Charnholm v. Bartell Drug Co.

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Unpublished Opinion

Don and Susan Charnholm[1] sued their former employer, the Bartell Drug Company, and other Bartell employees for defamation and outrage related to the Charnholms' employment and Don's termination. Their suit was dismissed on summary judgment and they appeal, claiming that they made a prima facie showing of [†] The true and correct spelling, "Leong," will be used in this opinion. each element of defamation and outrage. We affirm summary judgment of both claims because the alleged defamatory statements were privileged and the alleged outrageous conduct does not rise to the level of outrage.

FACTS

Don began working for Bartell in 1989 and became the manager of the Kingsgate store in 2001. Shortly after Don began working in Kingsgate, Jason Larsen, a second assistant manager, reported to Bartell his suspicion that Don covered for another employee, Susan Perry, who he suspected had stolen photo prints and prepaid phone cards from the store. Larsen reported that he had told Don about his suspicions and that Don then informed Susan that the phone cards could be traced if used.

In Bartell's subsequent investigation, Don acknowledged that Larsen told him about his suspicions. Bartell discovered that Don had contacted the store loss-prevention department to install cameras to monitor the prepaid phone cards. The investigation also revealed some key-entry errors that could account for some of the discrepancies in the phone-card inventory, and Bartell was unable to verify whether any thefts had occurred.

As part of this investigation, Bartell management also spoke with other Kingsgate store employees, and they raised a variety of complaints about Don. These complaints included statements that Don was difficult to get along with, made assumptions and jumped to conclusions, used his personal laptop on company time, regularly left early, ignored employees if he was angry with them, was insensitive, threatened to fire employees if they questioned him, and that employees could not trust him. At least seven employees reported a belief that Don was in a sexual relationship with Susan, and because Susan was a subordinate, such a relationship violated Bartell's employee policy.

Don met with his supervisor and the head of human resources to discuss the investigation. They presented Don with a notice of some of the complaints that Kingsgate store employees had raised. The notice did not state whether these complaints were true or false, but did state that the

allegations left "a serious question in our minds as to your ability" to be a "team leader" and to "lead by example." The notice went on to state:

Based on the information we received from the employee associates, we do not feel that you can effectively continue to manage the Kingsgate store. You will be transferred to the Houghton store where we expect you to conduct business in a fair, honest, and professional manner. . . .

Please be advised that further incidences of this nature will result in further disciplinary action up to and including termination of employment.

The notice requested Don respond to the complaints, and he denied all wrongdoing. Regarding the accusation that he covered for Susan's thefts, his response does not specifically state that he did not cover for Susan, but only that it was discovered that the phone cards were lost through improper counting procedures and that no improprieties were recorded on security cameras.

Don was transferred to the Houghton store in March 2001. At some point after that Don and Susan got married, and Susan voluntarily resigned from Bartell in August 2002 because she was pregnant. After working in several other stores, Don was transferred to the Mountlake Terrace store in April 2003. In October 2003, Robyn Leong, an assistant manager at the Mountlake Terrace store, submitted a written complaint to the human resources department. On the day Leong submitted her complaint, several employees had complained to her that Don was ignoring them. Leong reported that she tried to discuss the issue with Don but could not resolve it with him. Leong reported the employees' complaints in her written complaint and also reported that Don had "smacked" her on the buttocks on two occasions and inappropriately touched her breasts on a third occasion.

Bartell immediately investigated Leong's complaints. Bartell human resources supervisors interviewed 13 Mountlake Terrace store employees individually. Each employee was asked not to discuss the investigation with anyone. One employee corroborated Leong's allegations of inappropriate touching-she had seen Don touch Leong once and heard Leong complain of the other two incidents. One other employee reported that she also felt uncomfortable about the way Don touched her. The supervisors also asked employees general questions about Don's management of the store. The supervisors summarized the comments as follows:

1. Don is creepy. He stands outside of the Women's room door.

2. Don is sneaky. He hides in the catwalk a lot.

3. Don has inappropriately touched two female employee associates.

4. Don does not order properly.

5. Don is not a leader.

6. Don does odd things at the cash registers with other associate's registers.

7. Don is not ethical.

8. No one trusts Don at all.

9. Don spends way too much time in the Pharmacy.

After their investigation, the supervisors met with Tah Wang, Don's supervisor; Barbara Collett, the director of human resources; and Ed Littleton, the vice president of operations. After that meeting, Wang, Collett, and Littleton decided to terminate Don's employment.

Don was asked to come to Bartell headquarters for a meeting with Wang, Collett, and Littleton. At the meeting, Collett read through Don's termination memo, which states in part:

Interviews with several store personnel established that you have made numerous remarks to them to the effect that cameras have been put into the store to watch the crew due to inventory shortages. For you to make remarks of this kind indicates you are actively undermining efforts to investigate losses. A critical requirement of a store manager's job is to protect the company's assets. Such comments clearly demonstrate your disregard for this expectation.

It was also reported that your behavior is unprofessional in that you:

* disappear for long periods of time without explanation

* spend much unproductive time on the catwalk watching instead of on the sales-floor directing staff

* involve clerks in relocating shelf labels in an effort to mislead Tah [Wang] concerning outs

* make inappropriate remarks and unwelcome physical contact with subordinates

When you were managing the Kingsgate store in March 2001, interviews with employees of the store gave rise to similar concerns about your lack of productivity and leadership at that store and your suspected "covering" of the activities of a camera clerk suspected of taking pre-paid [phone] cards and photo prints without paying for them. It was alleged by employees that your motivation for this "covering" was your affair with the clerk in question. Despite your denial of the allegations, it is hard to dismiss the fact that you shortly thereafter married the clerk in question.

Don left with a copy of the termination memo and did not deny the allegations in writing at that time.

[2] According to Collett, only Don, Employers Unity and the Washington Employment Security Department (which handle unemployment claims), Wang, and Collett herself saw the termination memo before the Charnholms' filed their lawsuit against Bartell.

Wang informed the Mountlake Terrace store management and employees that Don was no longer with the company, but he did not explain any of the circumstances of Don's departure. Each employee was asked not to discuss the matter further. Between the time of the termination meeting and the filing of the Charnholms' lawsuit, Wang, Collett, and Leong assert that they did not discuss the reasons for Don's termination with anyone. Whenever asked about Don, Wang stated only that Don was no longer with the company. Leong states that she did not know the basis for Don's termination until the lawsuit was initiated.

Don applied for unemployment compensation and was initially denied compensation, but granted compensation upon appeal. The Charnholms sued Bartell, Wang, Collett, and Leong[3] for defamation and outrage. The Charnholms claim that Bartell, specifically Wang and Collett (the Bartell managers who wrote the termination memo), made defamatory statements in the memo accusing Don of covering for Susan's theft and of sexual harassment, and communicated those statements to other Bartell managers and to the offices that handle unemployment compensation claims. The Charnholms also claim that Leong's written complaint against Don is defamatory. The Charnholms base their outrage claim on Bartell's conduct during the termination process.

The defendants moved for summary judgment, and the trial court granted the motion. The Charnholms now appeal.

STANDARD OF REVIEW

Appellate courts review de novo orders granting summary judgment. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is appropriate when a plaintiff cannot demonstrate the existence of an element essential to the claim for which the plaintiff bears the burden of proof. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The existence of any alleged factual dispute does not defeat summary judgment; there must be a genuine issue of material fact. Young, 112 Wn.2d at 225.

ANALYSIS

Defamation

The parties agree that in order to bring a prima facie case of defamation, a plaintiff must prove (1) false published statement of fact, (2) unprivileged communication, (3) fault, and (4) damages. See Caruso v. Local Union 690 of Int'l Brotherhood of Teamsters, 107 Wn.2d 524, 529, 730 P.2d 1299 (1987). Bartell argues that the Charnholms' claim fails because the communication at issue was

privileged, and the Charnholms disagree.

Publication of a defamatory statement to someone other than the person defamed is essential to liability. Doe v. Gonzaga Univ., 143 Wn.2d 687, 701, 24 P.3d 390 (2001), rev'd on other grounds, 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed. 2d 309 (2002). Washington courts have held that intracorporate communications are not "published" for defamation purposes because the corporation is essentially communicating with itself. See Gonzaga, 143 Wn.2d at 701 (citing Prins v. Holland-North Am. Mortgage Co., 107 Wash. 206, 208, 181 P. 680 (1919)). Intracorporate communications are not, however, absolutely privileged; the privilege may be lost if the employee publishes a defamatory statement to a co-employee not in the ordinary course of his or her work or if the employee made the statement with actual malice. Gonzaga, 143 Wn.2d at 702--03. "Actual malice exists when a statement is made 'with knowledge of its falsity or with reckless disregard of its truth or falsity.'" Gonzaga, 143 Wn.2d at 703 (quoting Herron v. KING Broad. Co., 109 Wn.2d 514, 523, 746 P.2d 295 (1987)).

The Charnholms argue that the intracorporate communications privilege does not apply to the statements made in Bartell's memo terminating Don's employment because the statements were made with actual malice. The Charnholms also argue that the privilege also does not apply to the original accusations made by Leong because they, too, were made with actual malice. We separately consider the statements in the Bartell memo and those made by Leong.

Bartell Termination Memo

The Charnholms claim that Bartell managers Collett and Wang communicated defamatory statements about the Charnholms among themselves and to Don and that the termination memo must have circulated through other Bartell managers before it was given to Don. The memo was also given to offices handling Don's application for unemployment compensation. They argue that the statements in the memo were made with malice because Bartell had previously admitted that the accusations against Don for covering up Susan's theft were false and could not establish that the accusations were true.

Even if the termination memo must have been seen by multiple Bartell managers before it was given to Don and was provided to unemployment compensation offices, the Charnholms point to no evidence that this process was not in the ordinary course of business-so the first requirement of the intracorporate communications privilege is met. Thus, we must determine if Bartell included statements in the termination memo knowing the statements were false, and if so, then the second requirement is not met and the privilege has been lost here.

General denials of the truth of defamatory statements are not sufficient to defeat summary judgment in defamation action; specific evidence must be put forward to establish falsity. See Lambert v. Morehouse, 68 Wn. App. 500, 507--08, 843 P.2d 1116 (1993). This specific evidence must be "sufficient to permit a reasonable trier of fact to find clear and convincing proof of actual malice." Herron v.

Tribune Pub. Co., 108 Wn.2d 162, 170, 736 P.2d 249 (1987).

In Lambert, an employee was dismissed after the employer received several complaints that he had sexually harassed co-workers, and the employee sued for, inter alia, defamation. The employer moved for summary judgment, and it was affirmed on appeal because the court concluded that the employee had not created a genuine issue of fact as to the truth or falsity of the underlying factual allegations. The employee generally denied the legal conclusion of sexual harassment, but did not specifically deny the facts alleged. The court concluded that a plaintiff must come forward with specific evidence of falsity to avoid summary judgment, and general, conclusory denials are not enough.

Lambert, 68 Wn. App. 507--08.

Here, the Charnholms point to manager Jane Peterson's statement (made before Don's employment was terminated) that she was unable to confirm that Don covered for Susan's theft as evidence that Bartell knew the accusations made in the termination memo were false. But Peterson did not state that she was convinced that the covering accusations were false, but only that she had received conflicting information and could not be sure that the covering accusations were true. The Charnholms also point to the fact that Bartell did not retain surveillance videos during the time Don was allegedly covering for Susan as evidence that Bartell knew the accusations were false (because if the videos had revealed wrongdoing, Bartell would have retained them), but this merely supports Peterson's statement that she could not confirm that the accusations were true-it does not establish that the covering never happened, but only that it was not recorded on videotape. While Bartell characterized Don's e-mail response to the "covering" and favoritism allegation as a denial, his statements actually amount to less than a denial; he simply states that no theft was recorded on surveillance video and that it was discovered that a different employee's keystroke errors were responsible for "loss" of prepaid phone cards. None of this evidence would permit a trier of fact to find clear and convincing proof that Bartell knew of or recklessly disregarded the falsity of the accusations of covering for Susan.

The Charnholms point to inconsistencies in Leong's accusations as evidence that Bartell knew that her accusations of sexual harassment were false, but such inconsistencies do not establish that Leong was lying. It is true that Don generally denied all the sexual harassment accusations in a declaration (submitted in opposition to Bartell's motion for summary judgment), but did not provide specific denials to the facts of each accusation in that declaration or at any time earlier. Thus, because the Charnholms have not provided evidence from which a trier of fact could find clear and convincing proof that Bartell (and Collett and Wang) knew that all accusations were false, the Charnholms cannot establish that these defendants lost the privilege due to malice. We conclude that the statements in the termination memo were privileged, thus defeating the Charnholms' defamation claim against Bartell.

Leong's Statements

The Charnholms argue that Leong's accusations are defamatory because they were false and made with malice. Bartell argues that Don never specifically denied all of Leong's accusations. Without a specific denial, Bartell asserts that Don did not create an issue of fact regarding the truth or falsity of Leong's statements. Even if they were false, Bartell claims that Leong's accusations do not affect the ultimate "sting" of the termination memo-because another employee also accused Don of sexual harassment, the "gist" of the termination memo would stand even without Leong's statements.

As discussed above, Don has not specifically denied the facts of all Leong's accusations but only generally stated that he did not sexually harass anyone. But a general, conclusory denial is insufficient evidence of falsity to defeat summary judgment. See Lambert, 68 Wn. App. at 507--08. Without Don's specific denial, the Charnholms have not created an issue of fact regarding the truth or falsity of Leong's accusations.

Don did specifically deny touching Leong's breasts in the camera department (though she accused him of touching her on the sales floor)-but even if this is considered a specific denial, the falsity of Leong's accusations has not been established because the "gist" of the complaint still stands because Don did not specifically deny Leong's other accusations. See Mark v. Seattle Times, 96 Wn.2d 473, 494, 635 P.2d 1081 (1981) (To defeat a defamation claim, "[a] defendant need only show that the statement is substantially true or that the gist of the story, the portion that carries the 'sting', is true.)." Thus, the Charnholms have not shown evidence by which a trier of fact could find clear and convincing evidence that Leong's accusations were made maliciously because they have not established that they were falsely made or made with reckless disregard for the truth.

We conclude that both the Bartell memo and Leong's accusations were privileged and the privilege was not lost through abuse. Because the statements were privileged, the second element of defamation has not been met and the Charnholms' defamation claim was properly dismissed on summary judgment.[4]

Outrage

The Charnholms contend that they put forward sufficient evidence of each of the three elements of outrage to withstand summary judgment. "The basic elements of the tort are (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress." Rice v. Janovich, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987). Bartell argues that the Charnholms cannot establish any of these elements, and summary judgment was therefore appropriate.

1. Extreme and Outrageous Conduct

The Charnholms argue that the accusations in the memo and Leong's statements are outrageous because they imply that the Charnholms are criminals. Bartell argues that its conduct was not

outrageous because it privately delivered the memo to Don and it limited the comments made to other Bartell employees about Don's termination.

While terminating employment is not outrageous conduct in itself, the manner in which a termination is accomplished may constitute outrageous conduct. See Dicomes v. State, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989). To support a claim for outrage, the conduct at issue must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975) (emphasis omitted). "[M]ere insults and indignities, such as causing embarrassment or humiliation, will not support imposition of liability on a claim of outrage." Dicomes, 113 Wn.2d at 630.

In Dicomes, the employer privately delivered a termination letter to the plaintiff, and briefly responded to questions from the press about the termination. The court found that this conduct was not atrocious or intolerable. Likewise, Bartell managers, here, delivered the termination memo to Don in a private meeting, and other Bartell employees were not told the reason for Don's termination-only that he had been terminated. Bartell did pass along the termination memo to the unemployment compensation agency because of Don's request for compensation, but this communication was conducted in the ordinary course of business and was not outrageous. While it is true that statements within the termination memo and Leong's accusations could cause embarrassment and humiliation to the Charnholms, the termination was handled privately and in the ordinary course of business by Bartell. We conclude that any embarrassment and humiliation caused during the termination is not sufficient evidence of the first element of outrage.

2. Intentional or Reckless Infliction of Emotional Distress

The second element of outrage involves whether the defendant knew that it was highly likely that its conduct will cause severe emotional distress and yet proceeded in conscious disregard of those consequences. Birklid v. Boeing Co., 127 Wn.2d 853, 867, 904 P.2d 278 (1995). The Charnholms argue that it is clear that accusations of theft and sexual harassment would cause severe emotional distress to them (especially considering that they were new parents), while Bartell argues that there was no reason to know that Don's termination would be received any differently than any other employee's termination.

The record does not contain any evidence that the Charnholms are particularly susceptible to severe emotional distress-other than their statements that as new parents, they were especially susceptible to emotional distress. The record does not contain any evidence that Bartell was aware that their status as new parents would make them especially susceptible to emotional distress. And none of the circumstances surrounding Don's termination suggests that Bartell conducted the termination to intentionally cause emotional distress. In fact, nothing in the undisputed description of the termination process suggests that it was handled unreasonably or atypically. Bartell took steps to

keep the details of the termination private, thus attempting to minimize the embarrassment and humiliation suffered by the Charnholms. We thus conclude that the Charnholms did not offer sufficient evidence of the second element of outrage.

Because we conclude that the Charnholms did not show sufficient evidence of the first two elements of outrage, we need not consider the third element. Dismissal of this claim on summary judgment was appropriate.

For the foregoing reasons, we affirm.

1. Because Don and Susan Charnholm have the same last name, this opinion refers to them individually by their first names when appropriate for ease of reference. No disrespect is intended.

2. Bartell claims that Don did not deny the allegations at that meeting, while the Charnholms claim that Don did verbally deny the allegations at the meeting. Don did not deny the allegations in writing until his response in opposition to summary judgment.

3. This opinion refers to the defendants, who jointly briefed this case, as a group hereinafter as "Bartell" where appropriate for ease of reference, but also refers to defendants individually where necessary.

4. Because we conclude that the Charnholms' defamation claim fails because the second element was not met, we need not consider Bartell's argument that the Charnholms also did not meet the fourth element.