.2d 682 (1974).

Further, communications between managerial employees about the reasons for an employee's discharge are also privileged. *Turner v. Halliburton Co.*, 240 Kan. 1, 8-10, 722 P.2d 1106 (1986). Thus, statements made or documents generated internally at Boeing for management's use are privileged and inadmissible evidence. Accordingly, since plaintiff's claim of defamation is not sufficiently supported by fact, the cause of action is subject to summary judgment.

*8 IT IS THEREFORE ORDERED this 10 day of February, 1992, that defendants' motion for summary judgment (Dkt. No. 20) on each and every claim raised herein by plaintiff is granted.

1992 WL 42913, 1992 WL 42913 (D.Kan.)

END OF DOCUMENT

ADDENDUM B

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois,
Eastern Division.

Candida MARTINEZ, Plaintiff,
v.
U-HAUL COMPANY OF ILLINOIS, INC.
an Illinois corporation and Arlester
Webster
Defendants.

No. 99 C 8066.

June 6, 2001.

MEMORANDUM OPINION AND ORDER

PALLMEYER, J.

*1 Plaintiff Candida Martinez brings this action against her former employer, Defendant U Haul Company of Illinois, Inc. ("U Haul") and her former supervisor, Defendant Arlester Webster ("Webster"), alleging that Webster sexually harassed her and, after she complained about the harassment, retaliated against her in violation of Title VII of the Civil Rights Act of 1964. Additionally, Plaintiff brings a state law claim for defamation against both Defendants, contending that after she left U-Haul, Webster falsely told several prospective employers that Plaintiff was a thief. [FN1] Defendant U- Haul now moves for summary judgment, contending Plaintiff has not established that she suffered severe and pervasive harassment, nor has she established a prima facie case of retaliation. In addition, both Defendant U Haul and Defendant Webster seek summary judgment on Plaintiff's defamation claim, arguing that Plaintiff has not proffered any admissible evidence to sustain this count. For the following reasons, Defendant U Haul's motion for summary judgment is denied in part and granted in part, and Defendant Webster's motion for summary judgment is granted.

FN1 Plaintiff's complaint also contained a count of intentional infliction of emotional distress against both Defendants and an assault and battery count directly against Webster. This court dismissed Plaintiff's intentional infliction of emotional distress claim against U-Haul on May 18, 2000 and against Webster on January 9, 2001. Because Webster has not moved for summary judgment on the assault and battery claim, that claim will not be addressed in this opinion.

FACTUAL BACKGROUND

A. Plaintiff's Employment at U-Haul

Plaintiff was employed at the U-Haul moving center in Park Forest, Illinois, as a customer service representative from late 1997 until January 1998 and then again from August 1998 until she quit her job in May 1999. (U Haul Co. of Illinois' Rule 56.1 Statement of Uncontested Facts (hereinafter "Def.'s 56.1 Statement") ¶¶ 1, 30.) From August 1998 until May 1999, Defendant Arlester Webster was Plaintiff's supervisor. (*Id.* ¶ 3.)

Plaintiff's job duties as customer service representative included: (1) assisting with retail, taking reservations, and selling items out of the store; (2) light cleanup, including mopping and sweeping the storage area; (3) "trailer hookup" -consisting of hooking dollies up to the cars or trucks; and (4) displaying storage areas to customers. (Pl.'s Dep., at 35-37.) From early 1999 until she left U-Haul, Plaintiff was the only full-time customer service representative at the Park Forest facility. (Def.'s 56.1 Statement ¶ 36.)

On the day Plaintiff was hired at the Park Forest facility, she received a publication entitled "Welcome Aboard" which, among other things, describes U- Haul's sexual harassment policy. (Def.'s 56.1 Statement ¶¶ 10, 12.) That publication instructs employees who feel they have been sexually harassed to report these incidents and identifies a variety of avenues for reporting any perceived harassment. (*Id.* ¶ 11.) Additionally, to educate employees about this policy, U Haul provides

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its managers with a policy bulletin that contains more written information concerning sexual harassment. (*Id.* ¶ 17.) That bulletin includes such information as a definition of sexual harassment, a set of procedures for responding to and investigating complaints of sexual harassment, suggested corrective actions that may be taken in response to such complaints, and other guidelines for conducting investigations. (*Id.* ¶ 18.) The bulletin also notes that the EEO and Human Resources staff at U Haul are available to provide guidance regarding sexual harassment. (*Id.* ¶ 19.) Attached to that bulletin is another internal publication of U-Haul's Policy prohibiting sexual harassment. (*Id.* ¶ 21.) According to U-Haul, a copy of this policy is posted at every U-Haul moving center, and identifies the person(s) to whom an employee is to report any incidents of harassment. (*Id.* ¶¶ 13, 14.) Plaintiff denies that any such policy was posted at the moving center where she worked, but she admits that she herself had a copy of the policy and, further, admits that she had the toll free number to call to report incidents of sexual harassment. (Plaintiff's Response to U-Haul Co. of Illinois Rule 56.1 Statement of Uncontested Facts (hereinafter "Pl.'s 56.1 Response") ¶¶ 13, 16, 41.)

B. Alleged Incidents of Sexual Harassment

*2 Plaintiff testified that while Webster was her supervisor, he asked her out on dates "just about every day." (Pl.'s Dep., at 80, 95.) She also claims that other employees, including Donald Williams, Torino Terry, Vivian Shegog, and Greg Flores, witnessed Webster acting flirtatiously with her. (*Id.* at 160-162.) Plaintiff contends that Webster did not treat other employees this way. (*Id.*) She admits, however, that she did not complain to U-Haul about Webster acting flirtatiously towards her and also admits that his flirtatious behavior bothered her only "sometimes." (*Id.* at 162.) Additionally, she testified that she did not consider Webster's requests for dates to be sexual harassment, nor did those requests bother her. (*Id.* at 80, 95.)

Along with the requests for dates and the

flirtatious behavior, Plaintiff alleges that Webster improperly touched her at work on two separate occasions. The first such incident occurred in late January 1999 at a time when Plaintiff and Webster were alone in the store. (Pl.'s Dep., at 67-68, 72.) According to Plaintiff, she was standing at the store counter counting her receipts when Webster came up behind her and put his hands on her upper thighs, a little below the waist line, and rubbed there, above the clothing, for about 30 seconds. (*Id.* at 67-69, 70.) Because he came up from behind her, she did not know at first that it was Webster who was touching her. (*Id.* at 70.) When Plaintiff turned her head and saw that it was Webster, she told him, "Don't touch me," and he walked away. (*Id.* at 69-71.) Plaintiff went home immediately after the incident. (*Id.* at 73.)

The second such incident occurred a month or so later, sometime in late February 1999. (*Id.* at 75.) Again, Plaintiff was at the counter counting her receipts when Webster came up behind her and put his hands in her front pockets and began to rub her thighs for about five seconds, until Plaintiff hit him in the stomach and he walked away. (*Id.* at 75-77.) As with the first such incident, there were no other workers or customers in the store at the time. (*Id.* at 77.) Plaintiff contends that she went home directly after the incident and told her mother what happened. (*Id.* at 78-79.)

Defendant tells a very different version of his treatment of Plaintiff and of the two alleged incidents of touching. According to Webster, he never rubbed Plaintiff's thighs in either incident, but merely removed a set of keys from her back pocket on two occasions. (Webster Dep., at 69.) As he explained it, the first time this occurred, he asked Plaintiff for the cash drawer keys so he could ring up a customer and give him his change. (*Id.* at 72.) Plaintiff was eating lunch at the time and she turned to indicate he should just take the key from her back pocket. (*Id.* at 104.) He then grabbed the portion of the key ring that was sticking out of her pocket and, therefore, never had to reach into her pocket or touch her person. (*Id.* at 74-75.) According to Webster, the second incident occurred in much the same

way; Plaintiff gave him permission to take the keys out of her pocket and he took them out without touching her body. (Def.'s 56.1 Statement ¶ 57.)

*3 On March 11, 1999, Webster was arrested for the second touching incident after Plaintiff's uncle, Andre Martinez, called the police about the matter. (Pl.'s Dep., at 145.) [FN2] Plaintiff points out that, at this time, Webster signed a written statement in which he stated, in relevant part, "I put my hand in [Plaintiff's] pocket just as a joke, she got mad, I pulled it out and left her alone." (Pl.'s 56.1 Additional Facts ¶ 17.) Webster asserts, however, that he did not read over the statement before he signed it and specifically denies that he told the police he put his hands in Plaintiff's pockets. (Webster Dep., at 142-45.)

FN2 Plaintiff testified that she did not know whether Webster was eventually charged with any criminal conduct (Pl.'s Dep., at 149.)

Plaintiff herself did not testify to any other incidents of touching or any other harassing behavior by Webster. Plaintiff's cousin, Vivian Shegog, however, who worked with Plaintiff and Webster at the same U-Haul moving center, testified to a number of incidents in which she claims to have observed Webster harassing Plaintiff. (Plaintiff's Rule 56.1(b) Additional Statement of Contested Facts (hereinafter "Pl.'s 56.1 Additional Facts") ¶¶ 6-14.) For example, Shegog testified that on several occasions, she witnessed Webster attempt to reach around Plaintiff and, while reaching, he would "[pat] her up." (Shegog Dep., at 22; Pl.'s 56.1 Additional Facts ¶ 6.) She also saw Webster go out of his way on a daily basis to brush up against Plaintiff. (Shegog Dep., at 43; Pl.'s 56.1 Additional Facts ¶ 7.) She named several additional occasions, apart from the two incidents Plaintiff related, where Webster touched Plaintiff. (*Id.* ¶ 10.) She also testified that she saw Webster stare at Plaintiff, and if Plaintiff bent over, heard him make comments about her. (*Id.* ¶ 12.) On several of the occasions when Webster touched Plaintiff or moved close to her, Shegog witnessed Plaintiff push

Webster away, kick him, make facial expressions at him and ask him directly, "what are you looking for?" (*Id.* ¶¶ 25-28, 31.) Shegog testified that Plaintiff told her that this behavior bothered her and Shegog recalled that, at one point, Plaintiff was on the brink of tears as a result of these incidents. (Shegog Dep., at 78.)

Defendant U-Haul points out, however, that Plaintiff herself admitted that there were only two instances of physical contact with Webster. (Def.'s 56.1 Response ¶ 6.) In addition, Plaintiff did not testify to any of the events that Shegog related and, in fact, testified that Webster never made any comments about her anatomy. (*Id.* ¶ 12; Pl.'s Dep. at 213.)

C. U-Haul's Investigation of Plaintiff's Complaint

On February 23, 1999, shortly after the second incident of touching had occurred, Plaintiff called the 800 number listed in her "Welcome Aboard" book to report the perceived sexual harassment and spoke to Jim Cody at U-Haul International's Human Resources Department in Phoenix. (Def.'s 56.1 Statement ¶ 45; Pl.'s Dep. at 64, 96.) [FN3] She told Cody that on two separate occasions Webster had come up behind her and touched her thighs with his hands. (*Id.* at 65-67.) She also told him that Webster continually asked her out on dates. (Def.'s 56.1 Statement ¶ 46.) After her call, U-Haul International's Human Resources Department informed U-Haul Marketing Company President Chris McDermott of Plaintiff's complaint. (*Id.* ¶ 48.) Two days later, on February 25, 1999, McDermott went to the Park Forest facility to investigate. (*Id.* ¶ 49.)

FN3 Plaintiff actually says that she first called the 800 number during the first week of March 1999 (Pl.'s Dep. at 63.) Because Defendant itself claims she called the number even earlier (and, therefore, closer to the incident of harassment), for the sake of this motion the court will assume Plaintiff made the call on February 23, 1999.

*4 Plaintiff and Defendant dispute whether

McDermott followed U-Haul's guidelines for conducting a proper sexual harassment investigation. (Def.'s 56.1 Statement ¶ 50; Pl.'s Response ¶ 50.) According to Defendant, McDermott began his investigation by interviewing Plaintiff to determine the details of her complaint, at which point Plaintiff reiterated what she had reported in her call to the 800 number: that Webster had asked her out on dates and had, on two occasions, touched her. (Def.'s 56.1 Statement ¶¶ 51, 52.) According to McDermott, Plaintiff said Webster had been taking keys from her back pocket on those occasions and Webster admitted that he had in fact removed keys from her back pocket on two occasions, but said he had done so only with Plaintiff's permission and without touching her body. (*Id.* ¶¶ 52, 57.)

McDermott said he interviewed everyone on the active payroll at the Park Forest facility during the relevant time frame. (Def.'s 56.1 Statement ¶ 54.) This included Webster and a number of Plaintiff's co-workers: Julie Solis, Jovan Blount, Darney Rife and Torino Terry (who is Plaintiff's boyfriend). (*Id.* ¶ 54.) McDermott did not interview Plaintiff's cousin Vivian Shegog because she was on a short medical leave of absence during the time of the incidents of touching. (Def.'s 56.1 Response ¶ 101.) McDermott determined that none of Plaintiff's co-workers had seen the incidents of touching of which Plaintiff complained. (Def.'s 56.1 Statement ¶ 56.)

Plaintiff denied that McDermott began his investigation by interviewing her. (Pl.'s Response ¶ 51.) Instead, she claims that he started the investigation by interviewing her co-workers Jovan Blount, Julie Solis, and Darney Rife. (*Id.*) She also contends that McDermott never interviewed Torino Terry and that, though Shegog was on a leave of absence, there was no reason not to interview her. (*Id.* ¶¶ 50, 55.) Additionally, Plaintiff points out that no one was present for the two incidents of touching that she complained of, so none of the witnesses would have seen these contacts. (*Id.* ¶ 56.)

McDermott concluded his investigation on

March 4, 1999. (Def.'s 56.1 Statement ¶ 60.) He concluded that Webster had removed keys from Plaintiff's pocket by taking the key ring and not by touching her thighs. (*Id.* ¶ 61.) McDermott then met with Plaintiff and Webster. (*Id.* ¶ 63.) According to McDermott, Plaintiff admitted at that meeting that Webster had asked for the key and she had turned her hip and back pocket toward Webster and indicated that he should take the key because she was eating lunch and her hands had food on them. (*Id.*) McDermott also said that he found no corroboration for Plaintiff's claim that Webster had asked her out on a date. (*Id.* ¶ 64.) Finally, McDermott explained that he asked Plaintiff whether she wanted him to transfer Webster or herself but she did not request that either be transferred. (*Id.* ¶ 66.) Plaintiff testified that she felt Webster should be terminated from his employment at U-Haul, but admits that she did not request that either she or Webster be transferred. (Pl.'s Dep., at 91.)

*5 Based on McDermott's investigation, U-Haul issued a written warning notice to Webster on March 4, 1999, informing him that any future inappropriate comments or actions would subject him to immediate termination. (Def.'s 56.1 Statement ¶ 67.) Webster reviewed and signed the notice. (*Id.* ¶ 68.) It is undisputed that after this incident, Webster never again touched Plaintiff, asked her for dates, or acted flirtatiously toward her. (*Id.* ¶ 72.) Plaintiff, however, felt that a written reprimand was not sufficient, and so in March of 1999 she once again called U-Haul's 800 number and spoke to an employee in Phoenix named Cary Kirkland. (Pl.'s Dep., at 90-91.) [FN4] Kirkland failed to get back in touch with Plaintiff. (*Id.*) Plaintiff then filed a charge of discrimination with the Equal Employment Opportunity Commission on April 9, 1999. (Def.'s 56.1 Statement ¶ 85.)

FN4. Plaintiff was unsure as to Kirkland's official job title. (Pl.'s Dep., at 91.)

D. Plaintiff's Retaliation Claim

Plaintiff admits that Webster did not touch her again once she complained about the

harassment, but she claims that Webster retaliated against her in a number of ways for complaining about him. To begin with, Plaintiff testified that from the moment she called Jim Cody, Webster imposed harsher job duties on her than he imposed on other similarly situated employees. (Pl.'s Dep., at 43, 86.) [FN5] As she explained, Webster made her job harder by "pil[ing] on more work" and changing her daily tasks. (*Id.* at 62, 85.) Specifically, Plaintiff claims that she was required to change oil in the trucks, do many more trailer hook-ups, and clean out the storage area more often than she had in the past. (*Id.* at 85.) According to Plaintiff "all the work the other employees did" was now assigned to her. (*Id.* at 86.) Additionally, Plaintiff testified that Webster changed her hours, scheduled her for longer days, was reluctant to give her days off that she requested, and insisted that she open and close the store for him when he wasn't there. (*Id.* at 62, 99.) Plaintiff estimated that she was assigned five or six more hours of work per week, though she admitted she was paid overtime for those hours. (*Id.* at 99.) She also claimed that she was left doing Webster's job and that he came to work less often. (*Id.* at 100.)

FN5. Plaintiff testified that the day after she called Cody "everybody" at work knew that she had called him and everyone was talking about it (*Id.* at 86.) Because she did not tell anyone about the phone call, she assumed that Cody told someone in the company about it, who then called Webster (*Id.* at 87.)

Plaintiff's cousin, Vivian Shegog, corroborated Plaintiff's assertion that she was given different tasks, but Shegog testified that she also was made to do some of those tasks along with Plaintiff. (Shegog Dep., at 119.) [FN6] For example, Shegog recalled that after a conversation in which McDermott told Webster about Plaintiff's complaint, Webster required both Plaintiff and Shegog to hand wash trucks and vans and clean out storage areas. (Pl.'s 56.1 Additional Facts ¶ 58; Shegog Dep., at 119.) According to Shegog, she and Plaintiff had not previously been called on to wash the trucks because U Haul had other people to do this work. (Shegog Dep., at 60.)

Shegog also claimed that after Plaintiff made the last phone call and Chris McDermott came to speak to Webster, Webster directed Shegog and Plaintiff to drive the bigger trucks, sweep out the storage areas, and restock the back room, even though he had not previously asked them to do those things. (*Id.* at 60 61.) Instead, he generally made the male employees do such tasks as cleaning out the storage areas. (*Id.* at 118.)

FN6 Both parties agree that Shegog was on a short medical leave of absence during the time of the incidents of touching, but, because she provides first hand accounts of what occurred after Plaintiff complained of the harassment, the court assumes that she was once again back at U-Haul the same week that Plaintiff called Jim Cody to complain

*6 U-Haul points out, however, that none of the tasks Plaintiff or Shegog described were outside of Plaintiff's job description as a customer service representative. (Def.'s 56.1 Statement ¶ 76.) Webster contends that the real reason for assigning Plaintiff additional job duties was the fact that she was no longer pregnant, not the fact of her complaints. (Webster Dep., at 272.) As he explains it, from August 1998, when Plaintiff was nine months pregnant, until three months after childbirth, she was not required to do any heavy lifting or to pick up hitchers. (*Id.* at 272.) He explained, however, that by October or November of 1998, her duties were once again the same as any other U-Haul customer service representative, including assisting with the cash register, light cleanup, trailer hookup, and storage. (*Id.* at 272-73.) Thus, Webster argues that Plaintiff's job duties changed before she ever complained of harassment. (*Id.*)

Besides giving her additional tasks to perform, Plaintiff contends that Webster began verbally abusing her, threatening her in front of customers, yelling at her at work and "just being downright rude" to her. (Pl.'s Dep., at 152.) He also used profanity when talking to her, including calling her "all types of names." (*Id.* at 202.) Plaintiff explained that he mostly used the "A word" but also called her "[e]very other word in the book" including "Stupid B. You slow MF. You look like S." (*Id.*

at 207.) According to Plaintiff, such incidents happened frequently after she made her complaint and had not happened before she complained. (Pl.'s Dep., at 158.) She also testified that she did not see him direct these words at anyone else at U-Haul. (*Id.* at 207.) Shegog, however, claimed that Webster called both Plaintiff and Shegog "dumb asses, stupid bitches, fucking whores," though neither party has clarified whether Webster made these statements only after Plaintiff made her complaint or the entire time that both women were at U-Haul. (Shegog Dep., at 60.)

Without denying Webster's rude behavior, U-Haul points out that such behavior was doled out to others, as well as Plaintiff. For example, U-Haul points to Shegog's testimony that Webster used similar language and exhibited similar "rude" behavior with other employees. (Def.'s 56.1 Statement ¶ 78.) In addition, Torino Terry, Plaintiffs' boyfriend and co-worker, testified that Webster regularly raised his voice to all of the employees. (*Id.* ¶ 78; Terry Dep., at 96-98.)

As additional evidence of retaliation, Plaintiff points to several written reprimands that she claims she unfairly received after she complained about Webster and later filed her EEOC charge. Plaintiff notes that prior to the filing, Webster had never given her a written warning and had, in fact, given her a raise and a promotion to a full time position. (Pl.'s 56.1 Additional Facts ¶¶ 49, 50.) On March 1, 1999, six days after Plaintiff first complained to U-Haul about Webster, Webster issued a written warning notice to Plaintiff for failing to make the closing bank deposit for February 28, 1999. (Def.'s 56.1 Statement ¶ 79; Pl.'s 56.1 Additional Facts ¶ 46.) On April 6, 1999, Plaintiff was given four more warning notices, addressing the following violations that occurred on April 4, 1999: (1) failure to work to the end of her scheduled work shift of 5:30 pm, effectively closing the U-Haul center early that day; (2) taking a U-Haul vehicle for personal use without prior authorization and leaving the U-Haul facility understaffed while she used the vehicle; (3) using the vehicle overnight, after hours; and (4) failing to maintain a business atmosphere by allowing a

non-employee onto the premise to disrupt the facility's operations. (Def.'s 56.1 Statement ¶¶ 80, 81.)

*7 Defendant contends that, though Plaintiff began to receive written reprimands after she complained of harassment, she herself admitted that she deserved some of the reprimands. For example, Plaintiff admitted that she failed to make the bank deposit. (Pl.'s Dep., at 128-129.) She explained, however, that she did not do so because she did not have a car at the time. (*Id.*) Plaintiff also explained that she did not deserve all of the reprimands because it was Julie Solis, not Plaintiff, who took the van. (Pl.'s 56.1 Response ¶ 81.) She admits that she went with Solis in the van to get lunch but claims that Solis had permission to take the van out. (Pl.'s Dep., at 131, 132.) Plaintiff also denies that she left early or that she had a visitor on the premises. (Pl.'s 56.1 Response ¶ 81.) She asserts that her visitor, Torino Terry (who by this time had been terminated from his employment at U-Haul) remained outside of the store and only came to bring her lunch. (*Id.* at 139.)

Defendant claims, however, that these were not the first reprimands Plaintiff ever received. To the contrary, U-Haul contends that Plaintiff was orally reprimanded by Webster prior to her complaint for locking a U-Haul customer in a rental storage area and for throwing merchandise at a customer in response to the customer's complaint. (Def.'s 56.1 Statement ¶ 82, citing Webster Dep., at 273-76.) Webster admits, however, that he did not give Plaintiff a written warning notice at that time. (*Id.*) Nor was Webster sure whether or not he contacted U-Haul's Human Resources Department regarding those incidents. (*Id.*) Plaintiff denies that she was reprimanded for those acts. (Pl.'s 56.1 Response ¶ 82; Webster Dep., at 276.)

Plaintiff also alleges that, as part of his retaliation, Webster accused her of stealing different items and relayed these accusations to McLaughlin. (Pl.'s 56.1 Additional Facts ¶ 61.) Specifically, Plaintiff alleges that on April 30, 1999, Webster told McLaughlin that Plaintiff had stolen furniture from a

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customer's storage locker, on April 28, 1999, Webster accused Plaintiff of stealing some uniforms, and on May 3, 1999, Webster told McLaughlin that Plaintiff planned to break into the storage lockers with a former employee. (*Id.* ¶¶ 61, 62, 113.) Plaintiff also alleges that, at some point in April 1999, Webster told a customer named Omateg Barnes that Plaintiff had stolen something from Barnes' storage space. (Pl.'s Dep., at 185.) As a result, the police came and placed Plaintiff in a holding cell for almost three hours. (*Id.*) Plaintiff denied that she ever stole anything from U-Haul besides some ink pens and paper. (*Id.* at 194-95.)

For his part, Webster denies that he ever accused Plaintiff of theft. According to Webster, one of the storage customers had a number of pieces of furniture stolen from her storage space. It was the customer who suspected Plaintiff was somehow involved in the theft, (Def.'s 56.1 Response ¶ 61; Webster Dep., at 193-199), resulting in Plaintiff's being detained by the police for that incident. (Pl.'s 56.1 Additional Facts ¶¶ 120-121.)

*8 Sometime in April, close in time to when Plaintiff filed her EEOC charge, she spoke to Chris McDermott and told him that Webster was giving her extra jobs, scheduling her more hours, and treating others more favorably. (Pl.'s Dep., at 106.) According to Plaintiff, McDermott did nothing to change that treatment. (*Id.* at 107) Plaintiff therefore decided to leave her job in late May. (Pl.'s 56.1 Statement Additional Facts ¶ 40; Karen Martinez Dep., at 57; Pl.'s Dep., at 109-110.)

E. Plaintiff's Defamation Claim

After Plaintiff left U-Haul, she applied for work at four different places: St. James Hospital, Rent-A-Center, Ingalls Memorial Hospital and one other place whose name she could not recall. (Pl.'s Dep., at 16.) Plaintiff believes the reason she was not hired was that Webster did not recommend her to these employers and told them that she was a thief. (*Id.* at 28.) To support her claim that Webster defamed her to these employers, Plaintiff testified that her cousin, Vivian Shegog,

contacted a woman named Maria who had interviewed Plaintiff for the position at Ingalls Hospital. (*Id.* at 27.) [FN7] According to Plaintiff, Maria told Shegog that she did not hire Plaintiff because Webster had told her that Plaintiff was a thief. (*Id.* at 28.) Plaintiff claims she never spoke to Maria herself, but got this information solely from Shegog. (*Id.* at 28-29.) In addition, Plaintiff is certain that Webster told Rent-A-Center she was a thief because she "pretty much had [a] foot in the door," but then she wasn't hired. (*Id.* at 155-156.)

FN7. Neither Plaintiff nor Shegog could recall Maria's last name.

Shegog testified, however, that she never called Ingalls Hospital for Plaintiff. (Def.'s 56.1 Statement ¶ 88; Shegog Dep., at 75.) Instead, Shegog testified that Plaintiff was the one who was told by a potential employer that Webster had called Plaintiff a thief. (Shegog Dep., at 76.) Webster himself denies that he ever told any of Plaintiff's prospective employers that she was a thief and Plaintiff has offered no testimony from anyone at Ingalls Memorial Hospital or any other potential employer. (Def.'s 56.1 Statement ¶ 90.) Finally, though Plaintiff claims that Webster defamed her to several potential employers, she admitted that she did not know whether anyone at St. James Hospital ever communicated with Webster in connection with her application, nor could she say whether anyone at Rent-A-Center had ever contacted Webster. (Pl.'s Dep., at 18-19.)

DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper when "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); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Wade v. Lerner New York*, 243 F.3d 319, 321 (7th Cir.2001). In determining whether any genuine issue of

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material fact exists, the court must construe all facts in the light most favorable to the non moving party and draw all reasonable and justifiable inferences in favor of that party. See *Michas v Health Cost Controls of Illinois, Inc.*, 209 F.3d 687, 692 (7th Cir. 2000) (citing *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." See *Baron v City of Highland Park*, 195 F.3d 333, 338 (7th Cir. 1999) (citing *Anderson*, 477 U.S. at 248).

B Motion For Leave to File Under Seal

*9 As an initial matter, the court must rule on Defendant U Haul's motion for leave to file certain documents under seal. U Haul has requested leave to file portions of the deposition testimony of Defendant Webster, Christopher McDermott and Patrick McLaughlin as well as U Haul's memorandum in support of summary judgment and its 561 statement of fact under seal. As U Haul explains, these documents contain information that is "private to certain employees and former employees of U Haul, including information regarding the allegations in this sexual harassment case, and other private matters" and also contain "information that is proprietary, non public business information of [D]efendant U Haul, including confidential policy and procedure documents and other business information." (U Haul's Motion for Leave to File Certain Summary Judgment Papers Under Seal *Instantly* ¶ 3.) U Haul contends that disclosing this information "would likely have the effect of revealing otherwise private matters or otherwise causing substantial harm to U Haul and/or its current and former employees." (*Id.*)

No doubt every party involved in a sexual harassment suit would, if given the chance, prefer to keep many of the details underlying the suit from the public. U Haul has presented no specific justifications, however, for filing an entire memorandum and 561 statement of facts under seal, nor does this court see any justifications for so doing. In Illinois, the party claiming confidential protection of certain

documents bears the burden of showing (1) a trade secret or confidential business information, and (2) good cause. *Citizens First Nat'l Bank of Princeton v Cincinnati Ins. Co.*, 178 F.3d 943, 944-45 (7th Cir. 1999), *Culinary Foods Inc. v Raychem Corp.*, 151 F.R.D. 297, 300 (N.D.Ill. 1993). It is not enough for U Haul to insist that current and former employees would prefer these matters remain private. Such conclusory statements that disclosure will result in harm is insufficient evidence to support filing these documents under seal. See *Andrew Corp. v Rossi*, 180 F.R.D. 338, 340, 342 (N.D.Ill. 1998) (determining whether a protective order is appropriate requires balancing the public interest in the information with the possibility that a party will be unduly burdened or oppressed by the information).

Additionally, the court is genuinely puzzled by U Haul's argument that certain of its policies and procedures mentioned in this suit are confidential. Because U Haul provides no specifics about which of its policies are confidential, the court is left to wonder why U Haul would be concerned about revealing its well established (and apparently effective) sexual harassment policy. U Haul's attempt to keep its investigation of the sexual harassment policy confidential is also baffling in light of the evidence that U Haul handled that investigation with deliberate speed and thoroughness. Because U Haul has been unable to provide specific reasons that any particular information involved in this case must be kept confidential, its motion for leave to file certain documents under seal is denied. The court now turns to the merits of Defendant's summary judgment motion.

C Sexual Harassment

1 Defendant Webster's Conduct

*10 Sexual harassment is actionable under Title VII only if "it is so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment." *Clark County Sch. Dist. v Breeden*, 121 S.Ct. 1508, 1509 (2001) (quoting *Faragher v City of Boca Raton*, 524 U.S. 775,

786 (1998)(quotation marks omitted), *see also Hostetler v Quality Dining Inc*, 218 F 3d 798, 806 (7th Cir 2000) The test for determining whether harassment is actionable is both subjective and objective, the plaintiff must establish both that a reasonable person would find the harassment created an abusive working environment and that she, in fact, did perceive it to be so *Gentry v Export Packaging Co* 238 F 3d 842 (7th Cir 2001) As the Supreme Court has explained, in making this determination, "[w]orkplace conduct is not measured in isolation, instead, whether an environment is sufficiently hostile or abusive must be judged by looking at all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance" *Clark County*, 121 S Ct at 1510 (quoting *Harris v Forklift Sys, Inc*, 510 U S 17, 23 (1993)(quotation marks omitted) To be actionable "the conduct at issue must 'ha[ve] the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment" ' *Murray v Chicago Transit Auth*, No 99 3774, ___ F 3d ___, 2001 WL 493433, at *6 (7th Cir May 10, 2001), citing *Filipovic v K & R Express Sys, Inc* 176 F 3d 390, 397 (7th Cir 1999) (quoting *Saxton v American Tel & Tel, Co*, 10 F 3d 526, 533 (7th Cir 1993) "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment" *Clark County*, 121 S Ct at 1510 (citations and quotation marks omitted)

In the instant case, Plaintiff's allegations of harassment center around the two occasions where Defendant Webster came up behind her and rubbed her thighs, the first time, outside of the pockets and for about 30 seconds until she told him to stop, the second time, reaching inside of her pockets and rubbing her thighs for about 5 seconds until she hit him in the stomach Webster claims that he never touched Plaintiff's person, but instead, only took keys out of her pockets after she gave

him permission to do so Taking the facts in the light most favorable to the Plaintiff, however, the court assumes that these touches were inappropriate and unwelcome Along with the two incidents of improper touching, Plaintiff alleges that Webster asked her out on dates "just about every day" and acted flirtatiously towards her Additionally, Plaintiff's cousin, Vivian Shegog, who worked along side Plaintiff and Webster, testified to a series of harassing incidents to which Webster subjected Plaintiff These included moving close to Plaintiff and "patting her up," going out of his way to brush up against her, staring at her, making comments as she bent over, and touching her

*11 Even taking all of these incidents together, however, they do not establish harassment that is severe and pervasive enough to be actionable The two incidents of touching may have been inappropriate, but isolated instances of unwanted sexual advances are not enough to create a hostile work environment *See, e g, Saxton v American Telephone and Telegraph Co*, 10 F 3d 526, 534 (7th Cir 1993) In *Saxton*, Plaintiff's supervisor, Jerome Richardson, placed his hand on her leg above the knee several times, rubbed his hand along her upper thigh and grabbed her and kissed her for two to three seconds while the two were out together *Id* at 528 After plaintiff told him to stop, he did so, but three weeks later after the two had lunch together he came at her from behind some bushes and attempted to grab her *Id* The Seventh Circuit found that "although Richardson's conduct was undoubtedly inappropriate, it was not so severe or pervasive as to create an objectively hostile work environment" *Id* at 534 The court recognized that "any employee in Saxton's position might have experienced significant discomfort and distress as the result of her supervisor's uninvited and unwelcome advances," but explained that the limited nature of the incidents kept such behavior from rising to the level of pervasive harassment, even where there were "two instances of sexual misconduct rather than one" *Id*

Similarly, Webster touched Plaintiff on only

two occasions that Plaintiff could recall and both incidents were limited in nature. In Plaintiff's own version, the first incident lasted only about 30 seconds while the second incident lasted about 5 seconds. Webster stopped touching her the moment she told him to and never touched her again once he received a written warning from U Haul against such behavior. Thus, taking Plaintiff's version of the incidents as true, Webster's behavior was inappropriate and offensive but neither severe nor pervasive. See, e.g. *Koelsch v. Beltone Electronics Corp.*, 46 F.3d 705, 708 (7th Cir.1995)(offensive remarks and two incidents of physical contact by supervisor including grabbing plaintiff's buttocks found to be nonactionable harassment).

Nor does Webster's occasional flirting in the workplace change the analysis. Plaintiff explained the flirting only "sometimes" bothered her. In *Robinson v. Truman College*, No. 97 C 896, 1999 WL 33887, at *2 (N.D.Ill. Jan. 19, 1999), plaintiff claimed that her supervisor referred to her as "honey," "sweetie," or "baby", told her he couldn't believe they hadn't slept together yet and told her that if he wasn't married he would marry her, made frequent telephone calls to her for work related matters but spoke to her in a romantic tone of voice, and touched her buttocks on two separate occasions. The court found that the remarks, "while unquestionably obnoxious and boorish," were not "sufficiently severe or pervasive to have altered the conditions of Robinson's employment or to have made her workplace hellish." *Id.* at *5. The court also found that the two "seemingly isolated" instances of touching "occurring approximately one month apart," though inappropriate, did not rise to the level of actionable conduct. *Id.*, see also *Weiss v. Coca Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir.1993)(no actionable harassment where supervisor asked plaintiff out for dates, called her a "dumb blond," placed his hand on her shoulder several times, placed "I love you" signs in her work area and attempted to kiss her in a bar and in the office).

*12 Finally, Plaintiff's claim that Webster asked her out on dates on a "daily basis" and

Shegog's testimony about further harassing acts to which Webster subjected Plaintiff do not make this claim an actionable one. A supervisor is ill advised to ask his subordinate out on a daily basis. For purposes of Title VII, however, a Plaintiff must show not only that "a reasonable plaintiff would find [her environment] offensive," but also that "the plaintiff actually perceived it as such." *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662, 668 (7th Cir.2001), *Hostetler v. Quality Dining Inc.*, 218 F.3d 798, 807 (7th Cir.2000). Plaintiff testified that, though Defendant Webster asked her out on dates frequently, these requests did not bother her and she did not consider them to be sexual harassment. Because she herself did not find this behavior offensive, the court need not consider what others may have thought about such behavior. Similarly, Shegog's testimony concerning all kinds of offensive conduct that Plaintiff was allegedly subjected to does not meet the subjective component of the test. Plaintiff herself testified that the two incidents of touching and Webster's flirting were the only acts of harassment she perceived. Where Plaintiff herself was unaware of Webster's additional alleged misconduct, she cannot be said to have suffered from its effects. Thus, Plaintiff has not established an actionable harassment claim and summary judgment is properly granted to U Haul on this claim.

2 Employer's Liability

Even assuming that Plaintiff had established an actionable harassment claim, Defendant U Haul could not be held vicariously liable for Webster's harassment in this case. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. *Murray v. Chicago Transit Authority*, No. 99-3774, ___ F.3d ___, 2001 WL 493433, at *4 (7th Cir. May 10, 2001)(quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998)). If the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment, the employer will always be vicariously liable for the supervisor's action.

Ellerth, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08. When, however, no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. *Id.* The employer must then show: (a) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the plaintiff employee unreasonably failed to take advantage of available preventive or corrective measures. *Id.*

Plaintiff has offered evidence that she suffered some tangible employment action as a result of her complaint of harassment, as discussed below. There is no evidence, however, that she suffered any adverse action as a result of the alleged harassment. Indeed, Plaintiff herself admits that during the time of the alleged harassment, Defendant Webster gave her a raise and promoted her to a full time employee. Thus, U-Haul is entitled to assert an affirmative defense.

*13 It is undisputed that U-Haul had a detailed sexual harassment policy in place before Plaintiff began working there. This policy was included in a publication given to Plaintiff when she was hired and, in fact, it was this publication that Plaintiff used to ultimately find the 800 number she called to complain about Webster. In response to Plaintiff's call, U-Haul sent its marketing company president Chris McDermott to the Park Forest facility to investigate Plaintiff's complaint two days later. Plaintiff complains that McDermott did not handle the investigation according to company policy and conducted a poor investigation in a number of ways, including failing to talk to the Plaintiff first, talking to a witness without telling the witness to keep the matter confidential, and failing to talk to certain witnesses such as Plaintiff's cousin Vivian Shegog. It is undisputed, however, that after the investigation, McDermott gave Webster a written warning stating that any future inappropriate comments or actions would subject him to immediate termination. Webster then reviewed and signed that

warning. It is also undisputed that Webster never touched Plaintiff again after U-Haul's actions. Thus, U-Haul has clearly met the first prong of the affirmative defense.

To support the second prong, U-Haul points out that Plaintiff did not report that Webster had touched her until the second touching incident occurred. U-Haul notes that Plaintiff waited more than a month after the first alleged touching, more than a week after the second alleged touching, and through six months of Webster asking Plaintiff out before reporting the incidents. (Def.'s 56.1 Statement ¶ 44.) The court is hesitant to characterize as "unreasonable" a plaintiff who tries to resolve an inappropriate incident herself (by telling the harasser never to touch her again) and waits until a repeated incident occurs before reporting the harassment. Nevertheless, U-Haul could not be expected to remedy the first incident of touching or the alleged flirting until Plaintiff's phone call at the end of February. Thus, even if Plaintiff had stated an actionable harassment claim, U-Haul would not be vicariously liable for Webster's behavior.

D. Retaliation

Plaintiff next claims that Webster retaliated against her for complaining to U-Haul about him and for filing her EEOC claim. Title VII makes it unlawful "for an employer to discriminate against any of [its] employees ... because he [or she] has opposed any practice made an unlawful employment practice" by Title VII. *Murray v. Chicago Transit Authority*, 2001 WL 493433, at *7 (citing 42 U.S.C.2000e-3(a)). To state a prima facie case of retaliation under Title VII, a plaintiff must show that: (1) she engaged in statutorily protected expression; (2) she suffered an adverse action by her employer; and (3) there is a causal link between her protected expression and the adverse action. *Sweeney v. West*, 149 F.3d 550, 555 (7th Cir.1998).

*14 Plaintiff bases her retaliation claim on the fact that after she complained of the perceived harassment: (1) she received a number of written reprimands whereas before

this time she had never received any reprimand; (2) Webster accused her of stealing; (3) Webster made her work longer hours and gave her additional tasks that she had never been asked to perform before; and (4) Webster became verbally abusive to her. Defendant U-Haul contends that Plaintiff has not established a prima facie case of retaliation because none of these actions constitute materially adverse employment action and, even if they were adverse actions, Plaintiff cannot establish the required causal link between her protected expression and the adverse action, nor can she show that Defendant's proffered reasons for the actions were a pretext for retaliation.

Adverse job action is not limited "solely to loss or reduction of pay or monetary benefits" but can encompass "other forms of adversity as well." *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir.1996). A materially adverse change in the terms and conditions of employment, however, must be more disruptive than a mere inconvenience or an alteration of job responsibilities. *Crady v. Liberty National Bank and Trust Co.*, 993 F.2d 132, 135 (7th Cir.1993). Such a change might be indicated "by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Id.*; *Bell v. EPA*, 232 F.3d 546, 555 (7th Cir.2000).

Plaintiff contends that she received a number of written reprimands shortly after she complained about Webster's harassing treatment, but she admits that those reprimands did not lead to any demotions, reduced pay or other tangible consequences. The Seventh Circuit has already concluded that "negative performance evaluations, standing alone, cannot constitute an adverse employment action," where those evaluations were not linked to any tangible job consequences. *Sweeney v. West*, 149 F.3d 550, 556 (7th Cir.1998)(citing *Smart v. Ball State University*, 89 F.3d 437, 442 (7th Cir.1996)) ("There is little support for the argument that negative performance evaluations alone can

constitute an adverse employment action."). In addition, even if such actions could be seen as adverse, Plaintiff cannot show that U-Haul's proffered reasons for giving the reprimands were pretext for retaliation. In fact, Plaintiff admits that some of the reprimands were to a degree accurate: she admits she did not make a bank deposit when she was supposed to, she had a visitor come to the store, and she went out in a company van. Plaintiff has reasonable explanations for all of her actions, but such explanations are not relevant to the inquiry at hand: whether the employer's reasons for a decision were honest, not whether they were correct. *Sweeney*, 149 F.3d at 557. Nor has Plaintiff offered evidence that other workers guilty of similar misconduct were not subject to discipline. Thus, the written reprimands do not support Plaintiff's retaliation claim.

*15 Plaintiff also complains that Webster accused her of theft and let U-Haul management know about these accusations. As with the written reprimands, however, Plaintiff does not allege that she suffered any adverse employment actions due to these accusations. Webster never attempted to fire Plaintiff for theft nor did U-Haul, she was never suspended pending any investigation, and she never lost any pay with regard to these accusations. Even assuming Webster made such accusations, therefore, they do not constitute adverse employment action.

Finally, Plaintiff complains that she was assigned additional tasks immediately after she complained about Webster's harassment and, during this time, Webster became verbally abusive to her. U-Haul argues that, even if Plaintiff's testimony is believed, Webster was merely requiring Plaintiff to perform tasks already in her job description. Defendants note, further, that Plaintiff had greater responsibility than her co-workers because she was the only full time employee at the time and was second in command to Webster. (Def.'s 56.1 Statement ¶¶ 36, 76.) Plaintiff admits that the additional tasks she was assigned were always part of the customer service representative's job description, and that she received overtime pay for the extra hours she worked. She insists, however, that

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Webster did not assign her those undesirable tasks until after she voiced a complaint. (Def.'s 56.1 Statement ¶ 77; Pl.'s 56.1 Response ¶ 76.)

The Seventh Circuit has found that a change in an employee's assigned work tasks may constitute material adverse employment action even when those tasks are still within the scope of her job description. For example, in *Dahm v. Flynn*, 60 F.3d 253, 254 (7th Cir.1995), plaintiff, a former employee of the Wisconsin State Lottery, claimed that her employer retaliated against her after she testified about problems in her department in front of the Joint Audit Committee of the Wisconsin legislature. According to Dahm, after she gave this testimony, her job duties began to change in a way that she perceived as a "de-skilling" of her position. *Id.* at 255. Such changes included, among other things: (1) certain tasks that formerly were within her purview were delegated to her assistants; (2) she was given increased responsibility for processing requests, a less skilled job than she usually performed; and (3) she was required to begin documenting her daily telephone calls and her meetings with employees. *Id.* Despite evidence that these shifting responsibilities were "within the confines of her job description," the Seventh Circuit rejected the notion that such changes could not therefore be considered a materially adverse change in the terms and conditions of employment. *Id.* at 257. Instead, the court found that such change in responsibilities from intellectually stimulating activities to routine work could rise to the level of an adverse employment action, "even if the time required to perform the duties remains constant." *Id.*

*16 Plaintiff claims that after she complained of the harassing behavior, she was not only given additional work, but also made to perform more unpleasant tasks that she had not previously been required to perform, certain of which were normally left to the male employees. For obvious reasons, U-Haul insists that everyone, male and female, performed all of the tasks as a customer service representative. Plaintiff has, however, presented enough evidence to call this practice

into question. If a trier of fact were to believe Plaintiff and her cousin Shegog that there were certain, more menial tasks that she was not required to perform until after she complained about Webster's harassment, this change in job assignments would be enough for Plaintiff to establish her claim of retaliation. *See, e.g., Gaser v. Levitt*, No. 98 C 210, 1998 WL 684207, at *4 (N.D.Ill. Sept. 23, 1998)(where plaintiff alleged that his employer "significantly decreased the quality, if not the quantity, of his work assignments," by, among other things, assigning him "only routine tasks," the alleged change in plaintiff's job responsibilities constituted an adverse employment action); *see also Johnson v. Chicago Bd. of Ed.*, No. 00 C 1800, 2000 WL 1785311, at *5 (N.D.Ill. Dec. 5, 2000)(plaintiff had alleged sufficient facts to show an adverse employment action where she was transferred to another shift that she did not want and was allegedly given an increased work load).

Nor is the court convinced of U-Haul's assertion that Plaintiff's tasks changed after the birth of her child, not as a result of her complaint. Plaintiff admits that from the time she was nine months pregnant, in August of 1998, until six weeks after giving birth, she was not required to do certain tasks at U Haul, but both Webster and Plaintiff say she was already performing all of her tasks by the end of 1998. Thus, by testifying that she did not have to do some of these assignments and did not suffer verbal abuse until after she filed her complaint, Plaintiff establishes a dispute concerning the requisite causal connection between the adverse action and the retaliation. *See, e.g., Sweeney v. West*, 149 F.3d 550, 557 (7th Cir.1998) (A "telling temporal sequence" can establish the required nexus between an employee's protected expression and any adverse employment action, as long as the action follows soon after the protected expression: "One day might do it, so too might one week.")

Although the court concluded that Plaintiff's retaliation claim may go forward, a note of caution is in order. The court has granted summary judgment on the remainder of Plaintiff's claims, and she has not alleged

constructive discharge. Thus, any damages Plaintiff might receive would be limited to compensation for the harm she suffered during the short period of time (from the end of February 1999 until the end of May 1999) during which Plaintiff allegedly experienced retaliation.

E. Defamation

*17 Defamation is "the publication of anything injurious to the good name or reputation of another, or which tends to bring him into disrepute." *Howse v. Northwestern Memorial Hospital*, No. 98 C 4488, 2000 WL 764952, at *8 (N.D.Ill.2000). Under Illinois law, words that impute the commission of a criminal offense are considered defamatory *per se*. *Chisolm v. Foothill Capital Corp.*, 3 F.Supp.2d 925, 938 (N.D.Ill.1998)(quoting *Beasley v. St. Mary's Hosp.*, 200 Ill.App.3d 1024, 1033, 558 N.E.2d 677, 683 (5th Dist.1990)). To prove a claim of defamation, Plaintiff must establish that: (1) Defendant made a false statement of fact concerning her; (2) there was an unprivileged publication of the defamatory statement to a third party by Defendant; and (3) Plaintiff was, in fact, damaged by that publication. *Cianci v. Pettibone Corp.*, 298 Ill.App.3d 419, 424, 698 N.E.2d 674, 678 (1st Dist.1998); see also *Chisolm*, 3 F.Supp.2d at 938; *Pandya v. Hoerchler*, 256 Ill.App.3d 669, 673, 628 N.E.2d 1040, 1043 (1st Dist.1993).

Plaintiff claims that after she left U-Haul, Webster uttered defamatory statements to potential employers, including St. James Hospital, Ingalls Hospital, and Rent-A-Center. Specifically, Plaintiff claims that when potential employers called Webster for a reference, he falsely told them that Plaintiff was a thief. [FN8] Plaintiff bases her entire claim of defamation on the following facts: according to Plaintiff, her cousin, Vivian Shegog, called a woman, Maria, from Ingalls Hospital who told Shegog that Plaintiff was not going to be hired because Webster said that Plaintiff was a thief. Surprisingly enough, Shegog actually denies ever having had such a conversation, and instead testified that it was Plaintiff who called Maria and then told Shegog what Maria said. Other than

this contradictory evidence, Plaintiff supports her claim by offering only her own conviction that, with Rent-A-Center, another potential employer, she "pretty much had [a] foot in the door" but was not hired. (Pl.'s Dep., at 155-56.) [FN9]

FN8. Because Webster denied ever calling Plaintiff a thief and denied that he believed she stole anything from U-Haul, truth cannot be a defense to this defamation claim.

FN9. Shegog also testifies that at one point she called Webster, pretending be a prospective employer checking Plaintiff's references. (Shegog Dep., at 87-88.) According to Shegog, Webster responded that Plaintiff was a thief and had stolen money and products from the store and property from customers. (*Id.*, at 87-88.) Perhaps because she recognizes that this information is unreliable, Plaintiff does not mention this incident anywhere in her brief or in her lengthy statement of facts. In any event, because Plaintiff could not have been damaged by Webster's statements to her own cousin, the testimony, even if true, would not advance Plaintiff's defamation claim.

Both U-Haul and Webster contend that Plaintiff has failed to provide any admissible evidence to support her defamation claim. The court agrees. Leaving aside the glaring problem that Plaintiff and Shegog cannot agree on who allegedly called Ingalls Hospital and, assuming that Shegog did call the hospital as Plaintiff states, any information that Maria provided Shegog about what Webster said is, nonetheless, inadmissible hearsay. To be sure, the testimony of a witness that Webster told him or her that Plaintiff was a thief would not be hearsay because it would be offered to prove that Webster made the statement, not that the statement was true. See *Bularz v. Prudential Ins. Co. of Am.*, 93 F.3d 372, 377-78 (7th Cir.1996) (in a defamation case, testimony of a witness that an individual defamed the plaintiff is never hearsay where it is not being brought in for the truth of the matter, but, rather, merely to prove the statement was made); *Chisolm*, 3 F.Supp.3d at 939 (same). Thus, Maria could properly testify that she heard Webster call Plaintiff a thief. Absent Maria's testimony,

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however, her alleged conversation with Shegog is inadmissible hearsay, as is Shegog's conversation reporting the whole incident to Plaintiff. *See, e.g., Bularz*, 93 F.3d at 377-78 (where witness testified that a sales manager told her that another individual told him that yet a fourth individual defamed the plaintiffs, such testimony constituted double hearsay). Because Plaintiff offers no way around this double hearsay, nor does she offer the testimony of even one employer who allegedly heard Webster call Plaintiff a thief, Plaintiff's defamation claim cannot survive summary judgment.

*18 Plaintiff's blanket assertion that her inability to get a position at Rent-A-Center resulted from defamation is a nonstarter. There is no evidence that Webster actually spoke to any individual at Rent-A-Center. Plaintiff admits that she did not speak to a single potential employer to determine whether anyone called Webster for a recommendation, and Webster denied telling any potential employer that she was a thief. To prevail on a claim of defamation, mere speculation concerning the defendant's words is simply not enough; Plaintiff must affirmatively establish publication of the defamatory statements. *See, e.g. Gibson v. Phillip Morris, Inc.*, 292 Ill.App.3d 267, 275, 685 N.E.2d 638, 644 (5th Dist.1997) (publication is an essential element of a cause of action for defamation). Because Plaintiff has failed to present admissible evidence to establish that any defamation occurred, the court need not address the problematic inconsistencies between Plaintiff's and Shegog's testimony, nor need it address whether any such information Webster gave future employers was protected by a conditional privilege. Summary judgment is properly granted to Defendants on this count.

CONCLUSION

For the foregoing reasons, Defendant U-Haul's Motion for summary judgment (Doc. No. 77) is granted as to Plaintiff's sexual harassment count and defamation count and denied as to Plaintiff's retaliation claim. Defendant U-Haul's motion to file certain

summary judgment papers under seal (Doc. Nos.79, 103) is denied. Defendant Arlester Webster's motion for summary judgment on Plaintiff's defamation count (Doc. No. 75) is also granted. Additionally, because Defendant Webster has not moved for summary judgment with respect to Plaintiff's assault and battery claim against him, that claim survives this opinion. Because all other federal claims against Webster are dismissed, however, and because the state law assault and battery claim can be severed from Plaintiff's retaliation action, that claim is dismissed without prejudice to proceeding on that claim in state court.

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END OF DOCUMENT

ADDENDUM C

Only the Westlaw citation is currently available.

NOTICE: NOT DESIGNATED FOR PUBLICATION. UNDER TX R RAP RULE 47.7, UNPUBLISHED OPINIONS HAVE NO PRECEDENTIAL VALUE BUT MAY BE CITED WITH THE NOTATION "(not designated for publication)."

Court of Appeals of Texas, Dallas.

Dalton W. DAVIS, Appellant,
v.
HOUSEHOLD INTERNATIONAL, INC.,
Household Commercial Financial
Services, Inc.
(a Subsidiary of Household International, Inc.), H.F.C. Commercial Realty, Inc.(a Subsidiary of Household International, Inc. and Household Commercial Financial Services, Inc.), Household Finance Corp., and Thomas Nolan, Appellees.

No. 05-90-01553-CV.

June 21, 1991.

On Appeal from the 14th Judicial District Court Dallas County, Trial Court Cause No. 87-12820.

Before STEWART, KINKEADE and BURNETT, JJ.

OPINION

BURNETT, Justice.

*1 Dalton W. Davis appeals a summary judgment entered in favor of Household International, Inc., Household Commercial Financial Services, Inc. (a subsidiary of Household International, Inc.); H.F.C. Commercial Realty, Inc. (a subsidiary of Household International, Inc. and Household Commercial Financial Services, Inc.), and Household Finance Corp. (Household), and

Thomas Nolan. Davis, a real estate developer, brought this defamation suit alleging that Nolan, acting in the course and scope of his employment with Household, made defamatory statements to Mahmood Wakani, a New York loan broker. In three points of error, Davis asserts that the trial court erred in granting summary judgment on his slander per se claims. We overrule Davis's points of error. We affirm the trial court's judgment.

FACTS

Davis began searching for financing for Quail Run, a strip shopping center development, in 1986. He contacted W.C. Laws about obtaining financing for the project. Laws then contacted Wakani, a loan broker in New York. As a result, Wakani sent the loan package to Household in Atlanta, Georgia. Thomas Nolan, who worked for Household, reviewed the loan package. The record contains a letter from Nolan to Wakani dated September 5, 1986 which states in its entirety "Enclosed is the Quail Run package. As we discussed, I have no interest in this particular borrower." Davis alleges that Nolan made the following false statements to Wakani:

- 1) that Davis "screwed" a bank in Dallas out of over six million dollars;
- 2) that he [Nolan] knew of a lending institution which had difficulties in a project in which Davis was involved;
- 3) that he [Nolan] "had known the borrower[Davis] from previous transactions, and I preferred not to deal with him"; and
- 4) that "there was an administration problem getting information."

Davis and Laws met with Wakani in New York in September of 1986. In his deposition, Laws testified that Wakani repeatedly told Laws, in telephone conversations prior to that meeting, that he had information that "Davis screwed a bank in Dallas out of over six million dollars." Laws did not learn that

Nolan was the source of the information until the September meeting. Wakani denies that Nolan made the statement to him, and therefore he could not have repeated it to Laws and Davis. Wakani admitted that Nolan told him that another lending institution had a problem with a project in which Davis was involved.

Wakani testified by deposition that he ceased efforts to locate financing for Davis after the September meeting because Laws requested that he return the loan package. He stated that he contacted two other lenders between his conversation with Nolan and the September meeting. Neither lender was interested in the project. Laws stated that Wakani returned the loan package and refused to make further efforts on the project after his conversation with Nolan.

SLANDER PER SE

In his first point of error, Davis asserts that the trial court erred in granting Household and Nolan summary judgment on his slander per se claim regarding the statement that Nolan told Wakani that Davis "screwed" a bank in Dallas out of six million dollars. Summary judgment may be rendered only if the pleadings, depositions, admissions and affidavits show (1) that there is no genuine issue as to any material fact and (2) that the moving party is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Rodriguez v. Naylor Indus., Inc.*, 763 S.W.2d 411, 413 (Tex. 1989). A summary judgment seeks to eliminate patently unmeritorious claims and untenable defenses, not to deny a party its right to a full hearing on the merits of any real issue of fact. *Gulbenkian v. Penn*, 151 Tex. 412, 416, 252 S.W.2d 929, 931 (1952). Household and Nolan, as movants, must either (1) disprove at least one element of each of the plaintiff's theories of recovery or (2) plead and conclusively establish each essential element of an affirmative defense, thereby rebutting the plaintiff's cause of action. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 679 (Tex. 1979).

*2 The elements of slander are (1) a

defamatory statement, (2) which is orally communicated or published, (3) without legal justification, and (4) which is actionable per se or per quod. *Glenn v. Gidel*, 496 S.W.2d 692, 697 (Tex. Civ. App.-Amarillo 1973, no writ). Slander is actionable per se if the language is so obviously harmful to the plaintiff that it requires no proof of its injurious character. See *Arant v. Jaffe*, 436 S.W.2d 169, 176 (Tex. Civ. App.-Dallas 1968, no writ) (libel suit). Slander per quod is actionable only upon a showing of special damages. *Fields v. Worsham*, 476 S.W.2d 421, 426 (Tex. Civ. App.-Dallas 1972, writ ref'd n.r.e.). Oral words are actionable without proof of special damages if they impute the commission of a crime or affect the plaintiff injuriously in his profession, business or occupation. *Bayoud v. Sigler*, 555 S.W.2d 913, 915 (Tex. Civ. App.-Dallas 1977, writ dismissed).

Publication of a defamatory statement means to communicate it orally, in writing, or in print, to some third person capable of understanding its defamatory import. *Houston Belt & Terminal R. Co. v. Wherry*, 548 S.W.2d 743, 751 (Tex. Civ. App.-Houston [1st Dist.] 1976, writ ref'd n.r.e.), cert. denied, 434 U.S. 962 (1977). Davis seeks to establish the defamatory statement and its publication from Nolan to Wakani through his and Laws's testimony of the conversation with Wakani. This situation presents a double hearsay problem. The first part is the statement from Nolan to Wakani, and the second part is the statement from Wakani to Laws and Davis. Texas Rules of Civil Evidence 805 provides: hearsay included within hearsay is not excluded under the hearsay rules if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules.

Nolan's statement to Wakani would not be hearsay because it is verbal conduct which constitutes an operative fact of Davis's cause of action. See *Byrd Int'l, Inc. v. Electronic Data Systems Corp.*, 629 S.W.2d 177, 179 (Tex. App.-Dallas 1982, writ ref'd n.r.e.); *Scotchcraft Bldg. Materials, Inc. v. Parker*, 618 S.W.2d 835, 836-37 (Tex. Civ. App.-Houston [1st Dist.] 1981, writ ref'd n.r.e.); Tex. R. Civ. Evid. 801(e)(2) (Admission by Party-Opponent); McCormick,

Evidence § 249 (3d ed. 1987). Thus, if the statement were offered by someone who heard it, such as Wakani, it would be admissible. See *Scotchcraft*, 618 S.W.2d at 837. The Wakani out-of-court statement quoting Nolan, when offered by Davis and Laws, is obviously hearsay. Davis offers it for the truth of its assertion that Nolan published the defamatory statement to Wakani. The statement does not fall under any recognized exception to the hearsay rule. Tex. R. Civ. Evid. 803.

The summary judgment evidence shows that Laws and Davis testified that Nolan made the statement "that Davis screwed a bank in Dallas out of six million dollars" to Wakani, and then Wakani repeated the statement to them. Wakani denies ever hearing or repeating that statement. The testimony of Laws and Davis is inadmissible hearsay. Without the testimony of Laws and Davis, Davis can not establish publication of the statement. Nolan and Household have shown that, as a matter of law, Davis cannot establish an essential element of his cause of action. We overrule Davis's first point of error.

DEFAMATION AS A MATTER OF LAW

*3 In his second point of error, Davis asserts that the trial court erred in granting summary judgment as to his alternative claims because those claims were not slander per quod requiring the pleading and proof of special damages. The alternative claims rest on the other three statements made by Nolan to Wakani:

- 1) that he [Nolan] knew of a lending institution which had difficulties in a project in which Davis was involved;
- 2) that he [Nolan] "had known the borrower[Davis] from previous transactions, and I preferred not to deal with him"; and
- 3) that "there was an administration problem getting information."

The threshold question, which is a question of law for the court to decide, is whether Nolan's

words are reasonably capable of a defamatory meaning. *Musser v. Smith Protective Services, Inc.*, 723 S.W.2d 653, 653 (Tex. 1987) (libel suit on a letter sent by a company president to a client discussing a former company employee). Communication is defamatory if it tends to harm the reputation of another, to lower him in the estimation of the community, or to deter third persons from associating or dealing with him. *Gulf Atlantic Life Ins. Co. v. Hurlbut*, 696 S.W.2d 83, 96 (Tex. App.-Dallas 1985), *supplemented*, 749 S.W.2d 96, *rev'd on other grounds*, 749 S.W.2d 762 (1988) (discussing the differences in the burden of proof and damages between personal defamation and business disparagement); Restatement(second) of Torts § 559 (1977). Defamatory statements, libelous or slanderous, must be construed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive the statement. See *Musser*, 723 S.W.2d at 655; *Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914, 920 (Tex. App.-Corpus Christi 1991, no writ) (applying libel standard announced in *Musser* to slander case). Only when the court determines the language is ambiguous or of doubtful import should the jury then determine the statement's meaning and the effect the statement's publication has on an ordinary person. See *Musser*, 723 S.W.2d at 655.

In the first statement, Nolan said that a lending institution had difficulties with a project that Davis was involved in. [FN1] Innuendo can only be used to explain, but not to extend the effect and meaning of a statement. See *Arant*, 436 S.W.2d at 176. To interpret this statement as meaning that a previous lending institution had problems with a project *because* Davis was involved in it impermissibly expands the meaning of the statement. In the second statement, Nolan says that he prefers not to deal with Davis. That statement does not reflect adversely on Davis, but rather reflects Nolan's preference in a business relationship. In the third statement, like the first, Nolan says that there was administration problems on getting information on Davis. Once again, that does not reflect adversely on Davis or his business

dealings. It does not infer that Davis prevented the dissemination of information on himself. We hold, that as a matter of law, these statements are not reasonably capable of a defamatory meaning. We overrule Davis's second point of error.

*4 In his third point of error, Davis asserts that even if his alternative claims were slander per quod, Household and Nolan failed in their summary judgment proof and factual issues were presented. Because of our disposition of Davis's first and second points of error, we do not reach Davis's third point of error.

We affirm the trial court's judgment.

Do Not Publish

Tex. R. App. P. 90

FN1 Notably, this is the only statement of the three alleged that Wakani admits that Nolan made to him. It is also the only statement that Davis specifically refers to in his last two points of error.

1991 WL 110042 (Tex.App.-Dallas)

END OF DOCUMENT

ADDENDUM D

Only the Westlaw citation is currently available.

United States District Court, D. New Jersey.

Daniel M. GLENN, Plaintiff,
v.
SCOTT PAPER COMPANY, Defendant.

Civ. A. No. 92-1873.

Oct. 20, 1993.

Richard C. Cooper, Mark D. Lurie, McCarter & English, Newark, NJ, for plaintiff.

John J. Mulderig, Joseph A. Zechman, Brown & Connery, Westmont, NJ, Steven R. Wall, Marina C. Tsatalis, Morgan, Lewis & Bockius, Philadelphia, PA, for defendant.

WOLIN, District Judge

*1 This matter comes before the Court on the motion of defendant, Scott Paper Company ("Scott"), for summary judgment against plaintiff, Daniel M. Glenn ("Glenn"), pursuant to Rule 56 of the Federal Rules of Civil Procedure. Glenn initially brought a five-count complaint in the Superior Court of New Jersey against Scott and Daniel Schafer ("Schafer"), Vice President in Charge of Sales at Scott Worldwide Foodservice, a division of Scott. On grounds of diversity, Scott and Schafer then removed the action to this Court, pursuant to title 28, sections 1441 and 1446 of the United States Code. The Court subsequently dismissed all claims with prejudice as to Schafer. Scott now brings this summary judgment motion on Glenn's remaining claims.

In reference to Glenn's complaint, only Counts One, Three and Four are relevant to the pending motion. In Count One, Glenn alleges age discrimination in violation of New Jersey's Law Against Discrimination ("NJLAD"), N.J.S.A. § 10:5-1 *et seq.* In Counts Three and Four, Glenn sets forth

common law claims of slander. At oral argument on this motion, Count Five, Glenn's common law claim for intentional interference with prospective business relations, was dismissed. Count Two is applicable only against Schafer, who is no longer a defendant in the action.

For the reasons set forth below, Scott's motion for summary judgment will be granted on all counts.

BACKGROUND

A. Glenn's Employment History--The Age Discrimination Claim

Glenn was born on September 24, 1932. In March of 1970, Glenn was employed by the Hoffmaster Company, a manufacturer and seller of tabletop products in the foodservice industry. By June of 1985, Glenn was serving as Hoffmaster's Eastern Regional Sales Representative. At that time, Scott acquired the Hoffmaster Company and formed Hoffmaster--The Food Service Business of Scott Paper. Scott retained the Hoffmaster Company's management team to run the newly formed division, and Glenn continued to work in his regional management position.

Schafer joined the Hoffmaster Company in 1977 and held the Western Regional Sales Manager position at the time of the Scott acquisition. He, too, retained his management position within Scott's Hoffmaster Division.

In October of 1988, Scott acquired two other manufacturing companies in the foodservice industry and reorganized to form a new organization--The Worldwide Foodservice Business ("WFB"). WFB was comprised of two product groups--one making container products, the other making tabletop products, which included Hoffmaster products.

As part of the reorganization, WFB Vice President and Business Leader, Robert Vanderselt ("Vanderselt"), selected a core

management team to oversee WFB operations. The new team replaced the management group previously retained from the original Hoffmaster Company. Schafer was named to the new management team under the title of Vice President, Foodservice Sales. Vanderselt had considered Glenn as a candidate for this position.

***2** With the formation of WFB, Glenn was appointed Foodservice Regional Sales Manager for the East (the "Sales Position"). He received a salary increase and a high grade position. Glenn's responsibilities included selling container and tabletop products and managing container and tabletop sales representatives. Within the WFB hierarchy, Glenn was to report directly to Schafer.

On June 5, 1989, Vanderselt informed Glenn that Schafer was not satisfied with Glenn's performance and, in lieu of termination, offered Glenn the position of Market/Customer Development Manager (the "Development Position"). The job was newly created and designed to develop and lead the implementation of product and customer innovations in key domestic and international markets. On June 6, 1989, Glenn accepted the position at the same annual salary of \$81,000 and subsequently received a \$2,500 bonus on June 25, 1989. After Glenn's transfer, Daniel Rodenbush--31 years old at that time--took over the Sales Position.

By January of 1990, the extent of growth in Glenn's area forced WFB to create another Development Position--filled by Scott employee John Acton. In March of 1990, Glenn received a \$3,000 increase in his annual salary. In July or August of 1990, Sharon Robbins ("Robbins") replaced Vanderselt as WFB Vice President and Business Leader. In December of 1990, Richard Leaman ("Leaman"), President of Scott Worldwide, eliminated Glenn's Development Position and terminated Glenn's employment with Scott.

B. Events Subsequent to Glenn's Termination--The Defamation Claims

Shortly after Glenn's termination, from

December 14 through 17, 1990, WFB held a sales meeting in Bryn Mawr, Pennsylvania, at which WFB introduced to its sales force several new products, including the Custom Easy line. After leaving the Bryn Mawr meeting, William Connelly ("Connelly"), WFB National Marketing Manager, could not locate certain Custom Easy marketing materials--a mock order form and brochure--which he had used in his presentation to the WFB sales force. Connelly telephoned Francis McNamee ("McNamee"), WFB National Customer and Marketing Development Manager, and advised him of the missing items. McNamee offered that Acton might have taken the Custom Easy materials to give to Glenn.

During January of 1991, rumors were circulating throughout WFB that Acton had been accused of stealing the Custom Easy materials to give to Glenn. At this time, Schafer became aware of the rumor, as did Glenn by way of Acton. In March of 1991, Joan Vissers-Damie ("Vissers-Damie"), Scott Senior Creative Liaison, located the missing materials in a box in Oshkosh, Wisconsin and subsequently informed Connelly and McNamee of the discovery. In May or June of 1991, John Hull ("Hull"), a former Scott employee, met McNamee in the Pittsburgh airport. McNamee told Hull that Schafer had been telling people that Acton and Glenn stole the Custom Easy materials. Hull and McNamee discussed the matter in subsequent conversations.

***3** Between January and June of 1991, Glenn had a number of discussions with David Shapiro ("Shapiro"), Senior Vice President of Sales at the Marcal Paper Company ("Marcal"). These discussions culminated with Shapiro offering Glenn a position at Marcal as Vice President of the Away From Home Products Group at an annual salary of approximately \$100,000. Shapiro subsequently decided not to create the new Marcal position and withdrew the offer to Glenn.

In early 1992, Glenn was a candidate for the position of President at the Network Group. Glenn never received an offer. In the middle

of 1992, Glenn was a candidate for a job with Dennis Ogden. Glenn never received an offer. In July of 1992, Glenn commenced to work as a broker for Amoco Foam Products Company--presumably his current employment.

DISCUSSION

A. Standard for Summary Judgment

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. The party moving for summary judgment has the burden of showing that there is no genuine issue of material fact, and once the moving party has sustained this burden, the opposing party must introduce specific evidence showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); *Williams v. Borough of West Chester*, 891 F.2d 458, 464 (3d Cir.1989).

A genuine issue is not established unless the evidence, viewed in a light most favorable to the nonmoving party, would allow a reasonable jury to return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 2510-11 (1986); *Radich v. Goode*, 886 F.2d 1391, 1395 (3d Cir.1989). If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249-50, 106 S.Ct. 2510-11; *Radich*, 886 F.2d at 1395. Whether a fact is material is determined by substantive law. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510; *United States v. 225 Cartons*, 871 F.2d 409, 419 (3d Cir.1989).

Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322; *Appelmans v. City of Philadelphia*, 826 F.2d 214, 216 (3d Cir.1987). Rule 56(e) requires the nonmoving party to go beyond the pleadings and, by affidavits, depositions, interrogatory answers and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 323-24, 106 S.Ct. at 2553;

Cooley v. Pennsylvania Housing Fin. Agency, 830 F.2d 469, 474 (3d Cir.1987).

B. Glenn's Age Discrimination Claim

The crux of Glenn's age discrimination claim is certain disputed remarks made by Schafer at a WFB sales meeting in October of 1988. During the course of the meeting, Schafer allegedly stated that Glenn and some other "older, unproductive" Scott employees were to be terminated. In later conversations, Schafer allegedly referred to these older Scott employees as "dinosaurs."

*4 Glenn contends that Schafer followed through on his promise. By December of 1988, several other older employees accepted "voluntary retirement" packages. Then in June of 1988, Schafer, motivated by age bias, instigated Glenn's transfer to the Development Position, which was authorized and implemented by Vanderselt. Glenn portrays the transfer to and subsequent elimination of the Development Position as a "two-step" dismissal process unlawfully based on age.

1. Standards Applicable to New Jersey's Law Against Discrimination

Glenn brings his age discrimination claim pursuant to New Jersey's Law Against Discrimination ("NJLAD"), N.J.S.A. § 10:5-1 *et seq.* Age discrimination claims under NJLAD are governed by the same standards and burden of proof structures applicable to the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* See *Retter v. Georgia Gulf Corp.*, 755 F.Supp. 637, 638 (D.N.J.1991), *aff'd*, 975 F.2d 1551 (3d Cir.1992); *Giammario v. Trenton Bd. of Educ.*, 204 N.J.Super. 356, 361 (App.Div.1985), *cert. denied*, 475 U.S. 1141 (1986). Cf. *Erickson v. Marsh & McClennan Co.*, 117 N.J. 539, 550 (1990) (applying federal standards to NJLAD sex discrimination claim in employment context).

The plaintiff asserting an age discrimination claim carries the ultimate burden of proving, by a preponderance of evidence, that age was

the determinative factor in the adverse employment action *St Mary's Honor Ctr v Hicks*, No 92 602, 1993 WL 220265, at *6 (U S June 25, 1993), *Texas Dep't of Community Affairs v Burdine* 450 U S 248, 252 53, 101 S Ct 1093 94 (1981), *Billet v CIGNA Corp*, 940 F 2d 812, 816 (3d Cir 1991), *Healy v New York Life Ins Co*, 860 F 2d 1209, 1216 (3d Cir 1988), *cert denied* 490 U S 1098, 109 S Ct 2449 (1989) The plaintiff may meet this burden by presenting either direct or indirect evidence of unlawful discrimination *See Healy*, 860 F 2d at 1214

Direct or "smoking gun" evidence is usually unavailable or difficult to acquire In *McDonnell Douglas Corp v Green*, 411 U S 792, 93 S Ct 1817 (1983), the United States Supreme Court outlined a detailed method for establishing an inference of discrimination in the absence of direct evidence *See also Chipollini v Spencer Gifts, Inc*, 814 F 2d 893, 897 (3d Cir), *cert dismissed* 483 U S 1052, 108 S Ct 26 (1987) *McDonnell Douglas* implemented a three step analysis, which is applicable in the summary judgment context and allocates the burden of production as follows (1) plaintiff must come forth with sufficient evidence to establish a prima facie case of discrimination, (2) if plaintiff succeeds in establishing a prima facie case, the burden then shifts to the defendant, who must articulate some legitimate, non discriminatory reason for the employee's rejection, (3) if defendant is able to meet this burden, plaintiff must be given the opportunity to come forth with sufficient evidence to show that the legitimate reasons offered by the defendant should not be believed and that age was the determinative factor for the adverse employment action *See Hicks* 1993 WL 220265, at *9, *Burdine*, 450 U S at 252 53, 101 S Ct at 1093

*5 The Third Circuit has steadfastly applied *McDonnell Douglas* where a plaintiff seeks to prove unlawful discrimination by means of indirect evidence *See Healy*, 860 F 2d at 1209, *Chipollini* 814 F 2d at 897 However, the Court is aware of the Supreme Court's recent decision in *Hicks*, which clarified step three in the *McDonnell Douglas* framework

Previously, the plaintiff could meet the burden of proof by establishing that the non discriminatory reason proffered by the defendant was not credible *See Burdine*, 450 U S at 253, 101 S Ct at 1094, *Anastasio v Schering Corp*, 48 Fair Empl Prac Cas (BNA) 1651, 1653 (3d Cir 1988) Under *Hicks*, the plaintiff does not necessarily meet the burden by simply producing evidence that defendant's articulated reason is pretextual, but must prove that unlawful discrimination was the determinative factor underlying the adverse employment decision 1993 WL 220265, at *8 ("It is not enough to disbelieve the employer, the factfinder must believe the plaintiff's explanation of intentional discrimination") *See also EEOC v MCI Int'l, Inc*, No 90 1198, 1993 WL 294486, at *7 8 (D N J Aug 2, 1993) (applying *Hicks* in summary judgment context) Notwithstanding the Supreme Court's refinement in *Hicks*, the *McDonnell Douglas* framework allows a plaintiff to convince the court of discrimination where no direct evidence is available

3 Glenn Has Presented No Direct Evidence of Age Discrimination

Direct evidence, when presented to the trier of fact, proves the existence of a particular fact in question without the need for inference or presumption *Randle v LaSalle Telecommunications, Inc*, 876 F 2d 563, 569 (7th Cir 1989) Glenn alleges that Schafer vowed to "get rid of" the "older, unproductive workers" and, at other times, referred to these older employees as "dinosaurs" Scott argues that these statements fail as direct evidence of discrimination because they are (1) inadmissible hearsay, or alternatively, irrelevant as against Scott, because Schafer played no role in Glenn's termination, (2) too equivocal regarding discriminatory intent and (3) too attenuated from the decision ultimately terminating Glenn

Glenn argues that the alleged statements are admissible against Scott pursuant to the Federal Rules of Evidence, which provide that a statement is not hearsay when it is offered against a party and is made by that party's "agent or servant concerning a matter within

the scope of his agency or employment...."
Fed.R.Evid. 801(d)(2)(D).

While Schafer denies making the remarks, Scott contends that such statements are inadmissible hearsay against Scott because Vanderselt and Leaman--not Schafer--were responsible for the employment decisions concerning Glenn in June of 1989 and December of 1990. Scott cites a number of cases to support its argument that an agent's allegedly discriminatory statements are not admissible against the defendant employer where the agent had no authority to dismiss the plaintiff and no involvement in the termination decision. See, e.g., *Staheli Eudy v. BWD Automotive Corp.*, 51 Fair Empl Prac.Cas. (BNA) 724-25 (N.D.Ga.1989); *Hill v. Spiegel, Inc.*, 708 F.2d 233, 237 (6th Cir.1983).

*6 The Court finds the instant case distinguishable, as the record indicates that Schafer was involved in the employment decisions. Glenn concedes that Vanderselt and Leaman wielded ultimate authority respecting his employment, but proof exists that Schafer played a role in both decisions. It is undisputed that the disintegration of the Schafer-Glenn relationship was the impetus for Vanderselt's decision to remove Glenn from the Sales Position. See Certification of Steven J. Wall ("Wall Certification"), Exhibit 3. See also Certification of Mark D. Lurie ("Lurie Certification"), Exhibit B, Schafer Deposition at 169-70, 182-83; Exhibit F, Robbins Deposition at 62. In addition, Schafer provided input on the decision by Leaman and Robbins to ultimately let Glenn go and the severance package he would consequently receive. See Lurie Certification, Exhibit F, Robbins Deposition at 32-33. Therefore, the Court concludes that otherwise admissible proof of the alleged statements may be offered against Scott as nonhearsay under Rule 801(d)(2)(D).

The Court's determination on the hearsay question appears also to dispose of Scott's irrelevancy argument, in which Scott contends that "[t]he biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment

discrimination case." *Medina-Munoz v. R.J. Reynolds Co.*, 896 F.2d 5, 10 (1st Cir.1990) (emphasis supplied). As noted, Glenn has offered evidence suggesting that Schafer did influence the employment decisions affecting Glenn. Therefore, the Court concludes that Schafer's alleged statements would not be inadmissible as irrelevant.

The Court's preliminary determinations on admissibility should not impart that the alleged remarks constitute direct evidence of discrimination. The Third Circuit Court of Appeals has found that direct evidence exists where the employer states that the employee was fired because of a protected characteristic. *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 791 (3d Cir.1985), cert. denied, 474 U.S. 1057, 106 S.Ct. 796 (1986). See also *Randle v. LaSalle*, 876 F.2d 563, 569 7th Cir.1989) (" 'direct' evidence must not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question"); *Perry v. Prudential-Bache Sec., Inc.*, 738 F.Supp. 843, 851 (D.N.J.1989) (remarks not deemed direct evidence where superior did not state that employee was to be fired "because of his age" and any such conclusion could only be "inferred from the description of [employee] as being 'old' "), aff'd, 904 F.2d 696 (3d Cir.), cert. denied, 498 U.S. 958, 111 S.Ct. 386 (1990).

The Court is sensitive to the Third Circuit's directive that competing inferences as to a statement's meaning should not be weighed on a summary judgment motion. *Siegel v. Alpha Wire Corp.*, 894 F.2d 50 (3d Cir.), cert. denied, 496 U.S. 906, 110 S.Ct. 2588 (1990) (summary judgment improper where trial court should have left to jury competing inferences of remark "old dogs won't hunt"). However, the court in *Siegel* was dealing with the plaintiff's attempt to establish discrimination by indirect, not direct, evidence. Therefore, the Court concludes that Schafer's alleged statements cannot be considered direct evidence of unlawful discrimination, as the context in which they were made was not sufficiently proximate to either Glenn's transfer in 1989 or his ultimate termination in 1990. [FN1]

4 Glenn Has Not Established A Prima Facie Case of Age Discrimination

*7 To establish a prima facie case of age discrimination the plaintiff must prove by a preponderance of evidence that he or she was (1) a member of a protected class, (2) qualified for the position, (3) dismissed despite being qualified, and (4) ultimately replaced by a person sufficiently younger to permit an inference of age discrimination *Healy*, 860 F 2d at 1218

In view of the record, the Court has serious doubts as to whether Glenn can sufficiently prove certain of the required elements. To be sure, Glenn was a member of a protected class both when he was transferred from the Sales Position and when the Development Position was eliminated. In addition, the record suggests that Glenn was qualified to remain in both the Sales Position and the Development Position. Glenn had received satisfactory performance reviews prior to the transfer and had been given a raise in the Development Position prior to termination. See Certification of Glenn In Opposition To Motion For Summary Judgment ("Glenn Certification"), Exhibits 1-7. See also Scott Appendix, Exhibit A, Glenn Deposition at Exhibit P 6, Exhibit D, Vanderselt Affidavit at ¶¶ 18-20. Any contention by Scott that Glenn was not qualified merely raises a disputed material fact and precludes summary judgment against Glenn. The Court concludes that Glenn has satisfied the class and qualification elements for a prima facie case.

Glenn's effort to satisfy the other two prima facie elements is hampered by his weakly supported 'two step' dismissal theory. Glenn alleges that Scott accomplished its discriminatory goal by transferring Glenn from the Sales Position to the Development Position, which was created only to be eliminated—a smokescreen for the unlawful dismissal. The Court must ascertain whether the transfer from the Sales Position or the elimination of the Development Position, separately or taken together, were adverse employment actions taken by Scott. Glenn's

dismissal after the Development Position was eliminated clearly constituted adverse action by Scott. Conversely, it is not so clear that the transfer to the Development Position fits into a prima facie case of age discrimination under these facts.

Glenn has adduced no evidence that Scott implemented the transfer as a means for ultimately dismissing Glenn. Glenn's two step theory rests on three points. First, he cites the voluntary retirement of three older employees occurring contemporaneously to his transfer. Second, he asserts that the lack of documentation regarding the creation and subsequent elimination of the Development Position raises an inference that the job was designed merely as a way station on Glenn's journey toward inevitable termination. Third, Glenn identifies Schafer's comments, his role in the transfer and his advice respecting Glenn's severance. The Court concludes that Glenn's theory and allegations are not sufficiently supported in fact.

Glenn speculates that his removal and transfer were part and parcel of an overall effort to terminate older employees. The Court notes that "the mere offer of an early retirement program does not support an inference of discrimination." *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1422 (3d Cir.), cert. denied, 502 U.S. 941, 112 S.Ct. 379 (1991). Beyond the fact that other older Scott employees accepted voluntary retirement, Glenn offers no personal knowledge or other admissible evidence regarding the contents and acceptance of the retirement packages. See Lurie Certification, Exhibit A, Glenn Deposition at 194.

*8 Glenn's two step dismissal theory connotes a constructive discharge claim, which lurks within the fact that he had no choice but to accept the Development Position in lieu of termination. When considering a constructive discharge claim, the Third Circuit employs an objective test to determine whether the employer's conduct would have foreseeably resulted in working conditions "so unpleasant or difficult that a reasonable person in the employee's shoes would resign."

" *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3d Cir.1992) (quoting *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 887-88 (3d Cir.1984)).

Glenn provides no objective facts to support his subjective assertions that the Development Position was a make-work, dead-end job, or that Scott's "take it or be terminated" offer led foreseeably to unbearable working conditions. Glenn accepted the Development Position and held it for approximately nineteen months, notwithstanding his alleged personal reservations. While he no longer managed sales representatives, Glenn thrived in the position and was well compensated. After the transfer, Glenn received a \$2,500 bonus and his same \$81,000 annual salary, along with a subsequent \$3,000 raise. See Scott Appendix, Exhibit A, Glenn Deposition at 278, 322-23, Exhibit P-6. During Glenn's tenure, the Development Position flourished to such an extent that Scott was forced to create an additional Development Position, filled by John Acton. See *id.*, Exhibit D, Vanderselt Affidavit at ¶ 20. In contrast to Glenn's subjective portrayal, these facts undercut any allegation that Glenn was constructively discharged by the transfer to the Development Position.

Ultimately, the timing of and circumstances surrounding Scott's decision to eliminate the Development Position were far too attenuated from the decision to transfer Glenn nineteen months earlier. Glenn's failure to produce evidence impedes his effort to pull together the pieces of a discriminatory plot assignable to Scott by way of Schafer's comments and conduct. Consequently, the Court will not consider the transfer--either alone or in conjunction with Glenn's ultimate termination--in determining whether Glenn was dismissed despite his qualifications. In short, the record unreservedly indicates that Scott did not dismiss Glenn until the Development Position was eliminated.

As to the fourth element, after Glenn was transferred, Scott placed Daniel Rodenbush, aged 31, in the vacant Sales Position. The Court notes that this fact alone, in certain circumstances, would raise an inference that

the employment action was discriminatory. However, having concluded that Glenn's transfer is not pertinent to the discrimination claim, the Court finds no relevancy in the fact that Glenn, despite his qualifications, was replaced in the Sales Position by a person outside the protected class.

The Court must, however, assess Glenn's claim in view of Scott's elimination of the Development Position and ultimate dismissal of Glenn. The record reveals that Scott came to these decisions under the pressure of budget constraints and financial duress. See Lurie Certification, Exhibits E, H. Where an employer dismisses an employee in order to reduce the work force, the employer generally does not retain a position which can be filled by someone outside the protected class. Therefore, Glenn must provide evidence that Scott, during its alleged downsizing, treated persons outside the protected class more favorably. *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 342 (3d Cir.1990); *Massarky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir.), *cert. denied*, 464 U.S. 937, 104 S.Ct. 348 (1983).

*9 Glenn has failed to produce to the Court such evidence, choosing instead to argue that there were no "similarly situated employees, as Glenn's position was sui generis." Glenn's Memorandum Of Law In Opposition To Scott's Motion For Summary Judgment at 36 n. 22. Content to rest his prima facie case on the unsupported allegation that the Development Position was a smokescreen for unlawful discrimination, Glenn does not even attempt to adduce evidence concerning the scope of Scott's downsizing at the end of 1990, including a breakdown of the employees affected. Conversely, the record indicates that forty to fifty salaried employees were terminated between September and December of 1990, as part of Scott's budget reduction plan. See Lurie Certification, Exhibit F, Robbins Deposition at 27-28.

In view of the record presented, the Court, in sum, concludes that (1) Glenn was not dismissed--constructively or otherwise--when he was transferred to the Development

Position, (2) Glenn was terminated by Scott despite his qualifications in December of 1990, and (3) the record is without any evidence that younger employees were treated more favorably than Glenn when he was released, notwithstanding the fact that Rodenbush replaced Glenn in the Sales Position in 1989. Therefore, the Court finds that Glenn has not established a prima facie case of age discrimination under the recognized standards.

The Court acknowledges that, in most discrimination actions, the "prima facie case is easily made out." *Massarky*, 706 F.2d at 118. For the record, the Court notes that many of the foregoing problems that obstruct Glenn's prima facie case would also serve to defeat Glenn's age discrimination claim if the Court was required to carry out to completion the *McDonnell Douglas* and *Hicks* analysis.

Assuming that Glenn could establish a prima facie case, the burden would then shift to Scott to offer admissible evidence that would "allow a trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Chipollini*, 814 F.2d at 898. Scott has articulated legitimate, nondiscriminatory reasons to rebut a prima facie case. Regarding the removal from the Sales Position, Scott cites Glenn's poor work performance and resistance to Schafer's directives and policies. See Wall Certification, Exhibit 3. Regarding Glenn's final termination, Scott offers testimony of a number of executives concerning the company's financial problems and the need to make cuts. See Scott Appendix, Exhibits E, H.

With Scott meeting Glenn's prima facie case, all presumptions of discrimination would disappear and Glenn would then be required to present evidence sufficient to prove that age discrimination was the determinative factor in Glenn's dismissal. See *Hicks*, 1993 WL 220265, at *6-8. Evidence that Scott's articulated reasons have been provided merely as a pretext for discrimination might but may not necessarily be sufficient to withstand Scott's summary judgment motion. Compare *id.* at *6

("proving the employer's reason is false becomes part of (and often considerably assists) the greater enterprise of proving the real reason was intentional discrimination") with *Chipollini*, 814 F.2d at 898 ("in addition to establishing his prima facie case by indirect proof, a plaintiff can prevail by means of indirect proof that the employer's reasons are pretextual without presenting evidence specifically relating to age").

*10 At this stage as in the determination of Glenn's prima facie case the survival of Glenn's age discrimination claim depends upon the extent of proof supporting the two step dismissal theory [FN2]. While the Court does not suggest that an employer never could utilize a two step dismissal process to mask a discriminatory motive, the Court concludes that Glenn's allegations cannot survive summary judgment on the evidence presented here, given the nature and circumstances of Glenn's employment in the Development Position. Even if a discriminatory motive could be assigned to Schafer, the Court can find no evidence in the record raising an inference that Scott (1) actually terminated Glenn constructively or otherwise based on Schafer's recommendation or (2) developed and eliminated Glenn's Development Position in order to hide a discriminatory motive for dismissing Glenn.

To withstand Scott's motion for summary judgment, Glenn must produce "more than a mere scintilla of evidence" to support his claims, and cannot simply recycle factually unsupported allegations. See *Williams*, 891 F.2d at 458 [FN3]. On the basis of the record presented, the Court will grant Scott's motion for summary judgment on Glenn's age discrimination claim.

C Glenn's Defamation Claims

As noted, Glenn's defamation claims are based on events that occurred after the elimination of the Development Position and his release from Scott. Glenn asserts that Scott employees, McNamee and Schafer, published statements falsely accusing Acton and Glenn with the theft of the Custom Easy

materials, which, in actuality, were inadvertently misplaced after the WFB sales meeting in Bryn Mawr, Pennsylvania, in December of 1990.

Glenn points to the following to support his defamation claims: (1) statements allegedly made by Schafer to a group at a lunch meeting in Oshkosh, Wisconsin, (2) prior to revoking Marcal's job offer to Glenn, Shapiro allegedly informed Glenn that he had heard rumor of Glenn's involvement in the theft of the materials, (3) statements made by McNamee within one month of the sales meeting, suggesting that Acton stole the Custom Easy materials for Glenn, (4) the statement made by McNamee to Hull, a former Scott employee, in the Pittsburgh airport in May or June of 1991, indicating that Schafer was telling people that Acton and Glenn stole the missing Custom Easy materials, and (5) other statements made by McNamee and other Scott employees to Hull regarding Schafer's accusations.

Scott argues that the Court should summarily dismiss Glenn's defamation claims because (1) the record contains no evidence of defamation that would be admissible at trial, (2) the claims are time barred by the applicable statute of limitations and (3) any defamatory conduct by Schafer or McNamee is not assignable to Scott as a matter of law. The Court agrees with Scott on all three points.

1. The Record Contains Insufficient Admissible Evidence of Defamation

To withstand a summary judgment motion, the non-moving party must produce evidence that can be reduced to admissible form at trial. *Williams*, 891 F.2d at 466 n. 12. Hearsay problems plague Glenn's effort to adduce evidence that a Scott employee did in fact charge Glenn with the theft of the Custom Easy materials. In almost every circumstance concerning the alleged accusation, Glenn offers testimony of individuals who attribute the accusations to Schafer or McNamee, but never unequivocally state they heard either of these individuals make an accusation. Weeding through the

record, the Court is not satisfied that Glenn has produced enough admissible evidence to withstand Scott's summary judgment motion.

*11 As discussed above, under the Federal Rules of Evidence, a statement is not considered hearsay where it is offered against a party and is directly attributed to that "party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed.R.Evid. 801(d)(2)(D). The offering party must make a threefold showing, through evidence independent of the proffered statement, that (1) an employment relationship existed between the declarant and the party, (2) the statement was made during the agency or employment relationship and (3) the statement concerned a matter within the declarant's scope of employment. *Boren v. Sable*, 887 F.2d 1032, 1038 (10th Cir.1989) (cited with approval in *Lippay v. Christos*, 996 F.2d 1490, 1497 (3d Cir.1993)). [FN4]

Given this evidentiary rule regarding party-opponent admissions, the Court would consider nonhearsay--thus admissible against Scott--any statement respecting the Custom Easy materials made by Schafer or McNamee during their employment relationship with Scott. See *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1143 (7th Cir.) (documents containing statements attributable to high level management constitute corporate admission under Rule 801(d)(2)(D) even if report is based on hearsay or reflects opinion), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234 (1983). [FN5]

While the Court concludes that certain of the statements attributed to Schafer or McNamee may be admitted as evidence against Scott, Glenn's evidentiary problems are only beginning. Rule 805 provides that hearsay statements contained within hearsay statements, also known as double hearsay, are not excluded under the hearsay rules if each segment of the combined statement, when considered separately, falls within a hearsay exception. Fed.R.Evid. 805. Although the alleged statements by Schafer and McNamee

are technically nonhearsay under Rule 801(d)(2)(D), Rule 805 provides a useful tool for determining whether there exists any evidence of defamation admissible against Scott

Utilizing the Rule 805 framework, the Court, as noted, would be satisfied that most of the alleged statements by Schafer and McNamee regarding the theft of materials, when considered alone, overcome the first hurdle in the double hearsay analysis. However, Glenn repeatedly attempts to introduce these admissible statements via out of court declarations of other unidentified declarants

Reviewing the record, the Court finds too many phantom sources, which undermine the reliability concerns that pervade the hearsay rules. See *Boren*, 887 F.2d at 1036. Regarding the lunch meeting in Oshkosh, Glenn testified as to "what I had been hearing from several people." Lurie Certification, Exhibit A, Glenn Deposition at 12. In response, Glenn then contacted Acton, [FN6] who investigated the story through his superior at the time, Michael O'Neil ("O'Neil"), who according to Glenn, told Acton that "he did know about the [accusation], they had heard Schafer say it. Mr. O'Neil did know that Mr. Schafer was saying it." *Id.* at 30-31 (emphasis supplied).

*12 Viewed in a light most favorable to Glenn, this evidentiary offering constitutes Glenn testifying as to what he was told by Acton regarding what Acton was told by O'Neil regarding what Schafer was heard to have said about the missing materials. The record does not reveal that Acton, much less O'Neil, heard the accusation directly from Schafer. Respecting the Oshkosh meeting and the O'Neil conversation, Glenn is unable to direct the Court to any individuals who heard Schafer make the alleged accusation and whose out of court declarations are admissible against Scott. [FN7] Where declarants are identified as "they" and "several people," the Court is simply not satisfied that the trustworthiness requirements of Federal Rules of Evidence are met. See *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1003 (3d Cir. 1988) (statements

of unidentified declarants inadmissible)

Hearsay problems confound other attempts by Glenn to introduce the alleged accusations. During the investigation into the missing materials, Vissers Damie, the Scott employee charged with the search, was told by her supervisor, Douglas Schommer that "McNamee had accused Acton of taking [the materials] to give to Glenn." Scott Appendix, Exhibit I, Vissers Damie Deposition at 13 [FN8]. The record does not indicate that Vissers Damie heard the accusation directly from McNamee. In addition, Vissers Damie was unable to identify the individual who talked to Schommer, and could only offer that Schommer told her that McNamee was the "source" of the theft rumors. Lurie Certification, Exhibit I, Vissers Damie Deposition at 14, 32. In this instance, Glenn again offers unreliable evidence based on statements not directly attributable to any identified individual.

The Court now turns to Glenn's contention that Shapiro had been advised of the alleged theft and consequently revoked Marcal's offer to Glenn. *Id.*, Exhibit A, Glenn Deposition at 69-70. According to Glenn, Shapiro never identified the individual who informed him of the rumor. *Id.* at 70. In addition to the unidentified declarant problem, Shapiro's statement, as offered through Glenn's testimony, is hearsay and not within any hearsay exception. [FN9] In addition, Shapiro has testified that he did not know of the rumor until he became involved in this litigation. See Scott Appendix, Exhibit N, Shapiro Deposition at 39-40.

Finally, the Court reviews Hull's deposition, wherein he testified that (1) McNamee, on at least three occasions, told him about Schafer's accusations and (2) other Scott employees also, at various times, had discussed the rumors with him. In addition to his conversations with McNamee, Hull discussed in separate instances the alleged theft with Scott employees Milt Napper, Penny Amundson, Kathy Hable and Steve Gubelman. See Lurie Certification, Exhibit G, Hull Deposition at 59. The Court finds that unidentified

declarants also impede the introduction of the statements from Admundson, Napper and Gubelman via Hull's testimony. *Id.* at 76-78, 83-86. As to Hable's statements, Hull was unable to testify regarding the source of her knowledge. *Id.* at 87-88. [FN10]

***13** Turning to the Hull-McNamee conversations, Hull testified that McNamee said, "Schafer is going telling everybody that Glenn and Acton stole it and tried to sell it to Wisconsin Tissue Mills." *Id.* at 61. Hull reported a subsequent conversation, wherein McNamee stated that "Schafer says he has proof, and he continues to go around telling people that Glenn and Acton stole it." *Id.* at 70. In addition, Hull asserted that he knew "for a fact" that McNamee heard the accusation directly from Schafer, because McNamee told him so. *Id.* at 76.

The Court concludes that this paltry bit of testimony is the only piece of admissible evidence against Scott concerning Schafer's alleged defamation, despite serious reservations regarding its reliability. There are no unidentified declarants in the chain of reporting which culminates in Hull's testimony. On purely technical grounds, hearsay rules are not violated when Hull testifies that "McNamee said, 'Schafer said, 'Acton stole the materials for Glenn.' ' ' "

In segment one of Hull's testimony, Schafer allegedly makes the accusation within McNamee's presence (the "Schafer Statement"). Schafer's out-of-court declaration is nonhearsay under Rule 801(d)(2)(D)--a party-opponent admission by Scott. The Schafer Statement was made during Schafer's employment with Scott and the theft of the materials was a matter within the scope of Schafer's responsibilities as Vice President. In addition, the Schafer Statement is not hearsay because it is not being offered for the truth of its content, but rather, for the fact that the statement was made. *See, e.g., United States v. Cantu*, 876 F.2d 1134, 1137 (5th Cir.1989).

In segment two, McNamee relates Schafer's accusation to Hull on at least three separate

occasions (the "McNamee Statements"). Certain of these out-of-court declarations to Hull are also nonhearsay under Rule 801(d)(2)(D). The pertinent question as to the McNamee Statements is not whether engaging in the discussions with Hull was within McNamee's scope of employment. The Federal Rules of Evidence merely require that the alleged theft and accusations be matters within the scope of McNamee's employment. *See, e.g., MCI Telecommunications*, 708 F.2d at 1143. The Custom Easy materials, their disappearance and Schafer's alleged accusations were all matters within the scope of McNamee's employment as WFB National Customer and Marketing Manager and as a subordinate to Schafer. *See* Lurie Certification, Exhibit L, Scott's Objections and Answers To Glenn's First Set of Interrogatories at 23-25; Exhibit B, Schafer Deposition at 61.

In sum, as to admissible evidence, the Court agrees, in part, with Scott. The record contains second and third-hand accounts of Schafer's alleged accusations. The majority of these accounts--if not hearsay by themselves-- are based on unreliable hearsay statements made by unidentified declarants or, in one instance, rebutted by the declarant himself. However, the Court does find admissible Hull's testimony regarding the McNamee Statements.

***14** The Court comes to this conclusion with certain reservations based on the fact that Schafer's statement to McNamee, as revealed by Hull, lacks clarity of context and content. This only magnifies the reliability problem associated with layering out-of-court declarations on top of other out-of-court declarations. *See Boren*, 887 F.2d at 1037 (noting hearsay rule concerns for the accurate reporting of facts, the court warned that with each additional layer of hearsay, there is a corresponding decrease in reliability). Nonetheless, the Court concludes that Hull's testimony is admissible within the Federal Rules of Evidence.

The Court's inquiry, however, does not end with this evidentiary ruling in favor of Glenn.

The tenuous admissibility of Hull's testimony does not foreclose questions concerning the applicable statute of limitations or whether Glenn, as a matter of law, can withstand Scott's summary judgment motion. The Court determines that Glenn fails on both grounds. In reaching this conclusion, the Court focuses narrowly on Hull's testimony alone, given the inadmissibility of the balance of Glenn's profferings.

2. Statute of Limitations and Republication

Moving beyond evidentiary concerns, the Court must, as a preliminary matter, determine from which state it is to draw the substantive law and statute of limitations to be applied to Glenn's defamation claims. Sitting in diversity, this Court generally must look to New Jersey law to guide the choice of law decision. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020 (1940). However, the Court sua sponte will not challenge the application of a particular state's law where (1) the parties implicitly agree as to the governing law, (2) the state has an interest in the litigation and (3) the state's relevant law does not significantly conflict with the laws of another state with a comparable interest in the case. See *Schiavone Constr. Co. v. Time*, 735 F.2d 94, 96 (3d Cir.1984); *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 501-02 (3d Cir.), cert. denied, 439 U.S. 861, 99 S.Ct. 181 (1978).

In the instant case, the parties implicitly agree that New Jersey provides the applicable law. Glenn, the target of the alleged defamation is a resident of New Jersey, and the Court is satisfied that there are no conflicts between New Jersey and Pennsylvania defamation law that will substantially affect the outcome. [FN11] Accordingly, the Court applies New Jersey law to assess Glenn's claims.

New Jersey law provides that defamation actions must be brought within one year "after the publication." N.J.S.A. 2:14-3. New Jersey courts have strictly construed the statute's fixed time period for bringing defamation claims. See *Lawrence v. Bauer*

Publishing & Printing, Ltd., 78 N.J. 371, 374-75 (1979). (citing statute's fixed period, court rejected the "discovery rule" whereby a cause of action in defamation accrues when the plaintiff learns the state of facts which constitute a claim). Therefore, the plaintiff must alleged with specificity the circumstances giving rise to the defamation action. See *Wanamaker v. Columbian Rope Co.*, 713 F.Supp. 533, 544 (N.D.N.Y.1989) (defamation claim time-barred where complaint failed to allege when alleged remarks were made); *Zoneraich v. Overlook Hospital*, 212 N.J.Super. 83, 101 (App.Div.) (claim dismissed where complaint did not allege "when, where, by which defendants and by what words ... plaintiff was defamed"), cert. denied, 107 N.J. 32 (1986).

*15 Glenn commenced this suit on March 12, 1992. Therefore, Glenn must allege and consequently adduce evidence that a defamatory remark, assignable to Scott, occurred sometime after March 12, 1991. As Scott contends, the Court finds no record evidence that the Schafer Statement--or any other alleged accusations charged to Schafer--occurred within the one-year statutory period. Limited to Hull's testimony, Glenn offers little proof as to the timing and specific content and context of the Schafer Statement. Consequently, the Court considers the Hull testimony utterly insufficient to withstand summary judgment with respect to the statute of limitations. [FN12] Failing the statute of limitations as to the Schafer Statement, Glenn argues that the McNamee Statements effected a republication, resurrecting the Schafer Statement and bringing it within the one-year statutory period. Hull testified that the McNamee Statements occurred sometime after April 1, 1991--in May or June of 1991. See Lurie Certification, Exhibit G, Hull Deposition at 62-67. The McNamee Statements were made within New Jersey's one-year statutory period for defamation actions.

Glenn's republication argument raises two related, but separate issues: (1) whether Schafer would be liable as a result any republication by McNamee within the

limitations period and (2) whether the McNamee Statements, in and of themselves, are defamatory. Scott contends that the McNamee Statements cannot breathe life into the Schafer Statement, which considered alone would be time-barred. The Court agrees.

"Publication" occurs where the allegedly defamatory statement is communicated to a third person "with a reasonable ground to suppose that it will become known to others." *Kramer v. Monogram Models, Inc.*, 700 F.Supp. 1348, 1351 (D.N.J.1988), *rev'd on other grounds*, 875 F.2d 66 (3d Cir.1989). Under New Jersey law, where a third person has republished a defamatory remark within the limitations period, such republication does not operate to create a new cause of action against the original publisher, where the cause of action respecting the original publication would be time-barred. *See id.* Scott argues that a new cause of action as to Schafer did not accrue when McNamee, the third person, republished the Schafer Statement.

The Court finds *Kramer* instructive. The facts of *Kramer* could be described as follows. Party 1 issues to Party 2 a press release containing alleged defamatory remarks about the plaintiff. Party 2 subsequently publishes excerpts of the press release in a market report and magazine. Plaintiff sues only Party 1 for defamation. The issuance of the press release to Party 2 occurred outside the statute of limitations. The republication by Party 2 occurred within the statute of limitations. The court concluded that the only publication chargeable against Party 1 was the issuance of the press release. Similarly, the Court holds that the only publication chargeable to Schafer would be the Schafer Statement. [FN13]

*16 Determining that Glenn cannot reach Scott through the Schafer Statement is only one piece of the republication puzzle. The McNamee Statements do come within the limitations period. The survival of Glenn's claims rests upon the Court's determination whether the McNamee Statements are, as a matter of law, defamatory. The Court finds against Glenn.

In New Jersey, "one who republishes defamatory matter is generally subject to liability as if he or she had originally published it. *Schiavone*, 735 F.2d at 94. In the republication context, the defense of truth does not mean truthful republication of the original statement, but rather that the original statement does in fact prove to be true. *Lawrence*, 89 N.J. at 461 ("if defendant published that a third person stated that plaintiff has committed a crime, it is no justification that the third party did in fact make that statement").

While these rules of law appear to weigh against Scott, the Court is dissatisfied that McNamee published or republished defamatory matter. In New Jersey, the court, as a threshold matter, decides whether the alleged statement may be construed as defamatory. *Decker v. Princeton Packet*, 116 N.J. 418, 424-25 (1989). The statement "must be taken in context and the publication considered as a whole." *Id.* at 425. *See also Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96, 107 (3d Cir.1988) (context examination covers many factors, including "the nature of discussion in which the allegedly defamatory statements were made" and "the nature of the listener's understanding"), *cert. denied*, 489 U.S. 1078, 109 S.Ct. 1528 (1989).

As to the content and context of the Schafer Statement, the Court finds the record so insufficient that making a threshold determination favorable to Glenn is impossible. Through Hull's testimony, the Court gleans little information about what McNamee actually heard Schafer say. While recognizing that false accusations of theft may be defamatory, the Court deems Glenn's only admissible evidence insufficient to support his claims as to Schafer's conduct.

Even if the Schafer Statement is assumed to be defamatory, the Court cannot construe the McNamee Statements as a defamatory republication. Republication questions most often arise where media publishers report stories based on defamatory information received from other persons. Generally, the

courts are wary of publishers' attempts to immunize themselves from defamation claims by framing stories as "reports" or "opinions." See, e.g., *Lawrence*, 176 N.J.Super. at 389 ("[s]urrounding the defamatory sting of their words with terms such as 'reportedly,' 'may be,' or 'could possibly be' will not protect a publisher").

The instant case is distinguishable. McNamee did report information to Hull about Schafer's actions, but he did so in a manner and context designed to inform and refute the accusations. When McNamee met with Hull, he knew the Customs Easy materials had been found. See *Lurie Certification*, Exhibit L, Scott's Objections and Answers To Glenn's First Set Of Interrogatories at 24. In addition, Hull's testimony indicates that neither McNamee nor Hull believed the rumors that Glenn attributes to Schafer. See *Lurie Certification*, Exhibit G, Hull Deposition at 69-70. McNamee did not adopt or republish the Schafer Statement as his own or report it in a manner couched in defamatory "suggestion or insinuation." *Lawrence*, 176 N.J.Super. at 389. Borrowing liberally from the Third Circuit the Court concludes that the "facts indicate that no one who heard the [alleged] slander believed it, and those who repeated the [alleged] slander did so only to express outrage at the speaker.... [The Court believes] New Jersey would not compensate for slander under these facts." *Nanavati*, 857 F.2d at 109.

3. Scott Cannot Be Liable In Defamation Under Principles of *Respondeat Superior*

*17 Finally, even if Glenn could adduce evidence to adequately support his defamation claim, the Court finds that Scott would be entitled to summary judgment based on *respondeat superior* principles. In New Jersey, an employer may be liable for an employee's torts only if the employee was acting within his or her scope of employment. *GNOC Corp. v. Aboud*, 715 F.Supp. 644, 649 (D.N.J.1989); *Gilborges v. Wallace*, 78 N.J. 342, 351 (1978). To determine scope of employment questions, New Jersey considers whether the conduct (1) is the kind for which

the employee was hired to perform, (2) occurs substantially within the job's space and time limits and (3) is undertaken with a purpose to serve the employer. See *Aboud*, 715 F.Supp. at 649 (quoting Restatement (2d) of Agency § 228).

The Court undertakes the scope of employment question by focussing on the only piece of relevant and admissible evidence, the Hull testimony, and determining whether any liability of Schafer and McNamee could be assigned to Scott. The Court's analysis is again constrained by the limited evidence as to Schafer's statements and actions. The evidence leaves too many holes, including to whom, and in what context, Schafer published the accusation. The Court cannot be sure that Schafer, himself, was not merely passing on rumors derived from unidentified declarants or expressing a bona fide opinion. See Scott Appendix, Exhibit B, Schafer Deposition at 61-62.

Nonetheless, the Court recognizes that there is evidence that McNamee did hear Schafer say something, somewhere about Glenn and the Custom Easy material. Using its imagination, the Court can envision a discussion between Schafer and McNamee, in which Schafer makes a direct accusation against Glenn under conditions that meet the three-pronged scope of employment standard. Imagination, however, is not the most appropriate juridical tool on motions for summary judgment. Glenn simply provides no evidence that Scott would be liable for Schafer's alleged conduct and comments.

As to McNamee's actions, Hull's testimony does establish context by placing one of their meetings in the Pittsburgh airport. Even assuming that McNamee was on a business trip, and that the subsequent conversation with Hull occurred during business hours, the Court is not satisfied that any evidence suggests that McNamee's conduct should be assignable to Scott. With Glenn providing no evidence to the contrary, the Court is unable to conclude that McNamee's duties encompassed discussions with third parties about the arguably tortious activities of a

Scott vice president. In addition, Glenn offers nothing to prove that McNamee was guided by any purpose to serve Scott when making the disclosures to Hull

CONCLUSION

Glenn's entire case both the age discrimination and defamation claims is unable to stand upon the weak evidentiary foundation submitted to withstand Scott's motion. He cannot oppose a valid motion with incompetent or conclusory allegations and thereby continue to pursue his speculative charges. Therefore, the Court will grant Scott's summary judgment motion on all counts.

FN1 Scott, at length, argues that Schafer's statements, if made at all, were in reference to Glenn's obsolete sales philosophy. Glenn even testified that he understood the remarks in relation to sales philosophy. See Appendix to Scott's Statement of Undisputed Facts ("Scott Appendix"), Exhibit A, Glenn Deposition at 169-70. At this juncture, the Court takes no position on the meaning that may be assigned to the alleged remarks, but merely recognizes that an inference must be drawn to tie the statements to the employment actions taken by Scott against Glenn.

FN2 Glenn asserts that certain statistical evidence supports an inference that Scott unlawfully discriminated against Glenn. See *Abrams v Lightolier, Inc.*, 702 F.Supp. 509, 511 (D.N.J. 1988) (plaintiff asserting age discrimination claim may "rely on a discriminatory pattern or practice as indirect evidence of discrimination").

Glenn points to two items to support an inference of discrimination: (1) a document produced by Scott which lists certain Scott employees who reported to Schafer on December 31, 1988, June 1, 1989, and/or December 31, 1990, and (2) a Wisconsin agency's finding of probable cause in an administrative complaint of age discrimination filed by a former Scott employee, Donna Wisnoski, who was terminated in early 1992.

Regarding the lists produced by Scott, Glenn offers that, of the employees listed, most are younger than Schafer and those that are older are no longer employed by Scott. See Lurie Certification, Exhibit M. Scott's Supplemental Answers To Glenn's First

Set Of Interrogatories at Exhibit C, Exhibit B, Schafer Deposition at 201-05. The Court is not persuaded by this "statistical" evidence. First, respecting Glenn's prima facie case, these statistics reveal nothing about the respective ages of those employees affected and those unaffected by the cutbacks instituted by Scott in late 1990--at which time Glenn was terminated. Second, even if the cited statistics support an inference of discrimination to establish a prima facie case, Scott has sufficiently rebutted this inference and may succeed on its summary judgment motion. See *Barnes v Gencorp Inc.*, 896 F.2d 1457, 1469 (6th Cir.) (employer may rebut prima facie case based on statistics by (1) showing plaintiff's statistical method is faulty; (2) attacking presumption that nondiscriminatory reason for statistical disparity is unlikely; or (3) showing that even if bias was a factor somewhere, it did not play a role in the action taken against the specific plaintiff), *cert. denied*, 498 U.S. 878, 111 S.Ct. 211 (1990).

Through its proffered expert analysis, Scott convincingly argues that the statistics become insignificant when reasons for termination are properly factored. See Scott Appendix, Exhibit P. See also *Healy*, 860 F.2d at 1217-18 (statistical evidence is relevant to employer's defense and supports summary judgment against employee). In addition, Glenn simply has produced no evidence to counter Scott's work-force-reduction position. See *Barnes*, 896 F.2d at 1469.

As to the Wisnoski complaint, the Court deems the determination by the Wisconsin Department of Industry, Labor and Human Relations irrelevant to Glenn's discrimination claim. Schafer was not Wisnoski's supervisor nor is there any evidence that Leaman was involved in the decision to terminate her. While an administrative determination of probable cause regarding Glenn's claim would be relevant, the Court cannot conclude that the Wisnoski action has any relevance here. Compare *Morehouse v Boeing Co.*, 501 F.Supp. 390, 392-93 (E.D.Pa.) (in employment discrimination, court deemed inadmissible the testimony of five other former employees with separate discrimination cases pending against same employer), *aff'd mem.*, 639 F.2d 774 (3d Cir. 1980) with *Abrams*, 702 F.Supp. at 512 (preliminary EEOC finding that employer discriminated against plaintiff was admissible in plaintiff's subsequent Title VII action against the employer).

FN3 Presumably frustrated by a lack of evidence to support his claim, Glenn has accused Scott of withholding and destroying relevant evidence. The Court takes a grave view of such charges, which warrant serious sanctions if proven true, or alternatively, if proven false and made in bad faith. The Court is struck by the timing of Glenn's accusation--first brought defending a summary judgment motion after completion of discovery. At no time did Glenn raise these concerns during the discovery phase or bring them to the attention of the magistrate. Glenn never brought a proper motion to compel, or a motion for sanctions, pursuant to Rule 37 of the Federal Rules of Civil Procedure. Therefore, the Court finds it too late in the day for Glenn to raise these discovery issues and does not consider them on the pending motion. See *DesRostiers v Moran*, 949 F.2d 15, 22 n. 8 (1st Cir. 1991) (discovery violations waived where untimely made), *Clinchfield R. Co. v Lynch*, 700 F.2d 126, 132, 132 n. 10 (4th Cir. 1983) (where party objects to discovery, party seeking discovery must take initiative to request compulsory order).

FN4 Federal common law--not the forum state's law--governs a federal court's interpretation of "agency" under Rule 801(d)(2)(D). *Lippay*, 996 F.2d at 1497.

FN5 The record indicates that at some point after McNamee left Scott, he made additional statements to Hull respecting the Custom Easy materials. See Lurie Certification, Exhibit G, Hull Deposition at 61. Because these statements were made when no employment relationship existed between Scott and McNamee, they would not be admissible against Scott. See *Boren*, 887 F.2d at 1038.

FN6 The Court concludes that Glenn had this conversation with Acton, notwithstanding the fact that a portion of Glenn's deposition transcript refers to this individual as John "Abington." See Exhibit A, Lurie Certification, Exhibit A, Glenn Deposition at 29. The Court notes that a portion of the Glenn Deposition was revised by hand, changing "Abington" to "Acton." See, Scott Appendix, Exhibit A, Glenn Deposition at 51-52.

FN7 Glenn also alleges that two other Scott employees informed him of alleged accusations at the Oshkosh meeting. Barbara Kontos, a secretary at Scott, and Barbara Waite, a Scott customer service

representative. See Scott Appendix, at 46-49. Kontos did not attend the meeting and her statements are inadmissible because they are based on the statements of an unidentified declarant. *Id.* at 46 ("several people had told her"). Kontos' declaration is also hearsay as against Scott--it is not a Rule 801(d) party-opponent admission, as the theft of the Custom Easy materials was not within the scope of her employment.

According to Glenn, Waite did attend the Oshkosh meeting and consequently acquired first-hand knowledge of Schafer's accusation. While the source of Waite's knowledge is not attributed to an unidentified declarant, the Court concludes that her statements to Glenn regarding the accusations are also hearsay as against Scott. While both Kontos and Waite may have learned of the alleged theft during the course of their employment with Scott, the theft of the Custom Easy materials was not a matter within the scope of their employment.

FN8 Scott has admitted that, as the search for the missing materials ensued, McNamee did "opine that perhaps" Acton had stolen them. See Scott Appendix, Exhibit J, Scott's Second Set of Supplemental Answers To Glenn's First Set of Interrogatories at 6-7. The Court addresses the consequences of the admission in the discussion below regarding the applicable statute of limitations. See *infra*, at note 10.

FN9 Shapiro, in effect, reports, "I was told of the theft by a Scott employee." Glenn offers Shapiro's statement for its truth--what Shapiro was told. This is hearsay as it is not a statement from a Scott employee or agent under Rule 801(d)(2)(D).

FN10 Acton also testified that Hable informed him of the rumor regarding the alleged theft. See Scott Appendix, Exhibit G, Acton Deposition at 45, Exhibit S, Hable Affidavit at ¶ 3. Hable asserts that she never heard the accusation directly from Schafer or McNamee. *Id.*, Exhibit S, Hable Affidavit at ¶ 4.

FN11 The Court acknowledges that Pennsylvania may have a significant interest in having its defamation law applied in the instant case. Defendant Scott is a Pennsylvania corporation. In addition, certain of the McNamee Statements occurred in Pennsylvania at the Pittsburgh airport. However, the Court finds there to be little conflict between Pennsylvania and New Jersey law regarding the

statute of limitations and issues of republication

FN12 The Court also concludes that Glenn's defamation action is time-barred to the extent it is based on Scott's admission that McNamee initially suggested that Acton stole the material. See Lurie Certification, Exhibit L. Scott's Objections And Answers To Glenn's First Set Of Interrogatories at 23-24. Eschewing any discussion of whether McNamee's statement could constitute legal defamation, the Court simply notes that McNamee made this statement within a month of the December, 1990, Bryn Mawr meeting, and prior to March 12, 1991.

FN13 The Court notes that the court in *Kramer* based its conclusions on the fact that there was "no special relationship" between Party 1 and Party 2. *Kramer*, 700 F.Supp. at 1351. Had there been an agency relationship between Party 1 and Party 2, the court would have held that an action could have been brought against either Party 1 or Party 2 within one year of publication because as between principal and agent there is no publication. *Id.* There is no third person.

In reflecting on the instant case, the Court finds these conclusions of some interest. First, Scott assumes McNamee is a third person to whom the Schafer Statement is published. However, within the WFB hierarchy, McNamee was subordinate and reported to Schafer. See Scott Appendix, Exhibit B, Schafer Deposition at 61-62. Given the agency relationship between Schafer and McNamee, and the subject matter of the Schafer Statement, *Kramer* would suggest that the Schafer Statement did not constitute a publication, but that Glenn could bring his claims against either Schafer or McNamee based on McNamee's publication within the statute of limitations. See *Kramer*, 700 F.Supp. at 1351 (given the agency relationship, plaintiff may sue the author or the mass media publisher within one year of publication).

The Court finds this portion of *Kramer* unhelpful to the instant case. First, *Kramer*'s discourse on agency concerned the application of the single publication rule, which is generally utilized in cases with mass produced materials. The rule provides that a plaintiff will have only one cause of action against a media publisher, accruing on the date the publication was first circulated to the public. *Kramer*, 700 F.Supp. at 1351. The single publication rule is simply inapplicable to the facts underlying Glenn's

defamation claims--the statements by Schafer and McNamee must be considered separately.

Consequently, the Court treads carefully around the *Kramer* court's focus on the agency relationship between an author and the mass media publisher. The instant case does not involve a mass media publisher, but concerns the agency and employment relationship between a superior and a subordinate. The Court hesitates to conclude that the Schafer Statement, made to McNamee, did not constitute a publication. Defamation may occur during a principal-agent communication, even where such communications have a qualified privilege. See generally *Coleman v. Newark Morning Ledger Co.*, 29 N.J. 357, 375 (1959) (a *bona fide* communication on any subject matter between parties with a common interest or duty respecting the matter is privileged even if it contains actionable defamatory content), *Sokolay v. Edlin*, 65 N.J. Super. 112, 125-28 (App. Div. 1961) (common interest to sustain privilege where employees were informed that co-worker stole from employer).

1993 WL 431161 (D.N.J.)

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ADDENDUM E

Only the Westlaw citation is currently available.

United States District Court, D.
Massachusetts.

Richard HUMISTON, Plaintiff,
v.
ATOTECH USA, INC., Defendant.

Civ. A. No. 94-40002-NMG.

Nov. 28, 1995.

MEMORANDUM AND ORDER

GORTON, District Judge.

*1 Plaintiff Richard Humiston ("Humiston") brought this action against defendant Atotech USA, Inc. alleging two counts of breach of contract and one count of defamation. Pending before this Court is defendant's motion for summary judgment on all three counts. For the reasons stated below, defendant's motion will be allowed.

I. BACKGROUND

In 1990, plaintiff Humiston was hired by Chemcut Corporation, an American subsidiary of a foreign corporation, Schering AG, as a regional manager in Chemcut's chemistry sales and service department.

In or about August, 1992, Schering announced that Elf Atochem would be acquiring Chemcut and other Schering affiliated divisions. Notice of the merger was provided to Chemcut employees, including Humiston, and two days later, on August 21, 1992, a Purchase and Sale Agreement ("P & S Agreement") between Schering and Elf Atochem was signed. The P & S Agreement contained the following language in Article ("Art.") 24:

(b) The relevant Buyers will pursue the policy of promoting stable and long term employment opportunities for Transferred

Employees Abroad and subject to local law and practices. Buyers will respect local standards and practices of employment protection. For a period of six months from Closing, Buyers may under no circumstances institute operational dismissals affecting the Transferred Employees Abroad.

The acquisition was completed in February, 1993. Soon thereafter, Chemcut Corporation changed its name to Atotech USA, Inc. ("Atotech").

One month after the closing, in March, 1993, Humiston was terminated by Atotech for "insubordination." Humiston alleges in Counts I and II, respectively, that his termination constituted a breach of his employment contract and the P & S Agreement between Schering and Elf Atochem. Humiston further alleges in Count III that Atotech published defamatory statements relating to his termination that caused injury to his reputation and standing in his professional community.

In response to Count I, defendant Atotech maintains that Humiston was, at all times, an at-will employee and could be terminated at any time, with or without cause. With respect to Count II, Atotech argues that Humiston was not an intended beneficiary of the P & S Agreement between Schering and Elf Atochem and thus was not entitled to contractual protection under the Agreement. Atotech further argues that Humiston's defamation claim in Count III is unfounded because Humiston failed to present admissible evidence to support his defamation claim and employers enjoy a conditional privilege to speak to prospective employers about former employees.

II. DISCUSSION

A. Summary Judgment Standard

Summary Judgment shall be rendered where the pleadings, discovery on file and affidavits,

(Cite as: 1995 WL 708660, *1 (D.Mass.))

if any, show "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the entire record in the light most favorable to Humiston, the nonmoving party, and indulge all reasonable inferences in his favor. *O'Connor v. Steeves*, 994 F.2d 905, 907 (1st Cir.1993).

*2 With respect to a motion for summary judgment, the burden is on the moving party to show that "there is an absence of evidence to support the non-moving party's case." *FDIC v. Municipality of Ponce*, 904 F.2d 740, 742 (1st Cir.1990), quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If the movant satisfies that burden, it shifts to the non-moving party to establish the existence of a genuine material issue. *Id.* In deciding whether a factual dispute is genuine, this Court must determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Andersen v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); accord *Aponte-Santiago v. Lopez-Rivera*, 957 F.2d 40, 41 (1st Cir.1992) (citing *Andersen*). The nonmovant's assertion of mere allegation or denial of the pleadings is insufficient on its own to establish a genuine issue of material fact. Fed.R.Civ.P. 56(e). The nonmovant must set forth specific facts showing that there is a genuine issue for trial. The Court must view the entire record in the light most hospitable to the non-moving party and indulge all reasonable inferences in its favor. *O'Connor*, 994 F.2d at 907.

B. Analysis

1. Count I--Breach of Employment Contract

Count I of Humiston's complaint alleges that Atotech breached its employment contract with Humiston by terminating Humiston for "gross insubordination." Plaintiff has admitted in his deposition, however, that he was an at-will employee of Atotech (Vol. II, p. 103-5; Vol. III, p. 133). Under Massachusetts law, "[t]he general rule is that an employment at-will contract can be terminated at any time for any reason or for no reason at all."

Folmsbee v. Tech Tool Grinding & Supply, Inc., 417 Mass. 388, 394 (1994); see also *Fortune v. National Cash Register Co.*, 373 Mass. 96, 100-01 (1977); *Fenton v. Federal St. Bldg. Trust*, 310 Mass. 609, 612 (1942). According to the general rule and plaintiff's own admission, then, Atotech was free to terminate Humiston with or without cause.

Massachusetts courts have recognized narrow exceptions to that general rule. Employers may be held liable for terminating at-will employees in violation of a clearly established public policy. See *Hobson v. McLean Hosp. Corp.*, 402 Mass. 413, 416 (1988); *Smith-Pfeffer v. Superintendent of the Walter E. Fernald State Sch.*, 404 Mass. 145, 149-50 (1989). Terminating an employee for "gross insubordination", however, is not contrary to any public policy recognized by Massachusetts courts as an exception to the at-will employment rule.

In some at-will terminations, Massachusetts courts have implied a covenant of good faith and fair dealing to impose liability on the employer. *Fortune*, 373 Mass. at 100 05. Massachusetts courts have narrowly construed this exception, however, holding that the discharge of an at-will employee without cause is not, by itself, a violation of an employer's obligation of good faith and fair dealing. *Gram v. Liberty Mutual*, 384 Mass. 659, 671 (1981). Because plaintiff has failed to present evidence that even suggests improper motive or bad faith by Atotech in its discharge of Humiston, the Court finds that this narrow exception is not applicable.

*3 Defendant's motion for summary judgment on Count I, therefore, will be allowed.

2. Count II--Breach of Contract

Humiston further alleges that he was an intended beneficiary of the P & S Agreement between Schering and Elf Atochem and, as such, claims that he can enforce the contractual provision in Art. 24 of the P & S Agreement forbidding dismissals within the first six months of Elf Atochem's acquisition of Schering and its subsidiaries. Under

Massachusetts law, it is the contracting parties' intent that determines whether a third party is an intended or incidental beneficiary. *Markel Service Ins. Agency, Inc. v. Tifco, Inc.*, 403 Mass. 401, 405 (1988).

In support of his claim that he was an intended beneficiary, Humiston points to specific language in Art. 24(b), which states: "For a period of six months from Closing, Buyers may under no circumstances institute operational dismissals affecting the Transferred Employees Abroad." Based on that language, Humiston argues that there exists a genuine issue of material fact as to whether he was an intended or incidental beneficiary of the P & S Agreement.

Atotech maintains that Art. 24(b) was intended "to prevent the immediate post-acquisition dismantling of the Schering divisions or the wholesale lay-off of that entity's former employees." Atotech has submitted an affidavit from the Vice President/General Counsel of Elf Atochem, who reiterates that this was the intent of the parties in negotiating the P & S Agreement and states that the contract was not intended to shield individual employees from adverse employment decisions. Furthermore, Art. 24 clearly states that previous employees would continue to be governed by "local standards and practices" in effect prior to the acquisition. If Humiston was an at-will employee prior to the acquisition by Atotech, his at-will employment continued after the acquisition by Atotech.

In viewing the record in the light most favorable to plaintiff, the only evidence this Court has located in support of Humiston's claim that he was an intended beneficiary is the second to last paragraph of the notice allegedly sent to all Schering employees on August 19, 1992. That notice states that "Elf Atochem will not be allowed to give notice to employees during the first 6 months after their transfer." A reasonable jury could not, however, return a verdict for Humiston on the basis of the August 19, 1992 memo by itself. The preceding paragraph of the notice clearly states that "Atochem accepts the present local

personnel and social policies of Schering's subsidiaries ..." Furthermore, pursuant to Fed.R.Civ.P. 56(e), Humiston "may not rest upon the mere allegations or denials of the [defendant's] pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." The Court concludes that plaintiff has failed to establish a genuine issue of material fact as to whether he was an intended beneficiary of the P & S Agreement. Because plaintiff has failed to do so, defendant's motion for summary judgment on Count II will be allowed.

3. Count III--Defamation

*4 Count III alleges that an Atotech representative made defamatory statements to Humiston's subsequent employer, LeaRonol, in response to an inquiry from LeaRonol.

In his deposition, Humiston refers to statements made to him by a Mr. Schaefer at LeaRonol (Vol. I, p. 37-46). These statements, in turn, were relayed to Mr. Schaefer by a Mr. Kessler, based on phone conversations that Mr. Kessler had with a Mr. Hanlon, an executive vice-president at Atotech. This is the only evidence that plaintiff has presented concerning the nature or content of the allegedly defamatory statement. This evidence, however, is double hearsay and inadmissible at trial. On that basis alone, Humiston fails to show the existence of a genuine issue of material fact on his defamation claim.

Furthermore, regardless of the content of Mr. Hanlon's statements to representatives at LeaRonol and the truth or falsity of such statements, Mr. Hanlon had a conditional privilege as an official of Atotech to disclose defamatory information concerning an employee in the employment context as long as he did not abuse his privilege or act with actual malice, recklessness or ill will. *Burns v. Barry*, 353 Mass. 115, 119 (1967). Plaintiff bears the burden of proving that Mr. Hanlon abused his privilege or acted maliciously. *Foley v. Polaroid Corp.*, 400 Mass. 82, 95 (1987). There has been no such showing by plaintiff in this case.

(Cite as: 1995 WL 708660, *4 (D.Mass.))

Defendant's motion for summary judgment on Count III, therefore, will be allowed.

ORDER

For the foregoing reasons, the motion of defendant for summary judgment on Counts I, II and III is ALLOWED.

So Ordered.

1995 WL 708660, 1995 WL 708660 (D.Mass.)

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ADDENDUM F

SEE COURT OF APPEALS RULES 11 AND
12

Court of Appeals of Tennessee.

Donita PIPER, et al.,

v.

Curtis MIZE.

No. M2002-00626-COA-R3-CV.

Jan. 6, 2003 Session.

June 10, 2003

Appeal from the Circuit Court for
Montgomery County, No. 50000474; John H.
Gasaway, III, Judge.

Rodger N. Bowman, Clarksville, Tennessee,
for the appellants, Donita Piper and Lori
Turner.

Christopher J. Pittman, Clarksville,
Tennessee, for the appellee, Curtis Mize.

WILLIAM B. CAIN, J., delivered the opinion
of the court, in which BEN H. CANTRELL,
P.J., M.S., and STELLA HARGROVE, SP. J.,
joined.

OPINION

WILLIAM B. CAIN, J.

*1 Plaintiffs in this case are citizens of
Montgomery County. Defendants, Paul
Avallone, Wayne Gill, Curtis Mize and
Yvonne Van Der Touw are also citizens of
Montgomery County who, in varying degrees,
were alleged to be involved in the printing
and distribution of a newspaper known as *The
Rattler*. Defendant Avallone was the sole
writer, publisher and editor of each issue of
The Rattler. Defendant Mize is a businessman
who allowed copies of the October 5, 2000
edition of *The Rattler* to be placed on the
counter at his place of business for free
distribution. The trial court granted summary

judgment in favor of Defendant Mize and
finalized the judgment as to Mize under
Tennessee Rules of Civil Procedure 54.02.
Plaintiffs appeal, and we affirm the judgment
of the trial court.

At the time of the events involved in this
defamation suit, Johnny Piper was Mayor of
the City of Clarksville, Tennessee. Plaintiff/
Appellant, Donita Piper, was his wife.
Plaintiff/Appellant, Lori Turner, was a former
candidate for Mayor of Clarksville and was
the Grants Writer for the City of Clarksville.

On or about February 1, 2000, a person or
persons not enamored with the merits of the
Piper administration began distribution of an
underground newspaper called *The Rattler*.
Referring to itself as a "slander sheet" this
publication proclaimed itself to be "the first in
venomous gossip." To say that the various
issues of *The Rattler* were uncomplimentary of
Mayor Piper, his wife Donita Piper and Grants
Writer Lori Turner would be a most charitable
understatement. This appeal, however, does
not provide a proper forum for a full
adjudication of the issues between those who
wrote, edited and published the various issues
of *The Rattler* on the one hand, and Plaintiffs,
Donita Piper and Lori Turner, on the other.
The record shows that Defendant/Appellee
Curtis Mize neither wrote, edited nor
published any issue of *The Rattler*, but such was
the handiwork of Defendant Paul Avallone.
The issues drawn between Plaintiffs on one
hand and Paul Avallone and the other
Defendants on the other remain before the
trial court. Pursuant to the finality
designation entered by the trial court under
Tennessee Rules of Civil Procedure 54.02, only
the Curtis Mize case is before this Court, and
only such acts as the record shows to be
attributable to Defendant Mize are at issue in
this appeal.

While the Complaint filed in this case is
extensive and does not distinguish the relative
degrees of alleged culpability of Defendants,

the record before the Court establishes that the participation of Defendant Curtis Mize in *The Rattler* saga is limited to his action in allowing a single edition of *The Rattler*, to wit, the October 5, 2000 edition, to be placed on the counter at his place of business, along with other free publications, for his customers to take if they so chose.

The meat of the October 5, 2000 issue of *The Rattler*, as it relates to this case, is an article entitled "Sex Scandals Still Rock City Hall." Under this eye catcher is said, "Loud mouths and gossips had a field day earlier in the year when rumors of Mayor Piper's infidelity with his grants gal, the vivacious and every spunky Ms Lori Turner, spread like a Montana wildfire through the nooks and crannies of this otherwise quiet mini metropolis on the Cumberland River." The article continues with a recitation that, "as the story goes," the Mayor's wife, Donita Piper, catching him in the act with Ms. Turner the previous January, "clobbered him with a nine iron." [FN1]

FN1 The October 5, 2000 issue of *The Rattler* contains the disclaimer, "*The Rattler* is a miracle blend of fact, fiction, truth, opinion and satire. It uses inventive names in all its stories, except in cases where public figures are being satirized. Any other use of real names is accidental and coincidental. If you are a thin-skinned public official and don't like being satirized, give up the easy money and the perks of power and get out of the spotlight." The effect of this caveat, if any, addresses itself primarily to the issues between and among the parties still before the trial court.

*2 Curtis Mize answered the Complaint with general denials and, after discovery, filed a Motion for Summary Judgment. The trial court granted the Motion holding:

On November 15, 2001, the defendant, Curtis Mize, filed a motion for summary judgment. In support of his motion, the defendant simultaneously filed a memorandum of law, a statement of undisputed material facts and ten (10) exhibits consisting of publications, correspondence, portions of depositions, requests for admissions and an affidavit by the defendant. On December 18, 2001, the plaintiffs filed a brief in response to the

defendant's motion. On December 18, 2001, the defendant filed his reply to the plaintiffs' brief.

The Court has considered all of the above, deems the facts asserted by the defendant to be undisputed, and finds that there is no genuine issue as to any material fact and further finds that the defendant is entitled to summary judgment as a matter of law.

Plaintiffs timely appealed.

In granting the Motion for Summary Judgment filed by Defendant Curtis Mize, the trial court had before it undisputed facts establishing:

1. Paul Avallone, is the sole writer, publisher and editor of each issue of the newspaper known at (sic) "*The Rattler*" except the October 10, 2000 alleged edition of "*The Rattler*" which was not written, published, or distributed by Avallone.
2. Paul Avallone talked to no one about his planned newspaper before he began publishing "*The Rattler*."
3. Paul Avallone, alone, distributed the various issues of "*The Rattler*."
4. Paul Avallone printed and distributed thousands of copies [of] various issues of "*The Rattler*."
5. No one except Yvonne Van Der Touw knew prior to Paul Avallone's deposition in this lawsuit that Paul Avallone was the writer, publisher, and editor of "*The Rattler*."
6. Curtis Mize did not print any issue of "*The Rattler*."
7. Curtis Mize did not write any story found in any issue of "*The Rattler*."
8. Curtis Mize did not take any pictures used in any issue of "*The Rattler*."
9. Curtis Mize did not pay any printing costs of any issue of "*The Rattler*."
10. Curtis Mize did not tell Paul Avallone to publish any issue of "*The Rattler*."
11. Curtis Mize did not give Paul Avallone any story idea to use in any issue of "*The Rattler*."
12. Neither of the plaintiffs ever requested, either orally or in writing, that Curtis Mize retract any of the statements contained in any edition of "*The Rattler*."
13. The plaintiffs' complaint specifically asserts that the February 1, 2000, October 5,

2000 and October 10, 2000 editions of "The Rattler" contain defamatory statements concerning the plaintiffs

14 Among the "stories" contained in the February 1, 2000 edition of "The Rattler " are stories asserting the following that the Republican National Convention would be held in Clarksville in 2004 and that an additional 18,673 parking spaces had been located in downtown Clarksville

*3 15 Among the "stories" contained in the October 5, 2000 edition of "The Rattler " are stories asserting the following that God announced that one local politician was going to win an upcoming election, and that Mayor Johnny Piper's head exploded on television during the taping of a program

16 Paul Avallone did not write, publish or distribute any copies of the document purporting to be the October 10, 2000 edition of "The Rattler "

17 Curtis Mize did not write, publish or distribute any copies of the documents purporting to be the October 10, 2000 edition of "The Rattler "

18. The plaintiffs cannot identify any harm suffered by them due to the actions of Curtis Mize

19 There were rumors in the community of Clarksville, Tennessee, before February 1, 2000, that Mayor Johnny Piper had allegedly had an affair and that the plaintiff, Donita Piper, caught her husband in such an affair and hit him with a golf club

20 Plaintiff Lori Turner is a former candidate for Mayor of the City of Clarksville

21 Plaintiff Lori Turner has been the subject of numerous articles in both the "Our City " newspaper and "The Leaf Chronicle " newspaper

22 Plaintiff Lori Turner has been the featured speaker at various civic groups in the past 7 years

23 Plaintiff Lori Turner has hosted a local radio talk show

24 Plaintiff Donita Piper is married to the Mayor of Clarksville, Tennessee

25 Plaintiff Donita Piper has traveled out of the state and country as the spouse of the Mayor of Clarksville, Tennessee

26 Plaintiff Donita Piper has written stories

and has been a guest commentator for "The Leaf-Chronicle " newspaper

27 Curtis Mize did not distribute any copies of the February 1, 2000 edition of "The Rattler "

28 Paul Avallone anonymously left several copies of the October 5, 200[0] edition of "The Rattler " at the front door of Curtis Mize's business before Curtis Mize arrived at work one day in early October 2000

29 Along with the October 5, 2000 edition of "The Rattler," Curtis Mize also has allowed other free publications, such as "Our City " to be placed on his counter at work for customers to take if they choose [FN2]

FN2 These undisputed facts are taken verbatim from the Defendant's Rule 56.03 Statement of Undisputed Material Facts filed with his Motion for Summary Judgment. The Statement of Undisputed Facts is indeed, undisputed by Plaintiffs/Appellants

DEFAMATION

Certain near universal rules of law form a backdrop for our consideration. The law of defamation consists of the twin torts of libel and slander. *Lara v. Thomas*, 512 N.W.2d 777 (Iowa 1994), *Batt v. Globe Engineering Co.*, 774 P.2d 371 (Kan. Ct. App. 1989). "It is reputation which is defamed, reputation which is injured, and reputation which is protected by the law of defamation." 50 Am. Jur.2d *Libel and Slander* § 2 (1995), see also *Gobin v. Globe Publ'g Co.*, 649 P.2d 1239 (Kan. 1982).

As regards a private person, "To establish a prima facie case of defamation in Tennessee, the plaintiff must establish that 1) a party published a statement, 2) with knowledge that the statement is false and defaming to the other, or 3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement. See Restatement (Second) of Torts § 580 B (1977), *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978)." *Sullivan v. Baptist Mem'l Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999).

*4 As regards a public official or public figure, Tennessee follows section 580(a) of the Restatement of Torts providing

§ 580A. *Defamation of Public Official or Public Figure*. One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he
(a) knows that the statement is false and that it defames the other person, or
(b) acts in reckless disregard of these matters.

Press, Inc. v. Verran, 569 S.W.2d 435, 442.

" 'Publication' is a term of art meaning the communication of defamatory matter to a third person." *Sullivan*, 995 S.W.2d at 571-72 (citing *Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818, 821 (Tenn.1994)). "This being a civil and not a criminal suit for libel, it is essential that there be publication; that is, a communication of the defamatory matter to a third person. This is so for the reason that the gravamen of the act is the pecuniary damage to the character or credit of the party libeled. No such damage can arise, of course, without publication." *Freeman v. Dayton Scale Co.*, 19 S.W.2d 255, 256 (Tenn.1929). There is a difference between civil and criminal actions for liable where publication is concerned. "In the former, publication must be made to some third person, or in such public manner as to reach third persons; but, in criminal proceedings, publication may be made by communicating the printed matter alone to the party libeled." *Fry v. McCord*, 33 S.W. 568, 571 (Tenn.1895).

If the person allegedly libeled is a "public official or public figure," only clear and convincing proof of actual malice on the part of the defendant will survive a motion for summary judgment. *Trigg v. Lakeway Publishers, Inc.*, 720 S.W.2d 69, 75 (Tenn.Ct.App.1986).

The defamation action at bar is a libel action, as opposed to one for slander. Three questions are dispositive of the case:

1. Did Curtis Mize "publish" the October 5, 2000 issue of "The Rattler"?
2. Are Donita Piper and Lori Turner "public figures"?
3. If so, does the record disclose sufficient evidence of actual malice on the part of

Curtis Mize?

THE STANDARD OF REVIEW ON APPEAL

As to the questions of whether or not Defendant Mize published the October 5 issue of *The Rattler* and whether or not Donita Piper and Lori Turner are "public figures," the standard of review of a grant of summary judgment is well settled by *Byrd v. Hall*, 847 S.W.2d 208 (Tenn.1993) and *Evco Corp. v. Ross*, 528 S.W.2d 20 (Tenn.1975). The trial court, and this Court on appeal, must look at all the evidence and take the strongest legitimate view of it in favor of the opponent of the motion allowing all reasonable inferences in favor of the opponent and discarding all countervailing evidence. If, after doing so, there is any dispute as to any material fact or any doubt as to the conclusion to be drawn from the evidence, the motion must be denied.

*5 As to the third question, assuming Plaintiffs are actually "public figures," Defendant can be held liable only if actual malice is supported by clear and convincing evidence. A different, and rather controversial, standard of review is applicable on summary judgment. In addressing this very issue, the Supreme Court of the United States, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505; 91 L.Ed.2d 202, 255-56 (1986), held:

In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the *New York Times* "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding

either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

In sum, a court ruling on a motion for summary judgment must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists--that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity.

This holding by the Court evoked two of the most vigorous dissenting opinions in print with Justice Brennan observing:

The Court today holds that "whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case," *ante*, at 255. In my view, the Court's analysis is deeply flawed, and rests on a shaky foundation of unconnected and unsupported observations, assertions, and conclusions. Moreover, I am unable to divine from the Court's opinion *how* these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment. Accordingly, I respectfully dissent.

....

In my view, if a plaintiff presents evidence which either directly or by permissible inference (and these inferences are a product of the substantive law of the underlying claim) supports all of the elements he needs to prove in order to prevail on his legal claim, the plaintiff has made out a prima facie case and a defendant's motion for summary judgment must fail regardless of the burden of proof that the plaintiff must meet. In other words, whether evidence is "clear and convincing," or proves a point by a mere preponderance, is for the factfinder to determine. As I read the case law, this is how it has been, and because of my concern that today's decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain.

*6 *Anderson*, 477 U.S. at 257-58, 268 (Brennan, J., dissenting).

Justice Rehnquist observed:

The Court, apparently moved by concerns for intellectual tidiness, mistakenly decides that the "clear and convincing evidence" standard governing finders of fact in libel cases must be applied by trial courts in deciding a motion for summary judgment in such a case. The Court refers to this as a "substantive standard," but I think it is actually a procedural requirement engrafted onto Rule 56, contrary to our statement in *Calder v. Jones*, 465 U.S. 783 (1984), that "[w]e have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Id.*, at 790- 791.

The Court, I believe, makes an even greater mistake in failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now. *Id.* at 268-69 (Rehnquist, J., dissenting).

Tennessee echoed to follow the *Anderson* majority in *Trigg v. Lakeway Publishers, Inc.*, wherein this Court held:

Plaintiff also contends that summary judgment was inappropriate even if he was a public figure because there is a genuine issue of fact of whether the *Times* and Thompson were guilty of "actual malice."

... *New York Times Co. v. Sullivan* [376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)] makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth [and] unless the court finds, on the basis of pretrial affidavits, depositions, or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment.

Wright, J., concurring, *Wasserman v. Time, Inc.*, 424 F.2d 920, 922 (D.C.Cir.), *cert. denied*, 398 U.S. 940, 90 S.Ct. 1844, 26 L.Ed.2d 273 (1970).

"[A] public figure cannot resist a newspaper's motion for summary judgment under Rule 56 by arguing that there is an issue for the jury as to malice unless he makes some showing, of the kind contemplated by the Rules, of facts from which malice may be inferred." *Thompson v. Evening Star Newspaper Co.*, 394 F.2d 774, 776 (D.C.Cir.1968).

Whether there is "actual malice" is a proper question to be decided on motion for a summary judgment.

On motion for summary judgment where plaintiff, as in this case, is a "public figure," it is incumbent upon him to show "actual malice" with "convincing clarity." See *New York Times Co. v. Sullivan*, 376 U.S. at 285-286, 84 S.Ct. at 729, 11 L.Ed.2d at 710.

Trigg, 720 S.W.2d at 74; see also *Tomlinson v. Kelley*, 969 S.W.2d 402 (Tenn.Ct.App.1997).

*7 It is, therefore, incumbent upon this Court, in reviewing this grant of summary judgment as to the issue of actual malice, to determine, not whether there is material evidence in the record supporting Plaintiffs, but whether or not the record discloses clear and convincing evidence upon which a trier of fact could find actual malice.

PUBLICATION

"Publication" as used in the tort of defamation has no relationship to the ordinary meaning of the term as used in everyday life. In the law of defamation, it is a term of art meaning the communication of defamatory matter to a third person. *Quality Auto Parts*, 876 S.W.2d at 821; *Sullivan*, 995 S.W.2d at 571-72. "Publication" is an element of the tort which the plaintiff must prove or suffer his complaint to be dismissed.

The term "publication" causes some confusion in a libel case such as this because it is both a business term meaning printing and distribution of written materials and a legal term meaning communication of libelous matter to a third person. Painter, "Republication Problems in the Law of Defamation," 47 Va.L.Rev. 1131 (1961); 62 Harv.L.Rev. 1041 (1949). Moreover, "publication" used as a legal term in the *Isenberg* case and in T.C.A. § 39-2702 does not

determine how many causes of action are created by printing and distribution of a libelous book. Rather, use of the legal term in those instances merely indicates that publication is an essential element of a libel action without which the complaint must be dismissed.

Applewhite v. Memphis State University, 495 S.W.2d 190, 192-3 (Tenn.1973).

A distinction must, likewise, be drawn between the use of the term "publication" in a criminal indictment and its use as an element of the civil tort.

It is proper to state that there is a marked difference between civil and criminal actions for libel,—so far, at least, as the question of publication is concerned. In the former, publication must be made to some third person, or in such public manner as to reach third persons; but, in criminal proceedings, publication may be made by communicating the printed matter alone to the party libeled. The reason for this difference is that in a civil action of libel the gravamen of the action is the pecuniary damage to the character or credit of the party libeled, but in a criminal action the ground of the offense is the liability of the words written to provoke a breach of the peace. In the civil action the only publication that could injuriously affect the credit and character is that made to third persons, as no damage to credit or character could result from a letter or writing known only to the party to whom it is sent, and not communicated to others.

Fry, 33 S.W. at 571-72 (citations omitted); see also *Insurance Research Service, Inc. v. Associates Financial Corp.*, 134 F.Supp. 54, 61 (M.D.Tenn.1955).

While the undisputed facts show that thousands of copies of all editions of *The Rattler* were freely distributed in the Clarksville community by its publisher, Paul Avallone, and others, the case before the Court as to Curtis Mize is limited to what the undisputed facts show to be his individual conduct. He is a political opponent of the Piper administration and makes no secret in deposition that his sympathies lie with the writer, publisher and editor of *The Rattler*. The same undisputed facts

show, however, that his participation in any distribution of *The Rattler* was limited to allowing a number of copies of the October 5, 2000 issue to be placed on the counter of his place of business, along with other free newspapers, for his customers to take if they elected to do so. There is no evidence in the record that any copy of the October 5, 2000 edition of *The Rattler* ever reached the hands of a third party by any action of Curtis Mize, or that any third party ever took a copy of *The Rattler* from the counter in his place of business. Donita Piper testified:

*8 Q. Okay. How many copies of the Rattler did Mr. Mize give out?

A. Again, I have no knowledge of that.

Q. Okay. To whom did Mr. Mize give copies of the Rattler?

A. Again, I don't know who his employees are. I don't know who his clients are. I don't know who his friends are. They would probably be able to answer that better than I, but I don't have any knowledge of who.

When asked in deposition what third party had received a copy of *The Rattler* from either Curtis Mize or his place of business, Lori Turner could name no person, save a single individual named Roger Freeman, and as to this person, she testified:

Q. Well, didn't you say Mr. Freeman didn't--he tried to give him a copy and Mr. Freeman or Pastor Freeman didn't take it?

A. Correct.

Q. So do you have the names of anybody who can corroborate that they received a copy of the Rattler from Mr. Mize?

....

A. No.

An unsuccessful effort to deliver an alleged libelous document to a third person will not suffice to establish "publication."

There appears to be no question in the law of defamation that liability is not established unless the allegedly defamatory statement is in fact understood by a third person as referring to plaintiff. Restatement of the Law, Torts, Sec. 564 and comments; 53 C.J.S., Libel and Slander, § 82a, p. 133; 33 Am.Jur., Sec. 89, p. 102; Annotation 91 A.L.R., p. 1171; *Tompkins v. Wisener*, 33 Tenn. 458.

" * * * It is necessary that the recipient of the

defamatory communication understand it as intended to refer to the plaintiff * * *. If, however, the recipient does not understand that the plaintiff is intended thereby, the fact that the defamer intended to refer to him is immaterial." Restatement of the Law, Torts, Sec. 564, Comment, paragraph a.

Insurance Research Service, Inc., 134 F.Supp. at 61. In this same Restatement of Torts context, the Court of Appeals of Georgia held:

"In order to effect the publication of a libel there must be a reading of it. *Not only that, there must be an understanding of its meaning by the person reading it ...* Since the gravamen of civil libel is injury to reputation, where the evidence demands a finding that the libel was not read by those to whom it was alleged to have been communicated, and there is no evidence authorizing an inference that it was communicated to anyone else who read it, or will be presumed to have read it, the case must fall." (Emphasis supplied.) *Allen v.*

American Indem. Co., 63 Ga.App. 894, 895-896, 12 S.E.2d 127 (1940). "It is not enough that the language used is reasonably capable of a defamatory interpretation if the recipient did not in fact so understand it." Restatement of the Law, Torts 2d, § 563, Comment c, p. 163.

Sigmon v. Womack, 279 S.E.2d 254, 257 (Ga.Ct.App.1981).

We are not dealing, in this appeal, with a publisher of a newspaper or magazine where mass distribution would authorize a finding that the publication was read and understood by some third party within the context of Restatement (Second) of Torts section 563, but rather with a very limited posting of the October 5, 2000 issue of *The Rattler*, by one who had no part in the writing, publishing, editing or actively disseminating the scandal sheet. No competent material evidence has been offered that Curtis Mize "published" the October 5, 2000 issue of *The Rattler* within the meaning of the "publication" element of the tort of defamation. Summary judgment was properly granted by the trial court.

PUBLIC FIGURES

*9 The "actual malice" requirements of the landmark case of *New York Times Co. v. Sullivan*

do not apply to Donita Piper and Lori Turner unless it is first determined that they are 'public figures' within the meaning of *New York Times*. Tennessee adopted standards in sections 580A and 580B of the Restatement (Second) of Torts (1977) in establishing the distinction between defamation as to a public official or public figure and defamation of a private person. As to a public official or public figure, one can only be held liable if he knows that the statement is false and that it defames another person, or if he acts in reckless disregard of such matters. As to a private person, he may be held liable if he knows that the statement is false and that it defames the person, acts in reckless disregard of these matters, or acts negligently in failing to ascertain them. *Press, Inc.*, 569 S W 2d 435.

The disparity in treatment of these two classes of citizenry is inextricably interwoven with freedom of the press as defined in the First Amendment to the Constitution of the United States and in Article 1, section 19 of the Constitution of Tennessee. The right of the news media to criticize official conduct is the basis for the distinction between public figures and private persons. In the colorful words of Chief Justice Henry

From the days of the lonely pamphleteer operating clandestinely in Colonial America and crying out against the usurpations of the Crown, we have elected to reap the benefits and bear the burdens of a free and courageous press. It may disturb our tranquility, it may vex our peace of mind, it may outrage our sensibilities, it may shock our conscience, and it may even momentarily shake our beliefs in the right of freedom of the press, but so deeply grounded is our national commitment to a free press that we as a nation tolerate its abuses. The *Quid pro quo* is that we profit by the very freedom that sometimes causes us to squirm.

Press, Inc., 569 S W 2d at 442.

The heart of the *New York Times*' rule says, "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement

was made with 'actual malice' that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *New York Times*, 376 U S at 279 80 [FN3].

FN3 The Rule was extended to public figures by *Curtis Publishing Co. v. Butts*, 380 U S 130 (1967) and by *Gertz v. Robert Welch, Inc.*, 418 U S 323 (1974).

In determining the "public figure" status of Appellants, the Tennessee Supreme Court gives guidance.

The term "public figure" has been defined variously by the courts as reference to the above cases will indicate. Included within this classification must be those who have thrust themselves into the vortex of important public controversies, those who achieve such pervasive fame or notoriety that they become public figures for all purposes, and in all contexts, those who voluntarily inject themselves, or are drawn into public controversies, and become public figures for a limited range of issues, and those who assume special prominence in the resolution of public questions. There, no doubt, are other involvements that would invoke the 'public figures' designation.

*10 Finally, we think that a critical concern must be the nature and extent of the individual's participation in the particular controversy. See *Gertz, supra*. The status of the individual and the nature and extent of his involvement must be considered in those cases wherein the defamed party is involved in an activity affecting the public, but may not precisely fit into the pattern of a public official or public figure. It is a fact of life that one may be a public official today, a public figure tomorrow and a nonentity the next. His status must, in the last analysis, be dependent not only upon title or some convenient nomenclature, but also upon the character, nature, purpose, intent and extent of his participation in the particular controversy.

Press, Inc., 569 S W 2d at 441.

The undisputed facts show that Donita Piper, at the time of the events involved in this case, was the wife of the Mayor of the City of

Clarksville, that she traveled extensively out of the state and out of the country as the spouse of the Mayor, and that she has written stories and has been a guest commentator for *The Leaf-Chronicle* newspaper. Lori Turner was the incumbent Grants Writer for the City of Clarksville. She had been a candidate for Mayor of the City of Clarksville; had been the subject of numerous articles in both the *Our City* newspaper and *The Leaf-Chronicle* newspaper; had been a featured speaker at various civic groups in the past seven years; and had been host of a local radio talk show. Both Donita Piper and Lori Turner are "public figures" within the parameters laid down by *Press, Inc. v. Verran*.

ACTUAL MALICE

In this case, the Complaint does not allege, and the record does not contain, any evidence of a conspiracy. While the Complaint alleges joint and several liability as to all Defendants, the proof offered does not establish joint activity, at least as to Defendant/Appellee Curtis Mize. He must, therefore, be judged on this Summary Judgment Motion on the basis of his individual activity.

Evidence of "actual malice" within the *New York Times-Verran* standard is, at best, weak as to Mize and certainly does not rise to the dignity of "clear and convincing evidence." Summary judgment for Mize is mandated by *Tomlinson v. Kelley*.

Public figures who desire to pursue defamation actions bear a heavy burden of proof because of our society's commitment to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964). In order to recover damages, they must prove with convincing clarity that the defendant acted with actual malice. See *Press, Inc. v. Verran*, 569 S.W.2d 435, 551 (Tenn.1978); *Moore v. Bailey*, 628 S.W.2d 431, 433 (Tenn.Ct.App.1981).

The concept of actual malice in defamation cases connotes more than personal ill will, hatred, spite, or desire to insure. See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510,

111 S.Ct. 2419, 2429, 115 L.Ed.2d 447 (1991); *McCluen v. Roane County Times, Inc.*, 936 S.W.2d at 939; *Windsor v. Tennessean*, 654 S.W.2d 680, 688 (Tenn.Ct.App.1983). Rather, it is limited to statements made with knowledge that they are false or with reckless disregard to their truth or falsity. See *Press, Inc. v. Verran*, 569 S.W.2d at 441; *Cloyd v. Press, Inc.*, 629 S.W.2d 24, 27 (Tenn.Ct.App.1981); Restatement (Second) of Torts § 580A (1977). Determining whether a defendant acted with reckless disregard requires the finder of fact to determine whether the defendant "in fact entertained serious doubts as to the truth of his [or her] publication." *Trigg v. Lakeway Publishers, Inc.*, 720 S.W.2d at 75 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968)).

*11 *Tomlinson*, 969 S.W.2d at 405-06.

It is admitted by Plaintiffs that rumors of an affair between Mayor Piper and Lori Turner were rampant in the community long before the October 5, 2000 edition of *The Rattler*. The best that can be said of the proof is that it establishes that, Mize did not subjectively believe the rumors, that he did not investigate the validity of the rumors, and that he was a political opponent of Mayor Piper. These facts fall considerably short of being "clear and convincing evidence" of actual malice on the part of Curtis Mize. Summary judgment was properly granted. See *Sullivan*, 376 U.S. 254; *Gertz*, 418 U.S. 323; *Liberty Lobby, Inc.*, 477 U.S. 242; *Press, Inc.*, 569 S.W.2d 435; *Trigg*, 720 S.W.2d 69; *Tomlinson*, 969 S.W.2d 402.

As to the allegations of outrageous conduct and false light invasion of privacy, no proof is offered that the conduct of Curtis Mize "has been so outrageous in character, and so extreme in degree, as to go beyond the pale of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." *Major v. Charter Lakeside Hosp., Inc.*, 1990 WL 125538, at * 3 (Tenn.Ct.App. Aug. 31, 1990). The rumors contained in the October 5, 2000 issue of *The Rattler* were already prevalent in the Clarksville community long before October 5, 2000. No basis exists for a claim of false light invasion of privacy. *Langford v.*

Vanderbilt University, 287 S.W.2d 32 (Tenn.1956); *Fann v. City of Fairview*, 905 S.W.2d 167 (Tenn.Ct.App.1994); *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640 (Tenn.2001).

CONCLUSION

Whatever may be the rights and responsibilities between and among parties still before the trial court is not material to this appeal. On this Rule 54.02 designation of finality and the appeal of the Plaintiffs as to Curtis Mize, we are called upon to adjudge whether or not the trial court correctly granted summary judgment to Curtis Mize. We find summary judgment to have been properly granted and, in all respects, affirm the judgment.

Costs of this cause are assessed to the Appellants.

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