No. 33PA12 TENTH DISTRICT

NORTH CAROLINA SUPREME COURT

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MARK W. WHITE	)	
	)	
	)	
Plaintiff,	)	From Wake County
	)	
	)	
	)	
ROBERT J. TREW,	)	
	)	
	)	
Defendant.	)	

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PROPOSED AMICUS CURIAE BRIEF OF NORTH CAROLINA ASSOCIATED INDUSTRIES, INC.

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ISSUES PRESENTED

I. WHETHER THE NORTH CAROLINA COURT OF APPEALS ERRED IN FINDING AND CONCLUDING THAT COMMUNICATIONS BETWEEN AGENTS OF AN EMPLOYER REGARDING ITS EMPLOYEES ARE PUBLISHED FOR PURPOSES OF DEFAMATION LAW

II. WHETHER COMMUNICATIONS REGARDING AN EMPLOYEE'S WORK PERFORMANCE, PRODUCED BY THE EMPLOYEE'S SUPERVISOR, ARE PROTECTED BY A PRIVILEGE UNDER NORTH CAROLINA LAW

INTERESTS OF THE AMICUS CURIAE

North Carolina Associated Industries, Inc. (NCAI), is an organization consisting of three non-partisan, non-profit employers' associations representing more than 2,500 North Carolina member companies (Capital Associated Industries, Inc.; The Employers Association, Inc.; and Western Carolina Industries, Inc.). The employers range in size from small companies to the state's largest employers and are involved in a variety of types of businesses and industries. NCAI is dedicated to improving the quality of its member companies' human resources (HR) compliance and day-to-day people management practices. The impact of this decision will be extensive on NCAI's member companies as the Court of Appeals' decision will restrict managers' ability to freely and candidly discuss employment issues.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

NCAI adopts and incorporates by reference the Statement of the Case and the Statement of the Facts contained in Defendant-Appellant's new brief filed on 9 May 2012.

ARGUMENT

I. THE COURT SHOULD HOLD THAT COMMUNICATIONS BETWEEN AGENTS OF AN EMPLOYER REGARDING ITS EMPLOYEES ARE NOT PUBLISHED FOR PURPOSES OF DEFAMATION LAW

Under North Carolina law, to be published, the defamatory material must be "communicated to and understood by a third person." West v. King's Dep't Store, Inc., 321 N.C. 698, 703, 365 S.E.2d 621, 624 (1988). Without actual publication there simply can be no claim of defamation. Defendant-Appellant's new brief highlights the fact that numerous states have adopted the "intra-corporate non-publication rule." (Def. Appellant New Br. 8.) Under this rule, no publication occurs when statements are merely communicated between officers, employees and agents (hereinafter "agents") of a single employer in the course of their respective roles and duties. 50 Am.Jur. 2d *Libel and Slander* § 232. This rule clearly acknowledges how vital free-flowing communication among agents is to an employer's productivity, as well as the legal principle that a corporation can only act through agents.

Similarly, the North Carolina Supreme Court has held that a stenographer who transcribed information for a manager of an employee was "not a third person within the contemplation of law with respect to publication of a libelous matter." Satterfield v. McLellan Stores, 215 N.C. 582, 2 S.E.2d 709, 711 (1939). In Satterfield, a manager wrote a note to a stenographer to fill out a separation notice

for the plaintiff based on the plaintiff's alleged misconduct. This Court ruled that the communication between agents was not published to a third party.

In the case at hand, the North Carolina Court of Appeals held, based upon the language in Satterfield, which quoted a New York decision that also involved a stenographer, "that intra-office communications can be published in terms of defamation if the individual who reads the communications is independent of the process by which the communications were produced." White v. Trew, -- N.C. App. --, 720 S.E.2d 713, 720 (2011). The Court of Appeals construed the intra-corporate non-publication rule and this Court's decision in Satterfield too narrowly.

In applying that holding to the facts of this case, the court incorrectly found that the NCSU in-house counsel and the Dean of Engineering (the department head) were "distinct and independent of the process by which the statements were produced" because they did not contribute to the production of the original draft of the annual review that was the basis of the alleged defamatory statements. The court reasoned that, although both the Dean of Engineering and the in-house counsel are agents of the employer, they did not help produce the actual performance review and only became involved after the review was completed by the defendant when he sent it to them. The Court of Appeals' interpretation placed new limitations on the intra-corporate non-publication rule not recognized in other

jurisdictions. To the extent the court felt constrained by the factual setting of Satterfield, this appeal presents an opportunity for the Supreme Court to fully adopt the intra-corporate non-publication rule.

As a matter of law and good public policy, the Court of Appeals' rationale is too narrow and disregards how an employer and its personnel interact every day in the workplace. In today's workplace, managers frequently consult leadership, human resources (HR) and in-house counsel for advice in personnel matters. Indeed, managers are often required to report their evaluations to their peers and executives by business rules and practices. No modern manager exists in a silo. This interactivity and connectedness between managers benefits employees as well by encouraging a diversity of viewpoints and experiences in the employee review process. The Court of Appeals' very narrow view of the role of the Dean and in-house counsel ignores this reality of the modern workplace. More importantly, the interests of the state are not served by having courts second guess the necessity of internal guidance and collaboration often sought by managers and supervisors.

These inter-agent statements should not be considered publication to a third person. They should be viewed as the employer speaking to itself in the only way that it can – through agents. Supervisors and other agents of the employer, such as in-house counsel or an HR manager, are agents of the employer. As such, these agents of the employer should be free to speak among themselves.

An appellate court decision that communication between agents of the employer is publication for purposes of defamation law will have a chilling effect on the workplace. The agents of an employer must be free to evaluate and comment on their employees' work performance and conduct. At a high executive level, fiduciary obligations and the entity require executives to share their unvarnished opinions and judgment. This freedom will be unduly restrained if the agents are subject to a lawsuit and potentially liable for alleged defamatory statements made among other agents of the employer. The Court should not take lightly this possible negative effect because such a ruling would quickly be communicated to employers through legal counsel and/or trade associations, whose responsibilities include keeping employers up to date regarding important changes in the law and new laws that affect employers. Employers will then undoubtedly communicate this disturbing development to their agents and make policy changes to restrict various important communications in the work place. In addition, agents will likely become fearful of their own personal liability.

There will be many negative effects if a manager or other agent of an employer is afraid to speak up or take an adverse action against an employee out of fear of being sued by the employee. The simple fact is that not all employees perform well, nor do all employees follow behavioral guidelines. Managers must be free, particularly in this competitive environment, to candidly assess

performance and address misconduct. The Court of Appeals' ruling will potentially lead to undesirable situations in the workplace, such as an employee who needs to be disciplined or even terminated by the employer but is not because the agent of the employer is afraid to act. At the other extreme, managers may act alone without seeking guidance from superiors or HR managers. Neither situation would be good for the employer or its employees. All employees are negatively impacted by a fellow employee who is not satisfactorily performing his or her job, acting in an inappropriate manner in the workplace or prematurely terminated by a manager acting solo. Nor, NCAI submits, would this new policy be beneficial to the economic competitiveness of North Carolina.

There are countless situations that arise every day in workplaces across the State of North Carolina wherein agents of the employer must communicate among themselves regarding employees. The following are illustrative examples of these common workplace situations:

Recruiting

- References obtained during the hiring process are regularly shared with hiring managers involved and the HR department.
- Criminal records checks are shared to ensure the circumstances of the conviction are lawfully considered within the requirements of the job (and not discriminatory).

- Managers who interview applicants later get together to make decisions on all candidates and share candid observations and facts learned.
- Managers discuss with other managers what they learned about an applicant during reference calls to prior employers.

Managing People

- Performance reviews are usually maintained in files that can be accessed by upper management, a successor manager or HR.
- 360 degree assessments by team members of individuals contain candid comments that may be read by others on the team (usually anonymously stated but nonetheless "published").
- Employee self-assessments and goal setting processes usually include problem resolution comments by and among managers.
- Observations by a manager may be brought to key officials for review and guidance on next steps and who should be involved.
- Managers in a department meet to discuss their evaluations of direct reports to ensure consistency.
- Executive management team meetings where people issues may be very openly discussed, sometimes at the early stages of an issue without all the facts.

- The management team attends a workplace harassment training class conducted by the HR department and in the class one of the managers discusses a recent example involving several employees that might be a violation of the corporate workplace harassment policy.

Problem-Solving

- Employees often bring complaints to management about employee or manager behavior. Written records are often made and reviewed by others for help in making decisions.
- Employees accused of misbehavior often have counter-charges they levy with similar records and reviewers.
- Anonymous claims, blogs, emails, letters, notes slid under doors, graffiti in the restroom and such often lead to investigations particularly where theft, safety or quality are involved: any number of conversations may occur, theories tested and people questioned. Records and multiple conversations in such broad investigations are common.
- Discussions regarding judgments to be made about the right response to a threat of physical violence or retaliation by a current employee, an employee's spouse/friend or a just-terminated employee.
- Advice sought by one manager from another based upon a fact setting as it develops.

- Conversations about suspected illegal drug use and the need to send an employee for drug testing.
- Manager speaks with the HR manager, or another manager, to obtain advice and guidance regarding difficulty with one of his employees on either performance or conduct issues.
- Manager receives information from an employee about another employee regarding allegations of misconduct and that manager forwards to the HR manager for a follow up investigation.

Promotion/Transfer

- Management team discusses employee's performance and potential for promotion as part of a formal succession planning program.
- Employee is selected for promotion and a memo is written to summarize the reasons one employee is a better performer than another, shortcomings, etc.
- Employee is transferred following a serious conflict in the workplace to another location with a memo written and discussed.
- An open job is posted internally and a manager tells the hiring manager why "Employee X" is not a good fit for the role.

Termination/Layoff

- Manager seeks second opinion from another member of management while considering termination of an employee.

- Manager submits documentation of formal disciplinary actions of employee to HR for review and approval of termination request.
- HR manager communicates with in-house counsel to obtain an opinion regarding termination of an employee.
- Managers get together to rank employee performance in a job category based on multiple factors, some objective and some subjective. Records are kept for HR and legal review.
- A formal termination memo is written for the manager and HR to review before a termination meeting with an employee.
- Concerned co-employees are told an employee was terminated for "violation of company policy."

Post-Termination

- Statements made in response to regulatory inquiries and charges (discrimination and retaliation claims for example) require internal conversations to assemble the response and tell the story of what happened, and will also end up in a letter to an investigator that may or may not have a judicial privilege.
- Explanations to those in the "need to know" group following an employee termination or resignation.

- Conversations among managers about answering requests from a terminated employee, about considering a settlement of a claim or about the job reference the organization is willing to give.

As these examples illustrate, the Court of Appeals' holding would unduly restrict communication in the workplace and subject managers to unwarranted liability. In ruling, as a matter of law, that the Dean and in-house counsel were "distinct and independent" of the evaluation process, the Court displayed a lack of knowledge or concern for the level of communication that occurs between managers. In fact, NCAI regularly counsels its members to seek internal advice and fully discuss issues to lead to better decisions.

The Court, in contemplating its decision, should consider the impact of its ruling on current and prospective employers in North Carolina as well as the deleterious effect on necessary communications among agents of an employer that the North Carolina Court of Appeals ruling will have if upheld. Moreover, the "distinct and independent" test used by the Court of Appeals is extremely vague and would be difficult to apply to most employment communications. Therefore, NCAI respectfully requests that the Court reverse the Court of Appeals' ruling and hold that it is not publication for purposes of defamation law when supervisors and other agents of employers communicate among themselves in the course of their employment.

II. THE COURT SHOULD HOLD THAT COMMUNICATIONS REGARDING AN EMPLOYEE'S WORK PERFROMANCE MADE BY THE EMPLOYEE'S SUPERVISOR ARE PRIVILEGED COMMUNICATIONS UNDER NORTH CAROLINA LAW

Even if statements made in the annual review could be considered published for purposes of Plaintiff's defamation claim, Defendant was privileged to share his opinions with the Dean of Engineering and in-house counsel at NCSU. North Carolina recognizes a qualified privilege applicable to Defendant's statements in the annual review. The North Carolina Court of Appeals defined the rule as follows:

> [a] qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest.

Gibby v. Murphy, 73 N.C. App. 128, 132-33, 325 S.E.2d 673, 676 (1985) (quoting Stewart v. Check Corp., 279 N.C. 278, 285, 182 S.E.2d 410, 415 (1971)). A "privileged occasion" arises "'when for the public good and in the interests of society one is freed from liability that would otherwise be imposed on him by reason of the publication of defamatory matter.'" Ponder v. Cobb, 257 N.C. 281, 295, 126 S.E.2d 67, 78 (1962) (quoting 53 C.J.S., *Libel and Slander* § 87, 142-43).

North Carolina courts have long refrained from interfering with employment decisions and discussions. This is evidenced by North Carolina's status as an

employment at-will state. Under employment at-will, decisions to terminate employment are not actionable unless the decision violates public policy. At-will employment promotes flexibility in decisions and mobility of workforces, while still protecting employees from decisions that are discriminatory or in violation of public policy. A fundamental purpose of the at-will doctrine has always been to incentivize "economic development." Kurtzman v. Applied Analytical Indus., Inc., 347 N.C. 329, 334, 493 S.E.2d 420, 423 (1997). "[A]ny significant erosion of it could" discourage such development. Id. It would be wholly inconsistent to have a rule where a manager could fire an employee for any reason, whether good or bad, or even an irrational reason, but at the same time subject himself to a defamation claim if the terminated employee merely alleges that the manager communicated a false statement to a fellow manager or supervisor at any point before, during, or after the termination process.

For this reason, courts have recognized a broad qualified privilege for statements made in employment settings. On previous occasions, our courts have applied the qualified privilege to prevent liability for employment-related statements. In fact, this privilege is interpreted broadly by North Carolina courts to include intra-corporate statements made during evaluations, investigations and in connection with terminations. See e.g., Harris v. Procter & Gamble Mfg. Co., 102 N.C. App. 329, 331, 401 S.E.2d 849, 850 (1991) (where the court found the

employer had a qualified privilege to communicate the discharge of one employee to other employees); Pressley v. Can Co., 39 N.C. App. 467, 250 S.E.2d 676 (1979) (employment evaluation report by defendant's agent and sent to defendant's manager held to be privileged); Kinesis Advertising, Inc. v. Hill, 187 N.C. App. 1, 652 S.E.2d 284 (2007) (stockholder's allegation that employee stole millions of dollars from the company is privileged, even if libelous); Jones v. Hester, 260 N.C. 264, 132 S.E.2d 586 (1963) (corporate president's investigation of employee held to be privileged); Hartsfield v. Hines, 200 N.C. 356, 157 S.E. 16 (1931) (defendant's investigation of corporate mismanagement held to be privileged).

This privilege can only be overcome by evidence that the statement was made with actual malice. Barker v. Kimberly-Clark Corp., 136 N.C. App. 455, 461, 524 S.E.2d 821, 825 (2000). "If Plaintiff cannot meet his burden of showing actual malice, . . . privilege . . . bars any recovery for the communication, even if the communication is false." Clark v. Brown, 99 N.C. App. 255, 263, 393 S.E.2d 134, 138 (1990). "Actual malice may be proven by evidence of ill-will or personal hostility on the part of the declarant . . . or by a showing that the declarant published the defamatory statement with knowledge that it was false, with reckless disregard for the truth or with a high degree of awareness of its probable falsity." Id. at 263, 393 S.E.2d at 138 (citations omitted).

Here, there can be no doubt that the qualified privilege applies to Trew's comments in the evaluation. Trew clearly had an interest in communicating the information, and the Dean and in-house counsel had a corresponding interest in the subject matter. In an effort to avoid application of the privilege, Plaintiff's complaint includes conclusory allegations that Defendant knew the annual review contained false statements, that Defendant included the statements in reckless disregard of their truth or falsity and that Defendant's statements were malicious. (Compl. ¶¶ 20, 22.) NCAI acknowledges that this Court previously held that merely alleging a defendant's actual malice in making defamatory statements is sufficient to overcome the qualified privilege at the pleading stage. Presnell v. Pell, 298 N.C. 715, 720, 260 S.E.2d 611, 614 (1979). However, under this lenient standard, if the Court of Appeals' ruling is upheld, Defendant will be forced to exhaust enormous amounts of time and money merely to learn what he already knows – that Plaintiff's actual malice allegation has no factual basis. The qualified privilege available to intra-corporate communications was implemented to free corporations and their employees from such litigation concerns. If all a plaintiff must do is recite the definition of "malice" in his complaint, this fundamental purpose is completely undermined.

This Court should require more than mere allegations of actual malice to subject a manager or employer to a defamation lawsuit for statements made in a

performance evaluation. Therefore, NCAI submits that in asserting a defamation claim concerning a communication protected by a qualified privilege, the plaintiff should be required to show that the defendant acted with legal malice, the standard required for tortious interference claims, rather than actual malice.

In North Carolina, to prevail on a claim against a supervisor or manager for tortious interference with contractual relations, the plaintiff must show that the defendant acted with "legal malice." Varner v. Bryan, 113 N.C. App. 697, 702, 440 S.E.2d 295, 298 (1993). "A person acts with legal malice if he does a wrongful act or exceeds his legal right or authority in order to prevent the continuation of the contract between the parties." Id.

North Carolina courts have repeatedly held that a supervisor who acts within the scope of his job duties and terminates an employee has not acted with "legal malice" – even where the supervisor terminated the employee for personal reasons or acts, in part, out of malicious motives. See e.g., You v. Roe, 97 N.C. App. 1, 10, 387 S.E.2d 188, 192 (1990) (granting summary judgment to defendant employer on terminated employee's tortious interference claim despite the fact that the record in the case was "replete with allegations of the [supervisor's] motives" because there was no evidence that the supervisor's "actions were outside the scope of his authority"); Varner, 113 N.C. App. at 702, 440 S.E.2d at 299 (affirming dismissal of malicious interference claim of terminated town manager

on summary judgment because "[e]ven if plaintiff was terminated by defendants for personal or political reasons, as his evidence tends to show, such termination was neither a wrongful act nor one in excess of defendant's authority and therefore not legally malicious.").

Adoption of the legal malice standard for defamation claims arising out of employment decisions will strike an appropriate balance between (1) protecting employees who are harmed by actions of agents outside their legal rights and authority, (2) maintaining the interests of employers in free communications among managers, and (3) preserving the state's historical respect for the flexibility and mobility of employers and employees provided through the at-will rule, with limited judicial interference in employment matters.

Here, the Complaint alleges that Defendant "served as the Department Head" when he wrote the annual review of Plaintiff. (Compl. ¶ 2.) Therefore, by virtue of his position, Defendant "had a legitimate professional interest" in evaluating and reviewing professors within his department. Additionally, even if Defendant maliciously wrote the annual review as alleged, because of his position as department head, Defendant had a legitimate professional interest in ensuring that Plaintiff performed well and within the guidelines set out by NCSU. Therefore, when applying the legal malice standard to this set of facts, because the Complaint on its face admits that Defendant had a proper motive for the annual

review, Plaintiff's defamation claim should be dismissed pursuant to Rule 12(b)(6).

CONCLUSION

For the foregoing reasons, the Court of Appeals erred in affirming the trial court's denial of Defendant's motion to dismiss. NCAI respectfully asks this Court to reverse the N.C. Court of Appeals and hold that the annual review in question was never published for purposes of Plaintiff's defamation claim. Alternatively, NCAI requests that the Court recognize that legal malice is required to overcome the qualified privilege applicable to Defendants' communication in the review.

Respectfully submitted this 17th day of September, 2012

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CERTIFICATE OF SERVICE

I hereby certify that the parties were served with copies of the foregoing Proposed *Amicus Curiae* Brief of North Carolina Associated Industries, Inc. by depositing said copies in an official depository under the exclusive care and custody of the United States Postal Service addressed as follows:

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