

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

RICHARD E. GRAHAM,	*	
	*	
Plaintiff,	*	4-98-CV-90546
	*	
v.	*	
	*	
CONTRACT TRANSPORTATION, INC.;	*	
JAMES D. NIBLE; JEANE M. NIBLE;	*	
CONCENTRA MANAGED CARE	*	
SERVICES, INC.; CONCENTRA	*	
HEALTH SERVICES, INC.;	*	
and W. THOMAS FOGARTY,	*	MEMORANDUM OPINION AND
	*	ORDER
Defendants.	*	
	*	

This matter comes before the Court on two motions for summary judgment. The first was filed jointly on October 12, 2000 by Defendants Concentra Health Services, Inc., its parent company Concentra Managed Care Services, Inc., (collectively “Concentra”) and W. Thomas Fogarty (hereinafter “Dr. Fogarty”). Because they have filed their motion jointly, the Court will, out of convenience, refer to Concentra and Dr. Fogarty collectively as Concentra, unless otherwise indicated. The second motion was filed on October 25, 2000 by Defendants Contract Transportation, Inc., James D. Nible, and Jean M. Nible¹ (collectively “CT”). The Plaintiff Richard E. Graham (hereinafter “Graham”) filed his Resistance to both motions on February 20, 2001, along with a supporting brief. On March 1, 2001, Concentra replied; on March 2, 2001, CT replied. A hearing will not be necessary. The matter is considered fully submitted.

¹ James and Jean Nible are management employees of CT. They are being sued in their official capacity.

I. Facts

The following facts are either undisputed or viewed in the light most favorable to Graham as the nonmoving party. *See United States v. City of Columbia*, 914 F.2d 151, 153 (8th Cir. 1990).

Graham worked for CT as a truck driver beginning in 1989. On April 4, 1996, CT directed Graham to report for a random drug test pursuant to regulations promulgated by the United States Department of Transportation (hereinafter "DOT"). On April 4, 1996, Graham reported to the Concentra Medical Clinic in Des Moines as directed and gave a urine specimen. His sample tested positive for amphetamines. On April 17, 1996, Dr. Maurice A. Minervini (hereinafter "Dr. Minervini"), a Medical Review Officer for Concentra, reported the positive test result to CT. As a result, CT terminated Graham's employment that day.

By letter dated July 29, 1996, Graham's attorney asked Dr. Minervini to vacate his previous test result on the grounds that it was not obtained or processed in accordance with DOT regulations. On July 30, 1996, Dr. Minervini wrote a letter to Graham's attorney stating that he would change the result from positive to negative. Graham was then rehired on or about July 30, 1996.

In mid to late August 1996, Dr. Fogarty, Chief Medical Officer of Concentra's parent corporation, was informed of Dr. Minervini's reversal of Graham's test result. After reviewing the matter, Dr. Fogarty concluded that Dr. Minervini did not have the authority to reverse the initial findings regarding Graham's test result. In a letter to CT dated September 23, 1996, Dr. Fogarty reinstated Graham's positive test result, declaring "Mr. Graham to be positive for amphetamines

and in violation of 49 C.F.R. Part 382 Subpart B.”² Dr. Fogarty's letter to CT continued: “[A] driver cannot assume driving duties after testing positive until there is an evaluation by a substance abuse professional, who recommends return to work and a return to work drug screen that is negative.” Renewed Mem. In Supp. of Defs.' Mot. For Summ. J., Ex. 3 at 1. As a result of Dr. Fogarty's September 23, 1996 letter, CT again terminated Graham.

As a union member, Graham's employment was governed by a collective bargaining agreement that allowed Graham to grieve his discharge through arbitration, which he did. The parties stipulated that testing positive for an illegal drug constituted “just cause” for discharge. In the arbitration proceedings, Graham contended that the test result was not reliable, did not present a clear and compelling showing that he tested positive for drugs, and therefore, CT lacked just cause to discharge him. In its decision dated June 6, 1997, the arbitrator ruled against Graham. The arbitrator found, among other things, that “[Graham] was positive” for drugs, that “[CT] had a reasonable basis . . . to believe that [Graham] was positive for the presence of illegal drugs,” and that “[CT] was not arbitrary and capricious in discharging [Graham].” Renewed Mem. In Supp. of Defs.' Mot. For Summ. J., Ex. 1 at 19 (hereinafter “Arbitration Decision and Award”).

As part of his effort to find another job, Graham signed authorization forms releasing CT of liability for providing prospective employers information regarding his drug test result. He

² The relevant section states: “No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance, except when the use is pursuant to the instructions of a licensed medical practitioner” 49 C.F.R. § 382.213 (a).

signed one waiver form on September 20, 1997 for Iowa Tanklines, Inc.³ Graham signed a similar authorization form on May 28, 1998 in his application to Foodliner, Inc.⁴

On September 23, 1998, Graham filed a petition in the Iowa District Court in and for Polk County asserting six claims. After removal here and a full briefing on the Defendants' motion for summary judgment, this Court ruled that all of Graham's claims were preempted by § 301 of the Labor Management Relations Act, *see* 29 U.S.C. § 185(a). *See Graham v. Contract Transp., Inc.*, No. 4-98-CV-90546, slip op. at 10 (S.D. Iowa June 30, 1999). This Court further determined that the claims had not been brought within the six-month statute of limitations that governs § 301 actions, *see* 29 U.S.C. § 160(b), and therefore awarded summary judgment to the Defendants on all counts.

On appeal, Graham argued that his claims for tortious discharge, defamation *per se*, and defamation *per quod* were not preempted by § 301 and therefore were not untimely. The Eighth Circuit affirmed this Court's grant of summary judgment with regard to Graham's tortious discharge claim, reversed with regard to his claims for defamation *per se* and defamation *per quod*, and remanded for consideration on the merits of those claims. *See Graham v. Contract Transp., Inc.*, 220 F.3d 901, 914 (8th Cir. 2000). In light of the Eighth Circuit's opinion in *Graham*, the only claims now before the Court are Graham's defamation *per se* and defamation

³ This form stated, in part: "I hereby authorize without liability, any person or organization . . . by whom I have been previously employed to furnish Iowa Tanklines, Inc. any positive controlled substances test results * * * for the purpose of investigation as required by Section 382.413 of the Federal Motor Carrier Safety Regulations." Iowa Tanklines, Inc.'s Request For Information From Previous Employers Workplace, Ex. 1.

⁴ This form, stated in part: "I hereby authorize you to release the following information to Foodliner, Inc. for the purposes of investigation as required by section 391.23 of the Federal Motor Carrier Safety Regulations. You are released from any and all liability which may result from furnishing such information." Foodliner, Inc.'s Request For Information From Previous Employer, Ex. 2.

per quod claims. For the reasons that follow, the Court grants the two motions for summary judgment as to these two claims in their entirety.

II. Summary judgment standard

The role of summary judgment is to “pierce the boilerplate of the pleadings and assay the parties’ proof in order to determine whether trial is actually required.” *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794 (1st Cir. 1992) (citations omitted), *cert. denied*, 507 U.S. 1030 (1993). To prevail on summary judgment, Defendants, as the moving party, must 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). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *See First Nat’l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968).

To preclude the entry of summary judgment, Graham, as the nonmoving party, must set forth specific facts showing that there is a genuine issue for trial. *See Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Graham must go beyond the pleading and by affidavits, or by depositions, answers to interrogatories, and admissions on file, designate a genuine issue for trial. *See Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The quantum of proof that the nonmoving party must produce is not precisely measurable, but it must be “enough evidence so that a reasonable jury could return a verdict for the nonmovant.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). If Graham does not produce this proof, summary judgment shall be entered against him. *See Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 586-87. On a motion for summary judgment, the court views all the

facts in the light most favorable to the nonmoving party, and gives that party the benefit of all reasonable inferences that can be drawn from the facts. *See Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994); *City of Columbia*, 914 F.2d at 153; *Woodsmith Publ'g Co. v. Meredith Corp.*, 904 F.2d 1244, 1247 (8th Cir. 1990).

II. Discussion

As stated before, Graham's only remaining claims are for defamation.⁵ Graham claims CT defamed him to prospective employers by stating to them that he had a positive test result. Graham claims Concentra defamed him through Dr. Fogarty's September 23, 1996 letter to CT reporting Graham's positive test result. In their motion papers, Concentra and CT assert the affirmative defenses of collateral estoppel and privilege. CT additionally asserts protection under waiver principles, triggered, it believes, when Graham signed the waiver of liability forms. The

⁵ Graham claims written or oral statements made by the Defendants were defamatory *per se*, defamatory *per quod*, or both. Defamation *per se* requires that: (1)The defendant made statements; (2) communicated them to someone other than the plaintiff; (3) the statements would reasonably be understood to be an expression which would attack a person's integrity or moral character, expose the person to public hatred, contempt or ridicule, deprive the person of the benefits of public confidence and social dealings, or injure the plaintiff in the maintenance of his or her business; (4) unless the defendant has proven the defense of truth; or (5) unless the defendant has established the defense of qualified privilege, then the plaintiff must prove the defendant made the statements with actual malice. *See Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 221 (Iowa 1996); *Vinson v. Linn-Mar Comm. School Dist.*, 360 N.W.2d 108, 116 (Iowa 1984).

A statement is libelous *per quod* if it is necessary to refer to facts or circumstances beyond the words actually used to establish the defamation. *See* 50 Am. Jur. 2d Libel and Slander § 146 (1995). If a statement is libelous *per quod*, the plaintiff is required to prove damages in addition to all the elements of a defamation *per se* claim. *Id.* On the other hand, all the elements of proof are presumed to exist for statements that are libelous *per se* (based on the very nature of the language used). *See Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996); *Vojak v. Jensen*, 161 N.W.2d 100, 104 (Iowa 1968); *Kluender v. Semann*, 203 Iowa 68, 70, 212 N.W. 326, 327 (Iowa 1927).

Court will discuss the three legal issues—collateral estoppel, privilege, and waiver—that form the basis for the instant motions.

A. Collateral Estoppel

Collateral estoppel is a legal doctrine that dissects a lawsuit into its various issues and removes from reconsideration those issues that have been properly decided in a final action.⁶ Collateral estoppel comes into play not when a claim is barred, but when some issue involved in a claim has been previously litigated. *See* 10B Wright, Miller & Kane, *Federal Practice and Procedure* § 2735 (3d ed. 1998). Collateral estoppel bars from relitigation only those issues actually litigated and determined.

Collateral estoppel applies when: (1) the issue sought to be precluded is identical to the issue previously decided; (2) the prior action resulted in a final adjudication on the merits; (3) the party sought to be estopped was either a party or in privity with a party to the prior action; and (4) the party sought to be estopped was given a full and fair opportunity to be heard on the issue in the prior action. *See Wellons, Inc., v. T.E. Ibberson Co.*, 869 F.2d 1166, 1168 (8th Cir. 1989) (citation omitted).

In this case, Graham was a party to the prior action, namely the arbitration proceeding, and he received a full and fair opportunity to be heard. Therefore, this case focuses only on the first two requirements: (1) whether the issue sought to be precluded is identical to the issue previously decided and (2) whether the prior action resulted in a final adjudication on the merits.

It is well established that an arbitration award may constitute a final judgment for purposes

⁶ The doctrine of collateral estoppel is often referred to by the more modern term of issue preclusion. *See* Stephen C. Yeazell, *Civil Procedure* 783 (4th ed. 1996).

of collateral estoppel. See *Merrill Lynch, Pierce, Fenner and Smith, Inc., v. Nixon*, 210 F.3d 814, 817 (8th Cir.), cert. denied, 121 S. Ct. 383 (2000); *Wellons*, 869 F.2d at 1168; *City of Bismarck v. Toltz, King, Duvall, Anderson & Assoc., Inc.*, 855 F.2d 580, 582-83 (8th Cir. 1988); *French v. Jinright & Ryan, P.C.*, 735 F.2d 433, 436 (11th Cir. 1984); *Jeffers v. Convoy Co.*, 636 F. Supp. 1337, 1339 (D. Minn. 1986); *United Food v. G. Bartusch Packing Co.*, 546 F. Supp. 852, 855 (D. Minn. 1982). The arbitration proceeding resulted in a final adjudication in favor of CT on the question whether Graham was discharged with or without just cause. Therefore, it is clear that the second requirement for collateral estoppel is met.

The first requirement, however, is the one most fervently disputed. In the Arbitrator's Decision and Award, the arbitrator defined the issue as: "Did [CT] discharge [Graham] in accordance with the provisions of the Collective Bargaining Agreement?" Arbitrator's Decision and Award at 3. Graham argues that the issue as defined by the arbitrator (the propriety of his discharge) is not identical to the issue raised in this action (drug test results), and therefore, collateral estoppel does not apply. The Court disagrees.

Wellons, Inc., v. T.E. Ibberson Co., 869 F.2d 1166 (8th Cir. 1989) is instructive. In *Wellons*, a plant owner sued a boiler manufacturer for making and selling a defective boiler. The parties arbitrated the issue of liability. The arbitration panel found in favor of the plant owner, awarding it over three million dollars in damages. The following year, the boiler manufacturer commenced an action against the engineer and construction manager for indemnity. In this subsequent action, the boiler manufacturer alleged that it suffered losses when the engineer and construction manager misrepresented and negligently led it to believe that tests regarding boiler temperature capacity were correct. The district court granted summary judgment in favor of the

engineer and construction manager on the basis of collateral estoppel, and on appeal, the Eighth Circuit affirmed.

The “first step,” observed the Court, “is to determine whether the issues before the arbitration panel and before this Court are the same. If so, the next step is to decide whether a determination of [the engineer and construction manager's] negligence or misrepresentation was necessary or essential to the outcome of the arbitration.” *Wellons*, 869 F.2d at 1170. Both parties conceded that the engineer and construction manager's negligence was raised before the arbitration panel. Although the arbitration award contained no findings of fact and merely stated a conclusion expressed in dollars with no explanation or rationale, the Eighth Circuit found that the issues presented before the arbitrators were identical to those raised in the lawsuit. The *Wellons* Court reasoned that the arbitrators could not have found against the boiler manufacturer in the arbitration hearing without first passing on the issue of whether the engineer and construction manager were liable for negligently releasing inaccurate test data. The arbitrator in this case had to, and did in fact, find that, “[CT] had a reasonable basis, supported by a preponderance of the competent evidence, upon which to believe that [Graham] was positive for the presence of illegal drugs.” Arbitration Decision and Award at 19. That finding was necessary to its ultimate conclusion that Graham was discharged for just cause. Thus, under collateral estoppel principles, as expressed in *Wellons*, Graham is barred from relitigating the issue of the positive drug test result.

The question of drug test results is the same issue now before the Court on Graham's defamation claim. Graham claims that he was defamed by the Defendants when they declared that he tested positive for drugs. By virtue of the prior arbitration proceedings, this was a true or

substantially true statement. Under the law of defamation, truth is a complete defense. *See Behr v. Meredith Corp.*, 414 N.W.2d 339, 343 (Iowa 1987); *Vojak v. Jensen*, 161 N.W.2d 100, 108 (Iowa 1968); *McCuddin v. Dickinson*, 300 N.W. 308, 309 (Iowa 1941); *Children v. Shinn*, 150 N.W. 864, 869 (Iowa 1915). Given the prior finding by the arbitrator that Graham tested positive for drugs, no reasonable jury could find for Graham on his defamation claims. The doctrine of collateral estoppel prevents Graham from proving his defamation claim. Therefore, the Defendants' motion for summary judgment must be granted.

B. *Privilege*

Even if Graham were not barred from relitigating the issues of the drug test result, the Defendants are shielded from liability under the privilege doctrine of defamation law. The Iowa Supreme Court stated the doctrine succinctly:

Sometimes one is justified in communicating to others, without liability, defamatory information which would ordinarily entitle the defamed person to maintain an action for damages. The law recognizes certain situations may arise in which a person . . . must make statements about another which are indeed libelous. When this happens, the statement is said to be privileged, which simply means no liability attaches

Vojak v. Jensen, 161 N.W.2d 100 (Iowa 1968).

There are two types of privileged communication: those that are absolutely privileged and those that are qualifiedly privileged. *See Taggart v. Drake Univ.*, 549 N.W.2d 796 (Iowa 1996). If the privilege is absolute, there can be no liability under any circumstances, even if actual malice is shown. If the privilege is qualified, immunity in some, but not all instances, is provided. *See Vojak*, 161 N.W. 2d at 105.

Qualified privilege attaches to communications made (1) in good faith, (2) concerning a

subject matter in which the speaker has an interest, right, duty, or obligation, and (3) to a listener who has a corresponding interest, right, duty, or obligation in the subject matter of the communication. *See Taggart*, 549 N.W.2d at 803; *Vinson v. Linn-Mar School Dist.*, 360 N.W.2d 108, 116-117 (Iowa 1984); *Brown v. First Nat'l Bank of Mason City*, 193 N.W.2d 547, 552 (Iowa 1972); *Vojak*, 161 N.W.2d at 105. The question as to whether there is a privilege is for the court. *See Mills v. Denny*, 245 Iowa 584, 589, 63 N.W.2d 222, 225 (Iowa 1954).

As to CT, the elements of qualified privilege are met. CT's representations about Graham's positive test result to prospective employers were made in good faith; concerned, by virtue of federal requirements, a subject matter that CT had an interest and duty to report; and the prospective employers had a corresponding interest and duty to learn of the test result information.

In addition to the asserted federal requirements, Iowa law also affords CT an additional basis on which it can assert privilege. Section 91B.2 of the Iowa Code reads:

An employer or an employer's representative who, upon request by or authorization of a current or former employee or upon request made by a person who in good faith is believed to be a representative of a prospective employer of a current or former employee, provides work-related information about a current or former employee, is immune from civil liability unless the employer or the employer's representative acted unreasonably in providing the work-related information.

Iowa Code § 91B.2.

Graham's prospective employers asked for, and CT provided to them, drug test information. Pursuant to Iowa code § 91B.2, CT would appear immune from civil liability unless it acted unreasonably in providing the information. There is no evidence in the record that CT

acted unreasonably in providing to these prospective employers Graham's test result information. By virtue of Iowa law, CT is therefore immune from liability for providing to these prospective employers this information.

A qualified privilege only protects those statements made without actual malice. *See Taggart*, 549 N.W.2d at 804; *Vinson*, 360 N.W.2d at 116. Proof of actual malice destroys the qualified privilege. *See Vojak*, 161 N.W.2d at 104. A finding of malice turns on the motive for the communication, and requires proof that the statement was made with ill will or wrongful motive. *See Taggart*, 549 N.W.2d at 804. Graham has not come forward with anything in the record that would support a finding that CT (or anyone at CT) harbored actual malice or ill will against Graham or that the statements made to prospective employers were made in anything but good faith. To the contrary, when Dr. Minervini expunged Graham's positive test results, CT rehired Graham and only then fired him once the test results were reinstated by Dr. Fogarty. Based on the foregoing facts, the Court finds CT's statements to prospective employers were qualifiedly privileged and that this privilege has not been overcome with a showing of actual malice.

As to Concentra, it asserts the defense of absolute privilege. If the court determines that the publication (Dr. Fogarty's September 23, 1996 letter to CT) was absolutely privileged, this action must be dismissed. *Mills*, 63 N.W.2d at 225. Under the Restatement (Second) of Torts § 592(A), “[o]ne who is required by law to publish defamatory matter is absolutely privileged to publish it.”⁷ In its motion papers, Concentra argues that since it was required by law to report

⁷ Although § 592(A) comment a states that “[t]he chief present application of the Section is in the case of radio and television broadcasting station,” comment b states that, “[t]his Section is not, however, limited to the case of the broadcasting station, and will apply whenever the one who publishes the defamatory matter acts under

Graham's positive test result to CT, it was afforded an absolute privilege. Concentra states its legal requirement to publish arose from the DOT's transportation workplace drug testing guidelines, set forth at 49 C.F.R. § 40.33 (c)(7), which read in relevant part: "Following verification of a positive test result, the [Medical Review Officer] shall, as provided in the employer's policy, refer the case to the employer's employee assistance or rehabilitation program, if applicable, to the management official empowered to recommend or take administrative action (or the official's designated agent), or both."⁸ Concentra makes a strong case for invoking an absolute privilege. However, the Court need not pass on whether an absolute privilege exists because Concentra meets the requirements for a qualified privilege. Dr. Fogarty's letter to CT about Graham's positive test result was made in good faith; concerned a subject matter that Dr. Fogarty had an interest and duty to report; and CT had a corresponding interest and duty to learn of the test result information. In addition, there is no showing that Dr. Fogarty acted with actual malice in his letter to CT to strip Concentra of its qualified privilege. Because Graham cannot overcome the privilege that attaches to the alleged defamatory statements made by CT and Concentra, the Court grants both Defendants' motions for summary judgement on privilege grounds.

C. Waiver

Restatement (Second) of Torts, § 583 (1977) states that consent is a complete defense to an action for defamation. One who consents to a publication knowing that its contents may

legal compulsion in so doing."

⁸ Concentra and Graham incorrectly cite to this rule as 49 C.F.R. § 40.33(a)(7). Given that there is not a subsection (a)(7), the Court believes the parties meant to cite 49 C.F.R. § 40.33(c)(7), which is the citation that corresponds to the quoted language.

damage his reputation cannot complain when his fears come true. *See McDermott v. Hughley*, 561 A.2d 1038, 1046 (Md. 1989). In requests from Graham's prospective employers to CT, Graham expressly authorized the release of information concerning his drug test results through signed and dated statements. Both releases stated that Graham would not hold CT liable for providing this information.

Graham consented to the publication of his test results to prospective employers by signing and dating these waivers. Allowing Graham to sue CT for the release of information after he had authorized the release of such information flies in the face of logic. Graham cites *Aid Ins. Co. v. Davis Co.* 426 N.W.2d 631, 633 (Iowa 1988) in support of his claim that the releases he signed should not be valid. Graham cites *Davis* for the proposition that in order for a release to be valid, the party must be specifically identified in the document. *Id.* *Davis* is inapplicable because CT is specifically named as the party to be released from liability in both documents to prospective employers.

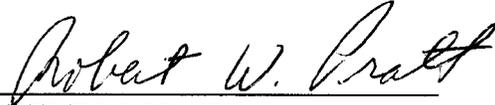
The Court finds that no genuine issue of fact exists on the issue of consent. The releases signed by Graham authorized CT to provide drug test information to his prospective employers. No reasonable jury could find the Defendants liable on these facts.

IV. Conclusion

In light of the foregoing analysis, there is no genuine issue as to any material fact regarding Graham's defamation claims. Therefore, the Defendants are entitled to summary judgment. Motions for Summary Judgment filed by Defendant Concentra and Defendant CT are **GRANTED.**

IT IS SO ORDERED.

Dated this ___24th___ day of April, 2001.

A handwritten signature in cursive script that reads "Robert W. Pratt". The signature is written in black ink and is positioned above a horizontal line.

ROBERT W. PRATT
U.S. DISTRICT JUDGE