

STATE OF MICHIGAN
COURT OF APPEALS

JAMI SLAWICK,

Plaintiff-Appellee,

v

DETROIT NEWSPAPER AGENCY, d/b/a
DETROIT NEWS, INC.,

Defendant-Appellant.

UNPUBLISHED

May 18, 2001

No. 219647

Wayne Circuit Court

LC No. 96-645796-CK

Before: Griffin, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Following a jury trial, plaintiff was awarded a judgment of \$106,000 in this defamation action. Defendant subsequently moved for judgment notwithstanding the verdict (JNOV) or for a new trial, which was denied by the trial court. Defendant appeals as of right and we affirm.

Plaintiff began working for *The Detroit News* in 1987 as a referral mailer and continued to work in this position until late March or early April of 1995, when she went on a pregnancy leave. On July 13, 1995, several of the newspaper unions called a strike. Plaintiff was still on her pregnancy leave at that time and, according to her, she did not attend any union meetings between her pregnancy leave and the beginning of the strike, she was not active in union activities, and she did not go on strike or attend any picket lines. During the course of the strike, there were numerous demonstrations, some of which were rather violent.

Plaintiff gave birth to her son on September 13, 1995, and was discharged from the hospital on September 15, 1995. On September 17, 1995, an incident occurred during a picketing demonstration at defendant's Riverfront Plant located on Jefferson. Apparently, a woman who was picketing climbed a fence and threw liquid substances (hot coffee and orange juice) on four security officers. Three of the four security officers involved stated that they could identify the woman. There was a videotape of the incident, which was reviewed by George Formicola, a supervisor in the plate-making department who had known plaintiff for about seven years. Formicola identified plaintiff as the woman throwing the liquid substances on the security officers.

On November 20, 1995, plaintiff received a letter of discharge (dated November 16, 1995) stating that she was discharged from her employment "because of your conduct on

September 17, 1995” accusing her of throwing liquid substances on security personnel at the Riverfront Plant. Plaintiff then spoke with John Taylor, defendant’s senior legal counsel and director of labor relations, and denied the allegation, stating that she had just had a baby and was not at the picket line. After numerous telephone calls and letters by plaintiff and her attorneys, it was determined that plaintiff was not the woman involved in throwing the liquid substances at the security officers, although defendant did not make this admission until July 25, 1996, at which time plaintiff was offered a return to her position. Plaintiff did not return to defendant’s employ.

Following trial, the jury returned a verdict in plaintiff’s favor on her defamation claim for \$106,000 (\$6,000 for economic damages, \$75,000 for noneconomic damages, and \$25,000 for exemplary damages). Defendant’s posttrial motion for JNOV or new trial was denied by the trial court.

On appeal, defendant first argues that the trial court erred in failing to dismiss the defamation claim because of lack of subject matter jurisdiction. Defendant contends that the claim is preempted by federal labor law because the claim requires interpretation of the collective bargaining agreement (CBA) with the Detroit Mailers Union.

In *Betty v Brooks & Perkins*, 446 Mich 270, 280; 521 NW2d 518 (1994), our Supreme Court held that the test for preemption under § 301 of the Labor Management Relations Act, 29 USC 185(a), is whether resolution of a plaintiff’s state law claim (here, defamation) requires interpretation of the CBA. Here, however, defendant used the CBA only as a defense by claiming that the CBA required that it provide written notice to the union’s president (Al Young) regarding plaintiff’s discharge and, therefore, the communication was absolutely privileged. Federal courts have held that “reliance on a CBA term purely as a defense to a state law claim does not result in section 301 preemption.” *Fox v Parker Hannifin Corp*, 914 F2d 795,800 (CA 6, 1990), citing *Caterpillar, Inc v Williams*, 482 US 386, 399; 107 S Ct 2425; 96 L Ed 2d 318 (1987) and *Smolarek v Chrysler Corp*, 879 F2d 1326, 1334 (CA 6, 1989). Consequently, plaintiff’s defamation claim is not preempted by § 301 of the Labor Management Relations Act because defendant used the CBA solely as a defense to the claim, contending that publication of the letter accusing plaintiff of throwing the liquid substances was absolutely privileged to the union president.

Moreover, we note that two months after plaintiff filed her complaint, defendant filed a notice of removal of the action to the federal district court on the basis of subject matter jurisdiction. The federal district court ruled that plaintiff was not a union member and, thus, the claim was not preempted by federal labor law. The testimony at trial, like the evidence before the federal district court, was that plaintiff was not a union member. As such, plaintiff was not covered by the terms of any CBA to the extent that her defamation claim was preempted by federal labor law. *Haber v Chrysler Corp*, 958 F Supp 321, 328 (ED Mich, 1997).

Accordingly, we find that the trial court did not err in ruling that plaintiff’s defamation claim was not preempted by federal labor law.

Defendant next attacks the defamation claim itself, arguing that plaintiff failed to present sufficient evidence at trial to sustain each element. The elements of defamation are: (1) a false

and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992).

Initially, defendant argues that publication of the November 16, 1995, discharge letter was absolutely privileged. Defendant, however, did not raise this issue until after trial when it moved for a directed verdict and later for JNOV. Indeed, defendant did not request an instruction on absolute privilege; rather, the parties agreed to a qualified privilege instruction. Accordingly, this issue is waived for appellate review.

Moreover, it is clear that an absolute privilege does not apply to the facts of this case. An absolute privilege was defined in *Kefgen v Davidson*, 241 Mich App 611, 618; 617 NW2d 351 (2000):

Communications deemed absolutely privileged are not actionable, even when spoken with malice. . . . The doctrine of absolute privilege is narrow and applies only to communications regarding matters of public concern. . . . The absolute privilege has generally been applied to communications made during legislative and judicial proceedings and to communications by military and naval officers. . . . The doctrine was extended to communications made by a public official in furtherance of an official duty during proceedings of subordinate legislative and quasi-legislative bodies.

Because this case does not implicate any of these types of communications, it is clear that an absolute privilege does not apply in any event. Accordingly, the trial court did not err in denying defendant's motion for a directed verdict or JNOV on this basis.

To the extent that defendant argues that the trial court erred in not finding that a qualified privilege existed with regard to publication of the letter to Al Young,¹ we find no error requiring reversal. Following defendant's motion for summary disposition on this issue, the trial court ruled that a question of fact existed regarding whether the communication to Young was qualifiedly privileged. Thus, the jury was left to the task of determining whether defendant had a qualified privilege to publish the letter to Young, and the jury answered on the special verdict form that defendant did have a qualified privilege in this regard. The jury further determined that defendant had knowledge that the letter was false or that the letter was published with reckless disregard as to its truthfulness (actual malice).

Defendant now argues that had the trial court initially ruled that it was entitled to a qualified privilege with respect to publication of the letter to Young, the trial court could not have given the jury the option of finding mere negligence, as opposed to the higher standard of actual malice. However, we find that even if the trial court erred in allowing the jury to

¹ We note that defendant argues this issue in a footnote in its appellate brief.

determine whether defendant had a qualified privilege to publish the letter to Young because the question whether defendant had a qualified privilege in this regard is a question of law for the court, *Prysak v R L Polk Co*, 193 Mich App 1, 14-15; 483 NW2d 629 (1992), the error was clearly harmless in light of the jury's findings. MCR 2.613(A).

Defendant next argues that the trial court erred in denying its motions for a directed verdict or JNOV because plaintiff failed to establish actual malice as an element of her defamation claim.

“An employer has a qualified privilege to defame an employee by making statements to other employees whose duties interest them in the subject matter.” *Patillo v Equitable Life Assurance Society of the United States*, 199 Mich App 450, 454; 502 NW2d 696 (1993). A plaintiff may overcome a qualified privilege by showing that the statement was made with actual malice. *Prysak, supra*, p 15. A statement made with actual malice is that which is made with knowledge of its falsity or reckless disregard of the truth. *Id.* The issue of actual malice is that for the jury, for which supporting facts must be given. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 79; 480 NW2d 297 (1991).

Having reviewed the record, we find that the jury could have found, based on the evidence adduced at trial, that defendant acted with actual malice in disseminating the letter of discharge. Initially, the identification of plaintiff as the woman throwing the liquid substances on the security officers was made by Formicola, who had known plaintiff for about seven years at the time of the incident in September 1995. As of February 1995, Formicola had become a supervisor in the plate making department and did not have contact with plaintiff in the course of their jobs. Formicola did not know of plaintiff's pregnancy in 1995. Further, Formicola had no specific recollection of seeing plaintiff at any time in 1995 after he became a supervisor.

Formicola reviewed the videotape of the incident three to five times and identified plaintiff as the woman throwing the liquid substances on the security officers. Formicola volunteered to review these videotapes and identify people on the videotapes. He stated that he was not told that his identifications could result in discharge and he further stated that if he had been so told, he would have been more careful in his review of the videotapes. Although Formicola felt he was certain about his identification of plaintiff and believed he was very careful in reviewing the videotape, he admitted at his deposition that had he been more careful in reviewing the videotape in November 1995 for a second time, he could have observed that the woman on the videotape was not plaintiff.

Timothy Kelleher, defendant's senior vice-president of labor relations who had the final decision with regard to discipline for strike-related incidents, and was responsible for investigation and recommendation of these incidents, stated that he reviewed the file one or two days before he wrote the discharge letter of November 16, 1995. Kelleher stated that he reviewed the file, discussed it with Taylor, and essentially relied on Formicola's statement identifying plaintiff as the person throwing the liquid. After plaintiff telephoned Kelleher's office regarding the discharge letter, Kelleher told Taylor to resolve the problem.

Taylor, like Kelleher, did little in terms of actual investigation and ensuring that the identification of plaintiff was correct, even after he spoke with her on the telephone. Taylor

stated that during the strike, he was responsible for handling security reports, reviewing videotapes, reviewing other evidence, and determining the action to be taken. Taylor received the file regarding this incident sometime in November 1995. Taylor admitted that he never spoke to, or even attempted to contact, the security officers regarding their possible identification of the woman, despite the fact that three of the four indicated in their reports that they could identify the woman involved. Moreover, there is apparently a rather clear color photograph of the woman throwing the liquid substances in the file that was not shown to Formicola for identification purposes. Formicola conceded that had he seen the color photograph, he would have known that the woman was not plaintiff.

Formicola did not speak to Taylor until July 3, 1996, despite the fact that plaintiff immediately telephoned Kelleher's office upon receiving the letter. Neither Taylor nor Kelleher contacted any other known witnesses (such as the security officers), nor did they contact plaintiff's supervisor. Further, Taylor merely assumed that plaintiff was on strike, but never asked her or otherwise attempted to verify this information.

Under these circumstances, the jury could find, as it did, that defendant acted with actual malice. That is, there was evidence at trial that the contents of the November 16, 1995, discharge letter were made with reckless disregard for the truth of the letter. Therefore, the trial court did not err in denying defendant's motion for a directed verdict or JNOV on this issue.

Defendant also argues that the trial court's instructions to the jury regarding actual malice and reckless disregard were erroneous. Claims of instructional error are reviewed de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The jury instructions are examined as a whole to determine whether there is error requiring reversal. *Id.* Even if somewhat imperfect, if the theories of the parties and applicable law are adequately and fairly presented to the jury, there is no error requiring reversal. *Id.* Reversal for instructional error is warranted only where failure to do so would be inconsistent with substantial justice. *Id.*

We have reviewed the trial court's instructions to the jury concerning actual malice and conclude that the instructions were appropriate and in accord with case law. The trial court properly instructed the jury that plaintiff had to overcome a qualified privilege by showing actual malice on the part of defendant and that actual malice is knowledge of the falsity or reckless disregard as to whether the statement was false. *Prysak, supra*, p 15; *Gonyea, supra*, p 79; *Smith v Fergan*, 181 Mich App 594, 597; 450 NW2d 3 (1989). There is no need to further define "reckless disregard" as defendant contends because that is part of the definition of actual malice. Cases do not further define "reckless disregard" and there appears to be no reason why a jury would not understand the meaning of "reckless disregard of the truth" on its own terms.

Accordingly, the trial court did not err in its jury instructions regarding actual malice.

Defendant next argues that the trial court erred in denying defendant's motion for a directed verdict or JNOV because plaintiff failed to prove a defamatory statement as part of her claim.

A defamatory statement is a communication that tends to harm the plaintiff's reputation so as to lower the plaintiff in the estimation of the community or to deter third persons from

associating or dealing with the plaintiff. *Rouch, supra*, p 251. There is no question that the statement that plaintiff threw liquid substances at the security officers was false; Kelleher admitted as such at trial. In fact, Kelleher also testified that that he considered this conduct to be “serious,” assaultive,” “gross misconduct,” and a “dischargeable offense.” The letter itself stated that such behavior was unacceptable and constituted just cause for plaintiff’s discharge. Defendant’s contention on appeal that the statement is merely “non-actionable accusation of bad judgment” is entirely unpersuasive in light of its own assessment and actions taken against plaintiff. Consequently, the jury could properly find that that statement had a tendency to harm plaintiff’s reputation and the trial court did not err in denying the motion for a directed verdict or JNOV on this basis.

Further, defendant’s arguments regarding the doctrine of libel per se, in that the statement did not constitute libel per se, are really nonissues in light of the jury’s finding that the statement did not constitute libel per se. Moreover, the trial court’s instruction to the jury regarding libel per se was not erroneous or prejudicial as defendant contends. Words charging the commission of a crime or imputing lack of chastity constitute defamation per se. *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 727-728; 613 NW2d 378 (2000). Because defendant’s own agents believed that the action of throwing hot coffee and orange juice on four security officers during a picket constituted an assault, gross misconduct, and a dischargeable offense, it was reasonable for plaintiff to argue that the statement charged the commission of a crime (assault) and was libel per se. Likewise, the trial court did not err in instructing the jury on libel per se because there is evidence supporting the instruction. *Case, supra*, p 6. There is no error requiring reversal with respect to the issue of libel per se as presented at trial.

Defendant next argues that the trial court erred in denying its motion for a directed verdict or JNOV because plaintiff failed to prove injury to reputation, and failed to prove any damages, including economic (back pay) and emotional distress damages.

This issue implicates MCL 600.2911; MSA 27A.2911, which provides in relevant part:

(2)(a) Except as provided in subdivision (b), in actions based on libel or slander the plaintiff is entitled to recover only for the actual damages which he or she has suffered in respect to his or her property, business, trade, profession, occupation, or feelings.

(b) Exemplary and punitive damages shall not be recovered in actions for libel unless the plaintiff, before instituting his or her action, gives notice to the defendant to publish a retraction and allows a reasonable time to do so, and proof of the publication or correction shall be admissible in evidence under a denial on the question of the good faith of the defendant, and in mitigation and reduction of exemplary or punitive damages. . . .

* * *

(7) An action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood

concerns the private individual and was published negligently. Recovery under this provision shall be limited to economic damages including attorney fees.

In *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993), this Court, in construing § 2911, held that private-figure plaintiffs who prove actual malice are entitled to, among other things, actual damages for reputation *or* feelings.

In the present case, plaintiff correctly argues that she was not required to prove injury to reputation because she alleged and proved actual malice and is, therefore, entitled to actual damages for feelings. In this regard, plaintiff testified that she was very upset when she received the discharge letter and telephoned Kelleher's office because she did not throw liquid substances on the security officers. She testified that she was scared, that the situation created a great deal of stress, and that she was depressed when she received the discharge letter. She believed that retaliatory action would be taken against her and that she might be subject to criminal prosecution since she was accused of trying to injure people. When she first talked to Taylor on the telephone in November 1995, plaintiff stated that after explaining to him that she was not the person involved because she had just given birth to her child before the incident occurred, Taylor yelled at her, "We're going to get you, we can prove it. We have you on video. We have pictures of you." By January and February of 1996, plaintiff stated that she was "devastated" because she needed a job desperately and "they wouldn't give me five minutes to clear my record."

Under these circumstances, we find that plaintiff adequately proved actual malice and was therefore entitled to actual damages for reputation or feelings. Thus, the jury's award for noneconomic damages was sustained by the evidence.

With respect to economic damages, the jury awarded \$6,000. Plaintiff testified that she was ready to return to work around November 23, 1995; however, the letter of discharge is dated November 16, 1995, and she received the letter on November 20, 1995. Further, although plaintiff was admittedly having some medical problems in 1996, there was evidence that she could have continued to work until June 24, 1996, when she began being treated by her doctor and ultimately had surgery in November 1996. Defendant offered reinstatement in its letter dated July 25, 1996; however, plaintiff admittedly could not return to work at that time because of her medical disability. Further, plaintiff was making \$16 an hour, and did not request any economic damages beyond the July 25, 1996, offer of reinstatement. Therefore, we conclude that the jury's award for economic damages is supported by the evidence.

Accordingly, the trial court did not err in denying defendant's motions for a directed verdict or JNOV regarding the issue of damages.

Lastly, defendant argues that it is entitled to a new trial because plaintiff's counsel improperly argued facts not in evidence during rebuttal argument. During trial, the following argument was made by plaintiff's counsel during rebuttal argument:

And for Mr. Neihoff to now come before you and say that the Detroit Newspaper Agency did all they can, and that she could have remedied the situation at any time. Well, first of all, she made a telephone call. She was

screamed at by Mr. Taylor at least by her remembrance of the conversation. Mr. Taylor says he doesn't have a recollection of that, but in his deposition he said he could have raised his voice.

Second of all, they received a letter from Mr. Garton, an attorney. They received a letter from me an attorney, and I can assure you that there were several telephone calls in between there.

MR. NEIHOFF: Objection, Your Honor. There's no evidence about any telephone call. I'm unaware of any.

MR. METRY: Well, there is a dialogue that goes on between lawyers that maybe it's not generated by--

THE COURT: I'm going to overrule the objection.

MR. METRY: -- that is not generated by correspondence, and I can assure you that we did—we were trying to do what we could do to remedy the situation.

Contrary to defendant's argument, the statement made by plaintiff's counsel at rebuttal argument was based on evidence presented at trial. Plaintiff received her discharge letter on November 20, 1995, and had her first telephone conversation with Taylor on that date. Taylor further testified that he had a telephone conversation with plaintiff's first counsel (Garton) on November 22, 1995, and there is a follow-up letter from Taylor to Garton dated November 30, 1995, specifically referencing the telephone conversation. Taylor also testified to a telephone conversation he had with plaintiff's counsel (Diana Dinverno) sometime after June 6, 1996, to set up the appointment to meet plaintiff personally in counsel's office on July 3, 1996.

Plaintiff's counsel's argument that there were telephone conversations between plaintiff's counsels and defendant was entirely supported by trial testimony. Consequently, it is supported by the evidence and is not improper argument. Counsel was clearly arguing to the jury that plaintiff indeed attempted to mitigate her damages. Moreover, as noted by plaintiff, the trial court instructed the jury on more than one occasion that the arguments of the lawyers were not evidence and that the jury must base its decision only on the evidence.

Accordingly, reversal is not warranted regarding this issue because plaintiff's counsel's rebuttal argument was proper because it was based on the evidence.

Affirmed.

/s/ Richard Allen Griffin

/s/ Kathleen Jansen

/s/ Hilda R. Gage