

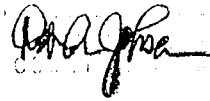
STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Timothy M. Halloran,
Plaintiff,



**ORDER GRANTING
SUMMARY JUDGMENT**

vs.

Court File No. 27 CV 08-4983

FranChoice, a Minnesota Corporation,
Defendant.

The above-entitled matter came duly on for hearing before Judge Mary S. DuFresne on September 25, 2008.

APPEARANCES:

Howard Bolter, Esq., appeared for Timothy M. Halloran.

Sonja Miller-Van Oort, Esq., appeared for FranChoice, a Minnesota Corporation.

Based upon the evidence adduced, the argument of counsel, and all of the files, records, and proceedings herein,

IT IS ORDERED:

1. Defendant's Motion for Summary Judgment is **GRANTED**.
2. Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**.
3. Judgment shall be entered in Defendant's favor.
4. The attached Memorandum is incorporated by reference herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Date: _____

11/24/08



Mary S. DuFresne
Judge of District Court

MEMORANDUM

Plaintiff Timothy Halloran was previously employed with The Maids International (“TMI”). Plaintiff sold franchises for TMI. TMI, as a franchisor, used the services of Defendant, FranChoice, to connect TMI with franchisees.

Plaintiff’s most recent supervisor at TMI was Mike Urdahl. Mr. Urdahl verbally warned Plaintiff about his behavior during Plaintiff’s last year of employment. Between September 10 and 12, 2007, Defendant FranChoice hosted an event at Vail Cascade Resort in Vail, Colorado. Lori Kaiser-Block was the President of FranChoice at that time.

On the second night of the Vail event, Plaintiff consumed three alcoholic drinks at the hotel bar. After consuming the drinks, he retired to his hotel room and went to sleep. Plaintiff woke up disoriented about one hour later and needed to use the bathroom. Instead of going into the bathroom in his hotel room, he walked out of his hotel room into the hotel hallway and his hotel room door locked behind him. Plaintiff used a bathroom on the first floor of the hotel. Upon leaving the restroom, two hotel security guards confronted Plaintiff. One of the guards saw moisture on the floor in a vending area that contained an ice machine (hereinafter referred to as “the ice machine room”). The guard accused Plaintiff of urinating on the floor in the ice machine room.

During the night, Tom LeClair, the manager on duty, entered information about the incident in the hotel manager’s log. The log read as follows:

A guest came to me at the front desk and stated there was a man walking around the 4th floor main in his underwear. He also stated that this man was disoriented and very intoxicated, and possibly defiling our ice machine. Nick (security) and I responded and found that the man had made it down to the lobby restrooms. He stated he was not a guest, but then looking up his information we verified him to be in room 427. Two of his business colleagues helped him back up to his room. It was then that it seemed he had deposited some bodily fluids in the ice machine room. I had Armando (eng) close that room and clean the mess. We informed the guest he could not be walking around the hotel like this, and that if any other problems came up during his stay he would be asked to leave the property.

Plaintiff had bariatric surgery approximately four years prior to the Vail event. He admits that the surgery makes him much more sensitive to the effects of alcohol.

Defendant's president, Lori Kaiser-Block, learned of the incident involving Plaintiff through her employees, the hotel, and indirectly through other conference attendees. She understood that the hotel might contact her company regarding the incident. Ms. Kaiser-Block obtained a copy of the hotel manager's log and forwarded it to Colin Bishop, Vice President of Plaintiff's employer, TMI. Ms. Kaiser-Block did not independently verify or investigate the truthfulness of the report in the manager's log. Ms. Kaiser-Block also did not obtain or send a copy of an additional report that hotel security created. That additional report states that the liquid on the floor did not smell like urine. (Aff. of Sonia Miller-Van Oort, Ex. N). The parties dispute the date that the report was created. Colin Bishop terminated Plaintiff's employment on September 17, 2007. Plaintiff is now employed with The Maid Brigade, earning far less than what he earned at TMI.

Plaintiff sued Defendant for tortious interference with contractual relations, defamation, and invasion of privacy—intrusion upon seclusion. Defendant previously moved to dismiss Plaintiff's complaint. The Court granted Defendant's motion as to tortious interference with contractual relations and invasion of privacy—intrusion upon seclusion. The Court found that Plaintiff stated a defamation claim. Discovery ensued. Defendant now seeks Summary Judgment.

ISSUE

Do genuine issues of material fact exist regarding whether Defendant defamed Plaintiff? If not, is Defendant entitled to judgment as a matter of law?

ANALYSIS

I. Summary Judgment Standard

In a motion for summary judgment, “Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. “A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.” *Id.* “A motion for a summary judgment may be granted pursuant to Rule 56.03 only if, after taking the view of the evidence most favorable to the nonmoving party, the movant has clearly sustained his burden of showing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law.” *Sauter v. Sauter*, 244 Minn. 482, 484, 70 N.W.2d 351, 353 (1955) (internal citations omitted).

“The district court’s function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997) (internal citations omitted). “[T]he court must not weigh the evidence on a motion for summary judgment...[but] the court is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented.” *Id.* In order to successfully oppose a motion for summary judgment, a party cannot rely upon mere general statements of fact but rather must demonstrate at the time the motion is made that specific facts exist which create a genuine issue for trial. *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986) (internal citations omitted).

II. Defendant is entitled to judgment as a matter of law on Plaintiff's defamation claim because Defendant's statements were qualifiedly privileged and Plaintiff has not established the existence of a genuine issue of material fact as to malice.

A defamation claim has three elements. Plaintiff must prove that Defendant: 1) made a false and defamatory statement about the plaintiff; 2) in an unprivileged communication to a third party; that 3) harmed the plaintiff's reputation in the community. *See Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2007). Defendant has chosen to focus its motion for summary judgment on the second two elements, namely privilege and harm. The Court finds that Defendant's communication to TMI was privileged as a matter of law and that the privilege was not abused, necessitating Summary Judgment in Defendant's favor.

A. Qualified privilege protects Defendant's statements to TMI.

Whether a statement is privileged is a question of law, properly resolved by this Court. A communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. *Stuempgues v. Parke, Davis & Co.*, 297 N.W.2d 252, 256-57 (Minn. 1980) citing *Hebner v. Great N. Ry.*, 78 Minn. 289, 292, 80 N.W. 1128, 1129 (1899). For example, an employer called upon to give information about a former employee is generally protected so that he or she may give an accurate assessment of the employee's qualifications. *See id.* Once the defendant has demonstrated the existence of conditional privilege, the burden shifts to plaintiff to prove that the privilege has been abused, which is generally a question for the jury. *Id.*

i. Defendant had a proper occasion and proper motive.

In this case, FranChoice had a proper occasion and proper motive for communicating the statements to Plaintiff's employer. As to occasion, FranChoice forwarded the allegedly defamatory statements to TMI shortly after receiving the statements from the hotel. The statements reflected Defendant's current understanding of the incident at the hotel.

FranChoice also communicated the statements based on proper motive. First, FranChoice had an ongoing business relationship with Plaintiff's employer. TMI would have wanted to know about the allegations against its employee, because the conduct took place while Plaintiff was representing TMI. Secondly, FranChoice reasonably believed that the hotel may pursue payment of any costs associated with the incident from either FranChoice or TMI. Due to the ongoing business relationship between FranChoice and Plaintiff's employer, FranChoice had a proper occasion and proper motive for communicating the statements to Plaintiff's employer.

ii. Defendant had reasonable or probable cause to believe the statements were accurate.

Plaintiff argues that FranChoice lacked reasonable or probable cause because FranChoice did not carry out an investigation regarding the truthfulness of the statements. First, the hotel, not FranChoice, was in a position to investigate the truthfulness of the statements. Secondly, FranChoice reasonably relied on the accuracy of the statements. The statements discuss the possibility that Plaintiff was seen "defiling" the hotel's ice machine. The statements read like a report, and a reasonable individual reading the statements would believe that the statement's originator witnessed or had access to additional facts that support the accuracy of the statement. FranChoice had no further duty to determine the accuracy or truthfulness of the statements. In fact, it was quite reasonable for FranChoice to send the information to Plaintiff's employer so that the employer could investigate the accuracy of the statements. Plaintiff also claims that Defendant should have sent on the second report created by Nick, the investigating security officer. This claim is unavailing for two reasons. First, the security officer's report is not obviously inconsistent with the first report. Second, Defendant had no duty to fully investigate or even fully report the circumstances surrounding the incident at the hotel.

In *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380 (Minn. 1990), the Minnesota Supreme Court found that an employer's statements were not privileged because the employer did not investigate to substantiate a charge that the plaintiff had stolen merchandise. "The managerial personnel who repeated the accusations simply believed their sources without further investigation." *Id.* The Court held that "...an employer who takes no steps to investigate but relies entirely on accusations either made by employees who may be biased or on second-hand hearsay with no identification of sources, has not acted as a reasonably prudent person and lacks probable or reasonable grounds for making a potentially defamatory statement." *Id.* Unlike the facts in *Wirig*, Defendant was not Plaintiff's employer, and Defendant had no reason to believe that the hotel employees were biased. Additionally, the hotel's statements identified its sources; specifically, the author is listed as Tom LeClair. Thus, FranChoice's communication was protected by qualified privilege because the statements were made on a proper occasion and with proper motive, and FranChoice had reasonable or probable cause to believe that the statements were accurate.

B. Plaintiff has not raised any genuine issues of material fact to support his accusation of malice.

Plaintiff attempts to overcome Defendant's privilege arguing that Defendant's statements were made with malice. Malice is usually a question for the jury, but here there are no genuine issues of material fact for the jury to resolve. In support of his argument, Plaintiff filed affidavit testimony from Mr. Chris Wright, which basically states that FranChoice used the incident at the hotel to pressure TMI into terminating Plaintiff's employment. First, the Court notes that Mr. Wright executed his affidavit on September 9, 2008. This is after Defendant noticed its motion for Summary Judgment on August 20, 2008, and well after the close of discovery on August 11, 2008. Second, this affidavit is the *only* evidence that Plaintiff has raised to support his malice argument. Plaintiff is now at Summary Judgment stage and

must raise sufficient evidence to support its allegations and demonstrate genuine issues of material fact.

Mr. Wright, the affiant, relies on the statements of others to raise genuine issues of material fact. Specifically, Mr. Wright repeats statements allegedly made by Sheila Lukonen, a former FranChoice employee that supposedly had knowledge of Ms. Kaiser-Block's opinion of Plaintiff. Wright also repeats a statement from Christina Jelinek, an employee with TMI, Plaintiff's former employer. Had these statements been obtained directly from Ms. Lukonen or Ms. Jelinek, they could raise genuine issues of material fact. Instead, the affidavit was obtained from someone with no personal, direct knowledge of the circumstances.¹ Given the timing of the affidavit, and that the affiant has no personal knowledge of facts relating to Plaintiff's allegation of malice, the affidavit fails to raise a genuine issue of material fact for the jury's determination. Plaintiff has offered no other evidence of Defendant's malice.

CONCLUSION

This case has reached the Summary Judgment stage and Plaintiff must raise genuine issues of material fact for the jury to determine. The Court has determined as a matter of law that the Defendant's statements are protected by a qualified privilege. A showing of malice will negate qualified privilege. While malice is typically a question for the jury to determine, Plaintiff has raised no reliable evidence that Defendant acted with malice. The minimal evidence that Plaintiff has produced to support its malice argument was produced after the discovery deadline in this matter, and after Defendant noticed its motion for summary judgment. Furthermore, the evidence is affidavit testimony from an individual that has no personal knowledge of the facts at issue. While the Court did not take the formal step of

¹ Defendant raises hearsay objections to the Affidavit of Chris Wright. It is unnecessary for the Court to formally exclude the Affidavit because the Court finds that the Affidavit fails to raise any genuine issues of material fact for trial.

excluding the evidence, the Court did find that Plaintiff has not raised a genuine issue of material fact for the jury to determine. Defendant is entitled to judgment as a matter of law on Count II of Plaintiff's Complaint. The Court previously granted Defendant's motion to dismiss Counts I and III of the Complaint. Plaintiff's complaint is dismissed in full.

M.S.D.