

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

BILLY G. MORRIS,

Plaintiff,

vs.

AMERICAN FREIGHTWAYS, INC.,

Defendant.

**No. 4:01-cv-40475**

**RULING ON  
DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT**

This matter is before the Court on Defendant's Motion for Summary Judgment. Defendant moved for summary judgment on Plaintiff's remaining defamation claim on August 30, 2002. Hearing was held on the motion on December 19, 2002. Attorney Michael Reck appeared for Defendant, and Attorney Mark Sherinian appeared for Plaintiff. The matter is now fully submitted for review. For the reasons discussed below, Defendant's Motion for Summary Judgment is **granted**.

**Summary of Material Facts**

Plaintiff's defamation claim arises out of his termination by American Freightways ("AF"), a trucking company for which Plaintiff was a supervisor. AF was conducting an investigation into an incident involving Plaintiff's nephew, who also was employed by AF. While this investigation was being conducted, AF began to receive reports that Plaintiff was attempting to undermine the investigation of his nephew's behavior, namely by discussing the matter with other employees. Steve Coccarelli

("Coccarelli"), AF's human resources manager, subsequently made a telephone call to Plaintiff, requesting that he send him the names of all individuals with whom he had spoken about the incident. Plaintiff provided three names to Coccarelli over the phone, but Bobby Haug, an AF employee who had informed Coccarelli he felt Plaintiff had attempted to pressure him into giving a false statement regarding the incident, was not included among them. Coccarelli then asked Plaintiff to send him the list of names via fax. Plaintiff proceeded to fax him the requested information.

Plaintiff was later relieved of duty pending the outcome of the investigation. Ultimately, his employment was terminated. AF maintains that the reason for Plaintiff's termination was that he omitted Haug's name from the requested list of names, which constituted dishonesty.

When Plaintiff was terminated, he was told by Scott Taylor ("Taylor"), AF's customer center manager, that he was being terminated for dishonesty and lack of confidence in his management style. Scott Allender ("Allender"), at that time the acting operation supervisor, was also present at this meeting, and he confirms these were the reasons Plaintiff was given for his termination. Coccarelli further informed Plaintiff that he was also terminated on the suspicion of favoritism on Plaintiff's part. Plaintiff concedes he was terminated because AF managers suspected him of dishonesty.

Plaintiff states that shortly after his termination, he was approached by current and former AF employees who wanted to discuss Plaintiff's termination with him. Plaintiff maintains that these current and former employees related to Morris that they knew the reason for his termination – dishonesty. Plaintiff alleges that Tish Stonehocker, a former AF clerical associate, told him that Allender told her the reason Plaintiff was terminated; that Earl Alertson told him he overheard Allender telling other employees Plaintiff was fired for dishonesty and trying to cover up a work incident; and that fellow dock worker Kevin Kalbus (“Kalbus”) heard Plaintiff had been terminated for dishonesty.<sup>1</sup>

AF bases its motion on the fact that Plaintiff fails to provide adequate specificity of the defamatory statement that was made, and by whom it was made. Defendant also claims qualified privilege and truth as a defense to the alleged defamatory statements Plaintiff claims were made.

### **Applicable Law and Discussion**

“[C]laims lacking merit may be dealt with through summary judgment under Rule 56.” Swierkiewicz v. Soreman, 122 S.Ct. 992, 998-999 (2002). “The judgment sought 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 the moving party is entitled to a

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<sup>1</sup> A full discussion of the background of this case can be found in the Court's August 20, 2002, Ruling On Defendant's Motion For Summary Judgment.

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); Herring v. Canada Life Ins. Co., 207 F.3d 1026, 1029 (8th Cir. 2000).

“Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.” Shelton v. ContiGroup Companies, Inc., 285 F.3d 640, 642 (8th Cir. 2002) (citing Henerey v. City of St. Charles, 200 F.3d 1128, 1131 (8th Cir. 1999)). Summary judgment should not be granted if the court can conclude that a reasonable trier of fact could return a verdict for the non-moving party. Andersen v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Burk v. Beene, 948 F.2d 489, 492 (8th Cir. 1991). In light of these standards, the Court considers the present motion.

Under Iowa law, to establish a prima facie case of defamation, a plaintiff must show “the defendant (1) published a statement that was (2) defamatory (3) of and concerning the plaintiff”. Taggart v. Drake University, 549 N.W.2d 796, 802 (Iowa 1996). “In a defamation case, the plaintiff must prove his case in the statements alleged as no other statements may be used to prove defamation.” Cimijotti v. Paulsen, 219 F. Supp. 621, 622 (8th Cir. 1963).

In support of his claims that a defamatory statement was made, Plaintiff alleges that Tish Stonehocker, a former AF clerical associate, told Plaintiff that Allender told

her the reason that Morris was terminated. However, her declaration, made July 24, 2002, and filed August 30, 2002, indicates otherwise. In her declaration, Stonehocker states as follows: “After Billy Morris left American Freightways, I asked Scott Allender why Billy was gone. Mr. Allender told me that he did not have all the information and was not at liberty to discuss the issue. Mr. Allender did not tell me the reason that Billy was gone from American Freightways.”

Plaintiff alleges that Earl Alertson, an AF associate, reported to Plaintiff that he had overheard Allender telling other AF employees that Plaintiff was fired for being dishonest and trying to cover up a work incident. Plaintiff relies solely on his own deposition testimony for this allegation; Alertson was never deposed. Hearsay evidence cannot defeat a motion for summary judgment. See Mays v. H. G. Rhodes, 255 F.3d 644, 648 (8th Cir. 2001); Erickson v. Farmland Industries, Inc., 271 F.3d 718, 728 (8th Cir. 2001); Johnson v. Baptist Medical Center, 97 F.3d 1070, 1073 (8th Cir. 1996).

Plaintiff next alleges that Kevin Kalbus testified he heard Plaintiff had been terminated for dishonesty, even though his position does not require that he would be privy to that information. Kalbus testified that “the only reason I heard why he was terminated, because he was trying to cover some things up from what his nephew had done, like damaging freight and things of that sort. And that’s all that I was ever told. . . .” When asked if he could recall who told him that Plaintiff was covering up for

his nephew, Kalbus stated that he could not recall, but that it was “not management”. Kalbus repeatedly stated that he had heard no other reasons for Plaintiff’s termination. In addition, the testimony he gave, which Plaintiff alleges implicates Joe Keller and Gary O’Leery, two fellow dockworkers, is inconsistent with later statements he made in that same deposition. In his deposition, Kalbus initially agreed with counsel that it was probably O’Leery and Keller who told him the reason for Plaintiff’s termination, but he later stated that he did not “recall a specific employee but them two are the ones that stand out the most because that’s who I used to work with on the dock the most”. Both O’Leery and Keller signed declarations that stated they were never told by anyone, especially not management, the reason for Plaintiff’s termination. More central to the current issue, however, no statement has been identified with any specificity of content, context, or source.

Finally, in his effort to establish that a defamatory statement was made, Plaintiff asserts that Allender admitted in his deposition that he could have told other people that Morris had been terminated for dishonesty. It greatly exceeds the context of the deposition to suggest such an admission. Allender could not recall having a conversation with anyone regarding the reason for Plaintiff’s termination, but when asked if he *could* have told *anyone* that Plaintiff had been terminated for dishonesty, Allendar answered “yes”. This is insufficient, without more, to make out a claim for defamation.

In Freeman v. Bechtel, the Iowa Supreme Court upheld the dismissal of a plaintiff's claims where the plaintiff did not "identify the defamatory statements with any specificity, they [did] not identify the manner of oral publication, and they [did] not allege that [an agent of defendant acting within the scope of that agency] published the statements to a nonprivileged recipient". Freeman v. Bechtel Constr. Co., 87 F.3d 1029, 1032 (8th Cir. 1996). For like reasons, this Plaintiff has failed to establish his prima facie case of defamation.

It is axiomatic that truth is an absolute defense to defamation. Smith v. Des Moines Public Schools, 259 F.3d 942, 947 (8th Cir. 2001); Campbell v. Quad City Times, 547 N.W.2d 608, 610 (Iowa 1996); Behr v. Meredith Corp., 414 N.W.2d 339, 342 (Iowa 1987). This provides the second barrier to a successful claim of defamation in this case. Plaintiff readily admits he was terminated because AF suspected him of dishonesty. Taylor testified during his deposition that Plaintiff was terminated for lack of confidence in his management style and for dishonesty. Allender was present when Plaintiff was terminated, and he confirms that Plaintiff was told he was being terminated for dishonesty. Plaintiff has produced no evidence to suggest that he was terminated for any reason other than the reasons given to him by Taylor and Coccarelli. Whether Plaintiff was dishonest is not the issue. What is at issue is the *reason* why Plaintiff was terminated, and both parties agree that he was terminated because the employer suspected dishonesty.

There exists a third barrier to a successful claim on defamation in this case:

[a] qualified privilege exists with respect to statements that are otherwise defamatory if the following elements exist: (1) the statement was made in good faith; (2) the defendant had an interest to uphold; (3) the scope of the statement was limited to the identified interest; and (4) the statement was published on a proper occasion, in a proper manner, and to proper parties only.

Theisen v. Covenant Med. Ctr., Inc., 636 N.W.2d 74, 83-84 (Iowa 2001). “[U]nless the complaints set forth the alleged defamatory statements and identify the persons to whom they were published, [defendant] is unable “to form responsive pleadings.””

Freeman, 87 F.3d at 1031 (citing Asay v. Hallmark Cards, Inc., 594 F.2d 692, 699 (8th Cir. 1979)). Where Plaintiff does not allege essential content and context regarding the claimed defamation, AF cannot adequately defend on the basis of qualified privilege.

Finally, Plaintiff does not allege any basis for holding AF liable for defamation.

For liability to attach to AF as the employer of any person found to have made a defamatory statement:

The test generally applied by the cases is: (a) Was the person who uttered the slanderous words an authorized agent of the corporation? (b) If so, was he at the time acting within the scope of his employment? and (c) Was the language charged used in the actual performance of his duties touching on the matter in question?

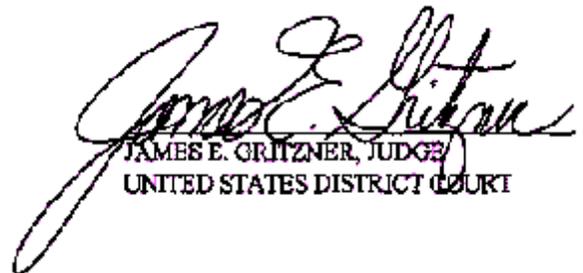
Vowles v. Yakish, 179 N.W. 117, 118-19 (Iowa 1920). The record lacks the facts essential to the application of this test.

**CONCLUSION**

Defendant has shown that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law on Plaintiff's defamation claim. Accordingly, Defendant's Motion for Summary Judgment (Clerk's No. 44) is **granted**, and this case is **dismissed**.

**IT IS SO ORDERED.**

Dated this 20th day of February, 2003.



JAMES E. GRITZNER, JUDGE  
UNITED STATES DISTRICT COURT