IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

MIKE GAL MERKAM	:	**CIVIL TRIAL DIVISION**
Appellants,	:	**SEPTEMBER TERM, 2006**
	:	**No. 2397**
v.	:	
	:	**Superior Court Docket No.**
WACHOVIA CORPORATION, Individually and/or dba Wachovia, Wachovia Bank, Wachovia Bank, N.A., Wachovia Securities, LLC, and/or Wachovia Shared Resources, LLC	:	**230 EDA 2007**
AND	:	
DAWN LANG, Individually and/or as agent, servant, workman, and/or employee of Wachovia Corporation, Wachovia Bank, N.A., Wachovia Securities, LLC, and/or Wachovia Shared Resources, LLC	:	
Appellees	:	

O P I N I O N

Tereshko, J.

PROCEDURAL HISTORY

Plaintiff appeals from the Order entered January 3, 2007, wherein this Court granted Defendant's Preliminary Objections and dismissed Plaintiff's Complaint without prejudice.

FACTUAL BACKGROUND

On January 27, 2003, Plaintiff Mike Gal Merkam, (hereinafter Plaintiff) began working for Defendant Wachovia (hereinafter Wachovia) as an "at will" employee.

Specifically, Plaintiff worked as a financial specialist at its 7345 Bustleton Avenue, Philadelphia Branch. (Complaint, pg.1). One of the Plaintiff's duties was to process auto loans for customers that were placed with Wachovia by auto dealers. (Id).

On or about December 2005, Dawn Lang (hereinafter Ms. Lang) became Plaintiff's immediate supervisor. (Complaint, ¶7). On April 28, 2006, Ms. Lang held a dismissal conference with Plaintiff. (Complaint, ¶9). During the conference, Ms. Lang issued a "Corrective Action and Counseling Report" notifying Plaintiff of the termination of his employment on the grounds that he violated Wachovia's Code of Conduct by receiving auto loans from a third party broker, an auto dealer named Tri-State Auto, and entering the loans into Wachovia's computer system without first speaking to the customer. (Id.). Significantly, the form did not expressly or impliedly allege that Plaintiff had engaged in fraud. (Id.).

On May 6, 2006, Plaintiff filled out a Termination Appeal Request. (Motion to Determine Preliminary Objections, Exhibit 1). By letter dated May 10, 2006, Plaintiff stated the grounds for his appeal. (Id., Exhibit 2). In his letter, Plaintiff expressly conceded that, on one occasion, he had received a faxed application for an auto loan from Tri State Auto and entered the application into Wachovia's computer system without first speaking to the customer. (Id.). He likewise, conceded that when he had been questioned about the application during a pipeline review on March 8, 2006, he had admitted that he had not spoken with the customer. (Id.).

By letter dated June 20, 2006, Wachovia advised Plaintiff that a determination had been made to uphold the decision to terminate his employment. (Complaint, ¶9). Wachovia's letter also expressly advised Plaintiff that Wachovia's response to any

request for employment verification would be limited to dates of employment, length of service and position title, along with the reason for separation from the company would not be disclosed. (Complaint, Exhibit A).

On July 11, 2006, Ms. Lang attended a hearing before an Unemployment Compensation Referee as Wachovia's representative. (Complaint, ¶14). The purpose of the hearing was to determine whether Plaintiff was eligible to receive unemployment compensation benefits. (Id.). At the hearing, Ms. Lang testified and corroborated the facts as set forth in her Report.

On July 14, 2006, Wachovia advised Plaintiff that his securities registration through Wachovia Securities, LLC had been terminated. (Complaint, Exhibit C). Enclosed with the correspondence to Plaintiff was a copy of the Form U-5 Uniform Termination Notice filed by Wachovia with the NASD. (Id.). In section 3 of the form, Wachovia stated the reason for Plaintiff's termination was, "Terminated by Wachovia Bank, for violation of Wachovia Bank's code of conduct. No Wachovia Bank or Wachovia Securities Clients were affected by the code of conduct violation." (Id.). Sections 7B and 7F2 of the Form U-5 asked whether the terminated employee was under internal review for, or accused of, fraud. (Complaint, ¶16). Wachovia answered in the negative to both these questions. (Id.). Based on Wachovia's submission of the Form U-5 to the NASD, the NASD chose not to take any remedial action against Plaintiff and closed the case file on this matter. (Complaint, Exhibit E).

On September 22, 2006, Plaintiff filed his Complaint alleging that the conduct of Ms. Lang, in accusing him of fraud and reporting it to Wachovia, was defamatory.

Further the conduct by Wachovia in reporting the reasons for Plaintiff's termination to the NASD was also defamatory.

Specifically, Plaintiff alleges that Ms. Lang made false accusations to have him dismissed from his position with Wachovia and that she further perjured herself, when on June 11, 2006, she testified under oath at the referee hearing on Plaintiff's application for Unemployment Compensation benefits that Plaintiff was terminated by her for fraud and for contracting with a third party broker. (Id.).

On November 2, 2006, Defendants filed their Preliminary Objections to Plaintiff's Complaint and their Motion to Determine Preliminary Objections on November 29, 2006. (See Docket). Plaintiff filed his response on December 19, 2006.

By Order dated December 28, 2006 this Court granted Defendants' Motion to Determine the Preliminary Objections and dismissed Plaintiffs Complaint without prejudice. Plaintiff did not file an Amended Complaint in this case.

On January 26, 2007 Plaintiff filed his Notice to Appeal and issued a Statement of Matters accordingly on February 15, 2007.

The sole issue which is the subject of this Appeal is whether the Trial Court abused its discretion or committed an error of law in sustaining the Defendants' Preliminary Objections for legal insufficiency of a pleading pursuant to Pa.R.C.P. 1028(a)(4).

LEGAL ANALYSIS

According to our Supreme Court the applicable standard of review for sustaining Preliminary Objections is well settled:

> An appellate court should affirm an order of a trial court ... sustaining preliminary objections in the nature of a

> demurrer where, when all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts are accepted as true, the plaintiff is not entitled to relief. The court need not, however, accept any of the complaint's conclusions of law or argumentative allegations.

Krentz v. CONRAIL, 589 Pa. 576, 586-587, 910 A.2d 20, 26-27 (2006) (citing *Small v. Horn*, 554 Pa. 600, 722 A.2d 664, 668 (Pa. 1998). Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it. Id.

Pennsylvania statutes have established the elements and burdens of proof required in a defamation action. Specifically, 42 Pa.C.S.A. §8343 states:

> (a) BURDEN OF PLAINTIFF.-- In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:
>
> (1) The defamatory character of the communication.
> (2) Its publication by the defendant.
> (3) Its application to the plaintiff.
> (4) The understanding by the recipient of its defamatory meaning.
> (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
> (6) Special harm resulting to the plaintiff from its publication.
> (7) Abuse of a conditionally privileged occasion.
>
> (b) BURDEN OF DEFENDANT.-- In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:
>
> (1) The truth of the defamatory communication.
> (2) The privileged character of the occasion on which it was published.
> (3) The character of the subject matter of defamatory comment as of public concern.

It is this Court's position that Plaintiff has failed to meet his burden of proving the statements by Ms. Lang were capable of defamatory meaning according to 42 Pa.C.S.A. §8343(a). "It is the function of the Court to determine whether the challenged

publication is capable of a defamatory meaning. If the Court determines that the challenged publication is not capable of a defamatory meaning, there is no basis for the matter to proceed to trial." *Livingston v. Murray*, 417 Pa. Super. 202 , 208-209, *612 A.2d 443, 446 (1992).*

Statements of opinion, without more, do not have defamatory meaning. *Mathias v. Carpenter*, 402 Pa. Super. 358, 587 A.2d 1, 2-3 (1991). Our Superior Court has adopted §566 of the Restatement (Second) of Torts which defines the rules regarding opinions, "A defamatory communication may consist of a statement in the form of an opinion but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Green v. Mizner*, 692 A.2d 169, 174 (Pa. Super. 1997). Comment (c) of §566 clarifies the distinction between a non-actionable "pure" opinion and a potentially actionable "mixed" opinion. It states:

> A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication. In the first case, the communication itself indicates to him that there is no defamatory factual statement. In the second, it does not, and if the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability.

Whether a particular statement is opinion or fact is a question of law for the trial court. *Mathias*, 692 A.2d at 174.

This Court finds the case of *Goralski v. Pizzimenti*, fundamental in defining opinions which are not defamatory. *Goralski*, 115 Pa.Commw. 210, 540 A.2d 595, 596-

597 (1988), *Constantino*, 2001 PA Super 4, 766 A.2d 1265, 1267 (2001). In *Goralski*, the plaintiff, a substitute teacher, received a letter from the school manager advising her that she was being terminated "due to misconduct." The letter specifically alleged that the teacher had been repeatedly requested to work, but had not been available, and had engaged in abusive behavior toward a school district secretary on one occasion. Id. The letter also stated that a carbon copy had been sent to the Bureau of Employment Security. Id. at 597.

The Commonwealth Court in affirming the trial court stated its rationale as follows:

> In the case at bar, the alleged defamatory statements were made in the context of an employment relationship by Defendant Pizzimenti, who can be considered Plaintiff's supervisor. The letter was written as a result of an evaluation of Plaintiff's work performance, intended for communication to only a few members of the Defendant School District and Bureau of Employment Security.
>
> In our opinion, the letter in question could not, as a matter of law, have a defamatory meaning. Therefore, the phrase in the letter complained of is not actionable under Pennsylvania law. Such an evaluation of Plaintiff's job performance might be embarrassing or annoying to Plaintiff, however, in our judgment, it did not lead the community to ostracize or shun Plaintiff. The letter was a result of incidents of employment that necessarily included statements akin to opinion and opinion without more, is not actionable. Id. at 598.

The *Goralski* Court then applied the test articulated in §566 of the Restatement (Second) of Torts. The Commonwealth Court found the school manager followed §566 and clearly laid out in his letter all of the facts that he thought constituted misconduct. Id. at 599. The Court then held that the trial Court was correct in granting nonsuit because the alleged defamation constituted nonactionable opinion. Id. In similar fashion to

Goralski, Wachovia prepared their Corrective Action and Counseling letter which clearly detailed the facts which resulted in Plaintiff's dismissal for violation of Wachovia's Code of Conduct. (Complaint, Exhibit A). The form stated the Plaintiff violated Wachovia's Code of Conduct by receiving auto loans from a third party broker, an auto dealer named Tri-State Auto, and entering the loans into Wachovia's computer system without first speaking to the customer. (Id.).

The statements made by Ms. Lang in the Corrective Action and Counseling Form are incapable of defamatory meaning. Like the statement in *Goralski*, Lang's statement that Plaintiff was being terminated for violating Wachovia's Code of Conduct is nothing more than her opinion that Plaintiff engaged in misconduct warranting the termination of his employment as an "at will" employee for Wachovia.

The same rationale holds true for the communication by Wachovia via its submission of the Form U-5 Uniform Termination Notice to the NASD. The Form U-5 Uniform Termination Notice supplied the reasons for Plaintiff's termination and the subsequent termination of his securities registration through Wachovia Securities, LLC. Broker-dealers such as Wachovia Securities, LLC must use this Form to terminate the registration of an individual who is no longer employed by their company. As previously discussed, Wachovia stated in Section 3 of the Form U-5 that Plaintiff's registration was being terminated because he had violated Wachovia Bank's Code of Conduct. (Complaint, Exhibit C). The NASD correspondence of July 17, 2006, verifies that it was informed that the facts giving rise to this violation were that Plaintiff had "utilized the outside services of a third-party loan broker." (Complaint, Exhibit D). Nowhere in any of the documentation that Plaintiff has provided to the Court does it use or reference that

Plaintiff's conduct amounted to "fraud." In fact, in Section 7 of the Form U-5 Wachovia specifically denies that Plaintiff, "under internal review for *fraud* or wrongful taking of property, or violating investment-related statutes, regulations, rules or industry standards of conduct" or resigned after allegations were made accusing Plaintiff of "*fraud* or the wrongful taking of property." (Sections 7B, 7F Form U-5, Exhibit C). (emphasis added).

The Form U-5 submitted to NASD and the NASD correspondence dated July 17, 2006 conclusively establish that Wachovia informed the NASD of its opinion that Plaintiff had violated Wachovia's Code of Conduct and specifically identified all of the facts supporting its opinion. Therefore, Wachovia's communications to the NASD are incapable of defamatory meaning for the reasons previously stated above.

Plaintiff also alleged that Wachovia, through the sworn testimony of its employee Ms. Lang, made these same defamatory comments at a referee hearing on Plaintiff's application for Unemployment Compensation benefits. Specifically Plaintiff states that Ms. Lang "testified under oath at the referee hearing on Plaintiff's application for Unemployment Compensation benefits that Plaintiff was terminated by her for fraud and for contracting with a third party broker." (Complaint, ¶14). However, Plaintiff failed to attach the transcript of Ms. Lang's testimony at the Unemployment Hearing.

In addition to Plaintiff being unable to meet his burden of proof that Ms Lang accused Plaintiff of committing fraud, Defendant was able to prove that the alleged defamatory communications were true.

According to 42 Pa.C.S.A. 8343(b)(1), truth is an absolute defense to a defamation claim. *Corabi v. Curtis Publ'g Co.*, 441 Pa. 432, 273 A.2d 899, 908 (1971). As discussed *supra*, Plaintiff admitted in his appeal letter that he did, on at least one

occasion, receive a faxed loan application from Tri State Auto and entered the application into Wachovia's computer system without first speaking with the customer. (Motion to Determine Preliminary Objections, Exhibit 2). Plaintiff does not dispute that such conduct violated Wachovia's Code of Conduct. Plaintiff's admissions of this conduct establishes the truth that he did in fact violate Wachovia's Code of Conduct and such conduct, along with his employment status as an "at will" employee, resulted in his termination from Wachovia for this violation.

Lastly, this Court believes that because the communications regarding the reason for Plaintiff's dismissal from Wachovia were made in context of his employment with Wachovia, they were subject to an absolute privilege and therefore are not defamatory. Consistent with a policy favoring private resolution of disputes between employers and employees, Pennsylvania law recognizes the absolute privilege of employers to publish defamatory matter in notices of employee termination. Thus, a letter articulating the reasons for an employee's termination which is published only to the employee "'may not be made the subject of an action in libel, regardless of whether the allegations of cause are true or false and regardless of the actual motive behind the dismissal.'" *Agriss v. Roadway Express, Inc.*, 334 Pa. Super. 295,310, 483 A.2d 456, 464 (1984). The purpose of the absolute privilege is to encourage the employer's communication to the employee of the reasons for discharge by eliminating the risk that the employer will possibly be subject to liability for defamation. Id. Where the privilege is abused by the employer's publication of the defamatory material to unauthorized parties, the employer is no longer immune from liability. *Yetter v. Ward Trucking Co.*, 401 Pa. Super. 467, 585 A.2d 1022 (1991). In addition, an employer has an absolute privilege to publish

defamatory matters in notices of employee terminations. *Agriss*, 482 A.2d at 464. Based on the caselaw, this Court believes that the absolute privilege applied to the statements Wachovia and its employee Dawn Lang made in its Corrective Action and Counseling Report documenting Plaintiff's violation of the Code of Conduct and the specific facts that gave rise to the violation and his termination.

This Court also concludes that based on a reading of the applicable caselaw, an absolute privilege applies not only for statements made relating to Plaintiff's employment review at Wachovia, but also for communications made to the Unemployment Compensation referee and the NASD.

We find it helpful to explore the original purpose of the absolute privilege. "The privilege, which includes judges, lawyers, litigants and witnesses, had its origin in defamation actions premised upon statements made during legal actions." *Panitz v. Behrend*, 429 Pa. Super. 273,632 A.2d 562, 564 (1993). The Pennsylvania Supreme Court explained:

> The reasons for the absolute privilege are well recognized. A judge must be free to administer the law without fear of consequences. This independence would be impaired were he to be in daily apprehension of defamation suits. The privilege is also extended to parties to afford freedom of access to the courts, to witnesses to encourage their complete and unintimidated testimony in court, and to counsel to enable him to best represent his client's interests.

Binder v. Triangle Publications, Inc., 442 Pa. 319, 323-24, 275 A.2d 53, 56 (1971); *Panitz*, 632 A.2d at 564.

Pennsylvania Courts have held that "all communications pertinent to any stage of a judicial proceeding are accorded an absolute privilege which cannot be destroyed by abuse," and therefore cannot be the basis of a defamation action. *Binder v. Triangle*

Publications, Inc., 442 Pa. 319, 323, 275 A.2d 53 (1971). Our Superior Court has also stated that:

> The 'judicial proceeding' wherein absolute privilege attaches has not been precisely defined in our Commonwealth. However, it has been defined to include any hearing before a tribunal which performs a judicial function, including many administrative officers, boards and commissions, so far as they have powers of discretion in applying the law to the facts which are regarded as judicial and 'quasi-judicial' in character.
>
> It is clear that an allegedly defamatory communication is absolutely privileged when it is published prior to a 'judicial proceeding' as long as that communication has a bearing on the subject matter of the litigation.

Milliner v. Enck, 709 A.2d 417, 1998 Pa. Super. LEXIS 408 (1998).

The *Milliner* Court has held that both Pennsylvania Courts and Federal Courts interpreting Pennsylvania law have uniformly held that Unemployment Compensation Hearings are 'judicial proceedings' protected by the absolute privilege. *Id*. at 419.

Here, the statements alleged to have been made by Ms. Lang at Plaintiff's Unemployment Compensation Hearing related directly to the issue of whether Plaintiff had engaged in conduct that would make him ineligible for unemployment benefits. Since Ms. Lang's alleged statements were relevant and material to the judicial proceedings before the Unemployment Compensation Referee, they are protected by an absolute privilege. Accordingly, Plaintiff's claims of defamation based on Ms. Lang's testimony at Plaintiff's Unemployment Compensation Hearing must be denied.

Analogous to the protections afforded statements made in Unemployment Compensation Hearings, Courts have also given statements made by brokerage firms on a Form U-5 an absolute privilege. *Herzfeld & Stern, Inc. v. Beck*, 572 N.Y.S.2d 683 (N.Y.

App. Div. 1991); see also *Rosenberg v. MetLife, Inc.*, 2005 U.S. Dist. Lexis 2135 (S.D.N.Y. 2005). The rational behind these decisions is a policy that promotes an unimpeded flow of information from brokerage firms to the NASD, allowing the reporting of unethical behavior in the securities industry without the threat of defamation or other tort claims. *Cicconi v. McGinn, Smith & Co.*, Inc., 808 N.Y.S.2d 604 (N.Y. App.Div. 2005). More importantly, the privilege is meant to protect investors:

> [b]y assuring brokerage firms that they will not be liable in tort for statements in their mandatory U-5 filings, [thus] avoid[ing] the possibility that they will hesitate to clearly state the exact grounds for an employee's termination. Only by clear descriptions of questionable conduct by brokers can [the court] best ensure that any future employers and customers have notice of any such conduct in their interactions with those brokers.

Wachovia and Ms. Lang should receive the full protection of absolute privilege to the statements made on Plaintiff's Form U-5 and Registration Comments documents as the Form U-5 was required to be filed with the NASD because Plaintiff no longer worked for Wachovia Securities LLC and cannot continue to maintain his registration with the NASD as affiliated with Wachovia. Pursuant to the Form U-5 response by Wachovia wherein they specifically denied any questions whether Plaintiff committed fraud, the NASD chose not to take any action against Plaintiff based on the reasons for his termination from Wachovia. The information that was disclosed to the NASD mirrored the statements made by Ms. Lang and Wachovia in their Corrective Action and Counseling Report and was communicated directly to the NASD. These statements therefore qualify as communications subject to absolute privilege.

CONCLUSION

In light of the foregoing circumstances this Court would respectfully request that the Order entered January 3, 2007, granting Defendant's Preliminary Objections and dismissing Plaintiff's Complaint without prejudice be affirmed by the Superior Court.

BY THE COURT:

_____ _____

Date **ALLAN L. TERESHKO, J.**

cc:
Bruce Preissman, Esq., for Appellant
John K. Ward, Esq., for Appellees