2019 IL App (3d) 180247-U

Order filed July 1, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

MATTHEW KUESTER,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Plaintiff-Appellant,	)	Kankakee County, Illinois,
	)	
v.	)	Appeal No. 3-18-0247
	)	Circuit No. 15-L-39
PEPSICO, INC., a/k/a Pepsi Beverages	)	
Company, BOTTLING GROUP LLC and	)	
WALMART STORES, INC.,	)	Honorable
	)	Adrienne W. Albrecht,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held*: The court did not err in dismissing the plaintiff's claim of defamation against Pepsi or in granting summary judgment in favor of Walmart.

¶ 2 The plaintiff, Matthew Kuester, appeals the granting of Pepsi's motion to dismiss and the granting of Walmart's motion for summary judgment.

¶ 3 I. BACKGROUND

¶ 4 In April 2015, Kuester filed his second amended complaint raising, *inter alia*, a defamation claim against Pepsi and defamation and intentional interference with prospective economic advantage against Walmart. The complaint stated that on April 11, 2014, Kuester worked for Pepsi and was distributing beverages to the Walmart store in Bourbonnais, Illinois. While on his way to the restroom at Walmart, he saw a piece of paper on the floor and picked it up. He discovered that the paper was a check made out to James Forbes for $2300. Kuester placed the check in his pocket, finished his job for the day, and went home. Once he arrived home, he looked online for any contact information for Forbes. When he did not find any, he called the check issuer. A representative from the issuer told Kuester to destroy the check, which Kuester did.

¶ 5 On April 15, 2014, Kuester received a phone call from Rick Nelson, a sales representative for Pepsi. Nelson stated that he had been contacted by Liz Calvillo, a market asset protection manager for Walmart. Calvillo informed Nelson "that they had a video of [Kuester] stealing a check from Wal-Mart. She further told *** Nelson that the video showed [Kuester] picking up a check off the floor of the store and heading into the restroom and then exiting the restroom with the check." Kuester told Nelson that he had been directed by the check issuer to destroy the check, which he had done. Kuester alleged that Nelson relayed this information to Calvillo, who subsequently spoke with Kuester's supervisor, Mark Sowards. Calvillo told Sowards,

> "a customer had dropped a check in the store on April 11, 2014. She investigated the whereabouts of the check and saw on video surveillance [Kuester] picking up the check and heading into the men's restroom for about thirty (30) seconds. He then exited the restroom and put the check in his pocket and proceeded into the

> store. Since there was no attempt to return the check to Wal-Mart personnel, [Kuester] was banned from the store for stealing the check."

Kuester alleged that stating that he stole a check from the store amounted to defamation because Walmart "described [Kuester's] conduct as dishonest and accused him of being a thief." Sowards called Kuester later the same day and told Kuester he was suspended pending an investigation.

¶ 6 On April 15, 2014, Mark Ahlden, a Walmart employee, met with Sowards and Marty Hull, Sowards's supervisor, to view the videotape. Sowards called Kuester on April 16, 2014, and asked him to attend a meeting and give a statement later that day. Before going to the meeting, Kuester called the check issuer to see if there was a recording of the call he had made. The representative stated that there was and offered to speak with employees of Walmart and Pepsi "to assure them that [Kuester] did nothing improper with the check and did not attempt to steal the check." Kuester gave the representative Sowards's direct phone number.

¶ 7 Kuester arrived at Pepsi later that day for the meeting. Present at the meeting was Sowards, Hull, and Kuester's union steward. The Pepsi district manager and a human resources representative named "Whinny" were also present by phone. Whinny told Kuester that Walmart had banned him from all of its stores and that, "pursuant to Pepsi company policy, if he could not service all of its accounts, which includes Wal-Mart stores, [Kuester's] employment with [Pepsi] had to be terminated." Kuester told them that he had not tried to cash or deposit the check, nor had he seen the person drop the check and explained that he called the check issuer and destroyed the check. Sowards stated that he had spoken to the representative from the check issuer and had given her contact information to Walmart. Whinny stated that Kuester was suspended until Walmart made its final decision. Kuester alleged that at this meeting, Pepsi

"maliciously and wrongfully defamed [him] by publicly accusing [him] of actions that were not true."

¶ 8 On April 17, 2014, "Anthony [Moiser], a merchandiser for Pepsi, called [Kuester] and told him most of the Pepsi plant was aware that he was suspended for stealing a check from Wal-Mart. A Pepsi employee by the name of Necole told the Pepsi drivers that [Kuester] was suspended for stealing a check from Wal-Mart." Moiser also told Kuester, on April 22, 2014, that "Lisa, a back room receiver for Wal-Mart told other merchandisers that were employed by [Pepsi] that Pepsi should fire [Kuester] for stealing a vendor check" and that "Bradford, a Coca-Cola merchandiser stated to Wal-Mart and Pepsi employees that [Kuester] stole a check." A Kraft Foods merchandiser also told Kuester on April 21, 2014, "that a Pepsi merchandiser, by the name of Steve, stated that [Kuester] was suspended for stealing a check and that [Kuester] knew the individual the check was made out to." Kuester alleged that these interactions amounted to defamation because they "maliciously and wrongfully accused [him] of stealing a check from Wal-Mart." Moreover, Kuester alleged that Lisa's statement proved that Walmart "had already published defamatory statements about [Kuester] to its workforce."

¶ 9 On April 24, 2014, Kuester attended a meeting at Pepsi with Sowards, the union steward, and Hull. He was given a "Company Employee Corrective Action Notice" (Corrective Action Notice) that stated,

> "Matthew Kuester has been banned from all Wal-Mart stores as a result of his actions on 4/11/2014. On 4/11/2014 [Kuester] picked up a check that a Wal-Mart customer had dropped on the floor. After retrieving this check, [Kuester] took the check into the bathroom and then left the store with the check without returning it to Wal-Mart Management. For this he will be discharged from duty with [Pepsi]

> as of 4/22/2014. As stated in the General Rules of Conduct Handbook. A group IV-R Any immoral or indecent conduct or unlawful or improper conduct, whether on or off Company premises or on or off working time, which casts discredit upon the Company's reputation or image or which adversely affects the employee's relationship with his fellow employees, supervisors or adversely affects the Company's products, property or goodwill."

Kuester alleged that Pepsi "maliciously and wrongfully composed [the Corrective Action Notice] containing false statements." Kuester stated that, by banning him from its stores, Walmart knowingly, intentionally, and unjustifiably interfered with Kuester's employment.

¶ 10 Kuester filed a union grievance regarding the termination of his employment, and a grievance meeting took place on August 27, 2014. Kuester was represented by three union representatives. "Representing Pepsi were Mark Sowards, Marty Hull, Ed Holloway, and Winston. Three other individuals were present that [Kuester] had never met before and had no idea who they were." Sowards read the Corrective Action Notice.

> "Then Winston stated that Wal-Mart's district manager informed Winston that they did not want [Kuester] in its stores because he presented an ethics issue. Specifically, Wal-Mart accused [Kuester] of taking Wal-Mart property and that he should have returned the check to Wal-Mart.
>
> *** A female individual that [Kuester] did not recognize at the meeting said, Wal-Mart refused to change their position of banning [Kuester] from its stores and did not want to know any other information regarding the check incident."

Kuester alleged that, at the union grievance meeting, Pepsi "republished the defamatory statements in front of a room full of persons and some were not necessary parties to the grievance meeting."

¶ 11 Pepsi and Walmart filed motions to dismiss, and a hearing was held on August 1, 2016. The court found that Kuester's complaint failed to state a cause of action regarding the defamation against Pepsi and granted Pepsi's motion to dismiss with prejudice. The court found that the pleadings stated a cause of action for defamation and intentional interference with prospective economic advantage against Walmart and denied Walmart's motion to dismiss.

¶ 12 Walmart filed a motion for summary judgment arguing that Kuester could not establish that Walmart made any false statements, any statements were privileged, and he could not show that Walmart acted with intent to interfere with his employment. Walmart stated that,

> "When a vendor, or other non-employee who is authorized to be on Walmart's premises for business purposes, removes property that does not belong to him or her, Walmart considers that to be an 'internal' theft of property. *** Walmart's policy and practice is to ban from its property an individual found to have committed such an infraction."

¶ 13 Attached to the summary judgment motion were depositions of Kuester, Calvillo, Nelson, Sowards, and Hull. Kuester stated that when he was employed with Pepsi, he worked five days a week, and delivered to Walmart in Bourbonnais on two of those days. He also delivered to Berkot's in Manteno, Ultra Foods, Jewel, and Target. Kuester had compiled a journal that chronicled what had happened each day since he had taken the check. In the journal, he had typed that Calvillo had contacted Nelson "[a]nd said that they had [Kuester] on videotape picking up a check and heading into the bathroom and exiting the bathroom with it." Kuester had

also written that during the meeting, Winney, "told [him] that Wal-Mart banned [him] from all of their Wal-Mart stores as a result of what had happened." He had further written, Winney "asked why [he] didn't turn it, being the check, into Wal-Mart. [He] told her it was not Wal-Mart's check and had no affiliation with them." Kuester stated that he thought this because he "didn't see anything on [the check] that said Wal-Mart. [He] saw it was through American Funds so [he] assumed it was somebody independent from Wal-Mart." However, he did not know whether Forbes was a Walmart employee or otherwise affiliated with Walmart. Defense counsel showed Kuester his second amended complaint that said, "Calvillo told Nelson they had a video of [Kuester] stealing a check from Wal-Mart." Kuester stated that he was not aware that it had ever been documented that he was stealing a check. Kuester's notes, Sowards's written statement, and the Corrective Action Notice all said that he had picked up a check from the floor of Walmart. Kuester stated that he never had any contact with anyone from Walmart and never received or saw anything written from Walmart that stated that he had stolen a check. Kuester stated that he did not know why the language was changed to stealing in the second amended complaint; the first two complaints only stated that he had picked up a check and taken it from the store. Kuester stated that he never spoke to Lisa or heard her say that he should be fired. Walmart was not present at the grievance meeting. Kuester was not sure whether Walmart knew that he could not work for Pepsi if he could not service the Walmart stores.

¶ 14 In her deposition, Calvillo said,

> "You work for the company. If you're taking something that doesn't belong to you, whether it was something off the shelf or whether it was something that belonged to another customer, then, yes, that's considered internal theft whether it's a direct loss to Walmart or not, a loss of trust, as they see it, to the customer."

She said that this policy extends to vendors, which included Pepsi merchandisers. She stated that she would not have been the person who banned Kuester from the store; it would have either been her supervisor or the regional human resources manager. However, Calvillo stated that it was not unusual for merchandisers to be banned from the store because, "Merchandisers steal all the time." She also stated that they have had to arrest merchandisers or vendors before. When asked if she considered what Kuester did to be stealing, she said,

> "Me? All day long. If I owned a business and I have people servicing my business, I don't want them to do anything to my customers that's going to make my customers not want to come there. We're not going to have business if we don't have customers. But, again, I'm not the final decisionmaker. But if you want to know what I consider, yeah, I do."

Calvillo did not think there was any documentation stating that Kuester was banned from the store.

¶ 15 Nelson's deposition said that he received a call from Calvillo stating that Walmart had a video of Kuester picking something up off the floor and leaving with it. Sowards's deposition said that Kuester had taken a dropped check off the ground, entered the restroom, exited the restroom, and put the check in his pocket. Sowards watched the videotape, and it showed that a customer dropped a check and approximately 15 seconds later Kuester "briskly walked over, picked up the check, and went into the men's restroom." He then exited the restroom and put the check into his pocket. Ahlden told Sowards that he was apprising Sowards of the incident because a "Pepsi employee had taken some property from the store." Sowards said that that is how it was described to him. He said he cited that particular rule in the Corrective Action Notice because "[t]he fact that he was banned from Walmart sheds a bad light on the company's

goodwill." The removal of property from Walmart amounted to improper conduct, according to Walmart's policy. Sowards stated he could not say that anyone used the word "theft" when describing Kuester's act, but that they said "[t]here was a no-tolerance policy for removal of their item from the store."

¶ 16 Walmart's investigation report written by Ahlden, the asset protection manager, stated that a woman contacted Walmart because she lost a check. Ahlden reviewed the security tape and saw the woman drop the check and one minute later Kuester picked it up and walked into the restroom. Kuester still had the check in his hands when he exited the restroom. He left with the check and at no time tried to return the check or give it to customer service.

¶ 17 A hearing was held on the motion for summary judgment. The court granted the motion for summary judgment, stating:

> "I can't tell you how offensive Walmart's behavior in this case is to the court. I can't tell you how often in reviewing all of these documents and reviewing all of the testimony and reviewing the complaint the court has wondered how easy it would be for one's life to be ruined by being a well-intentioned person and running afoul of their irrational behavior. We're talking about not a tangible piece of property but a negotiable instrument that is *** a check. We're talking about doing what a well-minded person would feel like would be a responsible behavior. It could *** have been a cell phone and when somebody sees somebody's cell phone what they typically do is try to contact the person and say I've got your cell phone in a restaurant. Walmart's behavior is reprehensible in the court's opinion. And when they found out that the person had done—*** had contacted the institution on which the check was drawn and followed the

instructions of that person and they still insisted on maintaining their policy, it's just irrational, offensive and wrong.

However, it's not defamation. Nothing that they did constitutes defamation. And I could not—I cannot maintain a cause of action for defamation without following the law. This is one of those cases where following the law for the court is a very painful thing. *** So the court has no choice but to allow the motion for summary judgment. And much to its dismay, because Walmart's behavior is offensive in the court's opinion and it resulted in serious wrongful consequences to the [Kuester]. But the court is—this is a court of law and the court has to follow the rules of law. In following the rules of law the motion for summary judgment will be allowed."

¶ 18 II. ANALYSIS

¶ 19 On appeal, Kuester argues the court erred in granting (1) the motion to dismiss his defamation claim against Pepsi, and (2) Walmart's summary judgment motion. We will consider each of these arguments in turn.

¶ 20 A. Defamation Against Pepsi

¶ 21 Pepsi filed its motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Code). 735 ILCS 5/2-615 (West 2016). "A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). We apply a *de novo* standard of review, accepting as true all well-pleaded facts and reasonable inferences and construing the allegations in the light most favorable to the plaintiff. *Id.* "Thus, a cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the

plaintiff to recovery." *Id.* "The plaintiff is not required to prove his or her case, but must allege sufficient facts to state all the elements of the asserted cause of action," (*Kumar v. Bornstein*, 354 Ill. App. 3d 159, 165 (2004)), and may not rely solely on conclusions (*Marshall*, 222 Ill. 2d at 430). Stated another way, if the plaintiff's factual allegations are insufficient to assert *any one* of the elements of the alleged cause of action, the motion to dismiss is properly granted.

¶ 22 "To state a defamation claim, a plaintiff must present sufficient facts establishing that (1) the defendant made a false statement about the plaintiff, (2) the defendant made an unprivileged publication of that statement to a third party, and (3) this publication caused damages." *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 38. A defendant is not liable for a defamatory statement if the statement is substantially true. *Moore v. People for the Ethical Treatment of Animals, Inc.*, 402 Ill. App. 3d 62, 71 (2010). A statement is substantially true if the gist of it is true. *Id.* "While determining 'substantial truth' is normally a question for the jury, the question is one of law where no reasonable jury could find that substantial truth had not been established." *Id.* (quoting *Wynne v. Loyola University of Chicago*, 318 Ill. App. 3d 443, 451 (2000)).

¶ 23 Here, Kuester's allegation of defamation against Pepsi stemmed from two main statements, Pepsi's statement that (1) Walmart had banned Kuester from all of its stores for "stealing" a customer check and that he had to be terminated if he could not service all of his accounts, which included Walmart, that was made at various times, and (2) Kuester was being discharged for committing "immoral and unlawful acts," which was contained in the Corrective Action Notice. Kuester alleged that each of these statements were published at different times on April 16, 17, 21, and 24, and on August 27.

¶ 24 First, it is not disputed that Kuester saw a piece of paper on the floor that turned out to be a check, picked the check up, put it in his pocket, and took the check home. Kuester agrees that doing so was the reason that he was banned from Walmart stores. Because this was true, it did not amount to defamation for Walmart management to make such a statement. Further, it was Pepsi's policy that if a merchandiser could not service his full route, then he had to be terminated. Therefore, telling Kuester that he was banned from Walmart stores for taking a customer check and that he had to be terminated if he could not service his accounts amounted to a substantial truth and no reasonable jury could find otherwise.

¶ 25 In coming to this conclusion, we reject Kuester's argument that the statement that he was banned from Walmart for "stealing" a check was false because he did not "steal" a check. Even accepting that one of the Pepsi representatives said that Kuester was banned from Walmart for stealing a check, such cannot be imputed as defamation to Pepsi, where Pepsi was solely relaying Walmart's reason for banning Kuester.

¶ 26 Second, the Corrective Action Notice stated,

> "Matthew Kuester has been banned from all Wal-Mart stores as a result of his actions on 4/11/2014. On 4/11/2014 [Kuester] picked up a check that a Wal-Mart customer had dropped on the floor. After retrieving this check, [Kuester] took the check into the bathroom and then left the store with the check without returning it to Wal-Mart Management. For this he will be discharged from duty with the Pepsi Beverages Company as of 4/22/2014. As stated in the General Rules of Conduct Handbook. A group IV-R Any immoral or indecent conduct or unlawful or improper conduct, whether on or off Company premises or on or off working time, which casts discredit upon the Company's reputation or image or which

adversely affects the employee's relationship with his fellow employees, supervisors or adversely affects the Company's products, property or goodwill."

Again, we find that no reasonable jury could find that this statement did not amount to a substantial truth. The notice solely quotes the plain language of Pepsi's rule under which Kuester's employment was terminated. Walmart deemed Kuester's taking of the check as improper conduct and such conduct adversely affected Pepsi's relationship with Walmart where Kuester could not service the store. While the dissent posits that Pepsi had to come to its own conclusion regarding the impropriety of Kuester's action, Pepsi could rely on Walmart's conclusion regarding Kuester's conduct and its store policy. As insufficiencies in any one element of the offense is enough to uphold a dismissal under section 2-615, the court properly dismissed the defamation claim against Pepsi.

¶ 27 B. Walmart's Motion for Summary Judgment

¶ 28 "Section 2-1005 of the [Code] provides for summary judgment when the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact ***." *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007); 735 ILCS 5/2-1005 (West 2016). We review the granting of summary judgment *de novo* and review the record in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriate where the plaintiff cannot establish an element of his claim. *Willett v. Cessna Aircraft Co.*, 366 Ill. App. 3d 360, 368 (2006).

¶ 29 1. Defamation

¶ 30 As stated above, a claim of defamation requires the unprivileged publication of a false statement about the plaintiff by the defendant. *Coghlan*, 2013 IL App (1st) 120891, ¶ 38. Damages are presumed if the claim falls into a category of statements that are defamatory *per se*,

which includes words that impute a person has committed a crime. *Harrison v. Addington*, 2011 IL App (3d) 100810, ¶ 39. However, even where a statement would amount to defamation *per se*, it is not actionable where it is substantially true or is capable of an innocent construction. *Coghlan*, 2013 IL App (1st) 120891, ¶¶ 41-42.

¶ 31 Here, Kuester alleges that Walmart published defamatory statements in two instances: (1) on or about April 22, 2014, when Lisa told other merchandisers that Kuester should be fired for stealing a vendor check, and (2) on April 15, 2014, when Calvillo spoke to Nelson and Sowards and said that Walmart had a video recording of Kuester "stealing" a check. Kuester alleged that on these two instances, Walmart "described [his] conduct as dishonest and accused him of being a thief."

¶ 32 Lisa's statement did not amount to defamation. Kuester stated that he did not hear her make the statement, but instead was told by Moiser that he heard her make the statement. Therefore, it would be considered inadmissible hearsay. See *Damani v. Simer SP, Inc.*, 650 Fed. Appx. 897, 899 (7th Cir. 2016); *Chisholm v. Foothill Capital Corp.*, 3 F. Supp. 2d 925, 939 (N.D. Ill. 1998). There is no indication that Lisa, as a back room receiver, was in a position of management at Walmart when she discussed the incident with other merchandisers. Lisa was solely expressing her personal opinion, not the opinion of Walmart, and conveyed her opinion to nonmanagement merchandisers who were not capable of firing Kuester.

¶ 33 As to the second allegation, as we found above, it was substantially true that Kuester picked the check up off the floor and took it home with him. Walmart had Kuester's actions on a security video. We note that, in the second amended complaint, Kuester's counsel changed the language used from "taking" a check to "stealing" a check. There is no indication that Calvillo actually characterized Kuester's taking of the check as "stealing" when speaking to Nelson and

Sowards on April 15. The notes Kuester wrote, Sowards, Hull, and Nelson's depositions, and the Corrective Action Notice all stated that Kuester was banned from Walmart for taking a check. Kuester stated during his deposition that he had never received any paperwork that said that he had stolen a check, nor did he know why the second amended complaint changed the wording from "taking" to "stealing." Calvillo in her deposition said that taking something that did not belong to the person amounted to internal theft, it was not unusual for merchandisers to be banned from the store because, "Merchandisers steal all the time," and in her personal opinion, what Kuester did was stealing. However, there was no indication that she actually said any of this to Kuester's supervisor on April 15.

¶ 34 Moreover, "a defamatory statement is not actionable where it is subject to a privilege." *Id.* ¶ 43.

> "One such occasion includes 'situations that involve some interest of the party publishing the statement, such as a corporate employer investigating certain conduct by its employees.' *Popko v. Continental Casualty Co.*, 355 Ill. App. 3d 257, 264 (2005). 'A corporation has an unquestionable interest in investigating and correcting a situation where one of its employees may be engaged in suspicious conduct within the company. [Citation.] Thus, a qualified privilege exists for communication made concerning an investigation.' *Id.* Once a defendant has established a qualified privilege, the plaintiff must then prove that the defendant either intentionally published the material while knowing the matter was false, or displayed a 'reckless disregard' as to the matter's falseness [*Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 24 (1993).] Reckless disregard is defined as publishing the defamatory matter ' "despite a

high degree of awareness of probable falsity or entertaining serious doubts as to its truth." ' *Id.* at 24-25 (quoting *Mittelman v. Witous*, 135 Ill. 2d 220, 237-38 (1989))." *Coghlan*, 2013 IL App (1st) 120891, ¶ 43.

¶ 35 We find that this privilege applies here. While the dissent points out that Walmart and Kuester did not have a standard corporate employer/employee relationship, such relationship is only one example of an occasion in which privilege applies. As *Coghlan* states, the privilege applies generally to " 'situations that involve some interest of the party publishing the statement.' " *Id.* (quoting *Popko*, 355 Ill. App. 3d at 264). We find that this applies equally to the store/vendor relationship that Walmart and Kuester had. On April 15, 2014, Calvillo spoke to Nelson and Sowards because she had received a call from a customer about a lost check. Upon reviewing the security video, she saw Kuester pick up the check, put it in his pocket, and leave the store with it. There is no doubt that Walmart had an interest both in recovering property that belonged to its customers and in making sure its vendors complied with store policies. Calvillo's conversations were pursuant to an investigation and, thus amounted to a privileged communication. Kuester contends that Walmart acted with reckless disregard when it subsequently failed to investigate his claim that he called the check issuer and destroyed the check. However, at the time Calvillo made the statement on April 15, 2014, the only time that Kuester alleges Walmart made such a statement, Calvillo had no reason to believe that the video was untrue or that Kuester had not taken the check. While Walmart may have failed to subsequently look into Kuester's claims, that does not negate the privilege that existed at the time the statement was made. Therefore, we find that the court properly granted summary judgment as to Kuester's claim of defamation against Walmart.

¶ 36 2. Intentional Interference with Prospective Economic Advantage

¶ 37 "In order to prevail on a claim of intentional interference with prospective economic advantage, appellant must show: (1) that he had a reasonable expectation of continued employment; (2) that the defendant knew of the expectancy; (3) that their intentional and unjustified interference caused the termination of the employment; and (4) damages." *Harrison*, 2011 IL App (3d) 100810, ¶ 52.

¶ 38 Here, Kuester cannot show that the third element is met. First, there is no indication in the record that Walmart intended to interfere with Kuester's employment. While Walmart banned Kuester from the store, there is no indication in the record that, when it did so, it knew Kuester's employment would be terminated or intended such a result. Walmart was only one of the stores that Kuester delivered to. Second, we do not find that Walmart's decision to ban Kuester was unjustified. Walmart's policy was that,

> "When a vendor, or other non-employee who is authorized to be on Walmart's premises for business purposes, removes property that does not belong to him or her, Walmart considers that to be an 'internal' theft of property. *** Walmart's policy and practice is to ban from its property an individual found to have committed such an infraction."

Sowards was told that this was a "no-tolerance policy." Pursuant to its own policy, Walmart was justified in banning a vendor in this situation, even if Kuester was acting with good intentions. We also note that providing an employer proper and accurate reports cannot represent an unjustified interference. *Voyles v. Sandia Mortgage Corp.*, 196 Ill. 2d 288, 301 (2001). As stated previously, Calvillo accurately told Pepsi that Walmart had a video recording of Kuester taking a check. Moreover, she accurately told Pepsi that Kuester was banned from Walmart pursuant to Walmart policy. Therefore, the court did not err in granting summary judgment.

¶ 39 III. CONCLUSION

¶ 40 The judgment of the circuit court of Kankakee County is affirmed.

¶ 41 Affirmed.

¶ 42 JUSTICE McDADE, dissenting.

¶ 43 The majority has affirmed the dismissal of Kuester's defamation claim against Pepsi for failure to state a redressible claim and the granting of summary judgment in favor of Walmart. For the reasons that follow, I dissent from both of those decisions.

¶ 44 Motion to Dismiss

¶ 45 With regard to Pepsi, I would find that Kuester's employer is subject to liability on at least the second prong of his claim—the one based on the issuance of the Corrective Action Notice. A plain reading of the Corrective Action Notice itself shows that to find a violation of the cited rule in Pepsi's General Rules of Conduct Handbook, Pepsi, not Walmart, must find that Kuester's conduct was "immoral or indecent" or "unlawful or improper." See *supra* ¶ 9. It necessarily follows that a decision to issue the Corrective Action Notice on that basis constitutes an assertion by Pepsi that it had determined Kuester's conduct actually met that level of impropriety.

¶ 46 Moreover, in a defamation action, a plaintiff must also prove publication and injury (unless the defamation is *per se* and injury/damages are presumed). *Coghlan*, 2013 IL App (1st) 120891, ¶ 38. Allegations of which specific persons in the relevant community heard and/or repeated the statements are not necessary to state a claim, nor is it necessary to prove the truth of the statements themselves, but only the fact that they were made, accepted, and possibly passed on. They are, therefore, not hearsay. See *Morelli v. Ward*, 315 Ill. App. 3d 492, 497 (2000)

("Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted.").

¶ 47 I would find that Kuester's complaint currently does state a claim. However, even if we were to find his claim is incompletely alleged or inartfully crafted, it seems clear to me that the facts alleged by Kuester are capable of supporting a viable claim. The majority has set out the standards for reviewing a section 2-615 dismissal. *Supra* ¶ 21. Following those rules, the facts already alleged by Kuester, if proved, could entitle him to judgment.

¶ 48 Motion for Summary Judgment

¶ 49 I would find that Kuester has demonstrated the existence of a triable issue of disputed material fact. As with the motion to dismiss, we view the record in the light most favorable to Kuester. The manner of our review was set out by the majority above. *Supra* ¶ 28. The majority discounts some of the alleged statements as "protected" opinion, subject to an innocent construction, and "privileged." I will consider each of these conclusions in turn.

¶ 50 First, not all opinions are "protected" speech. A statement claimed by the person uttering or publishing it is not protected by the first amendment if it is an expression of opinion that states or implies a foundational assertion of fact that is capable of being proven false. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990). In *Milkovich*, the Supreme Court noted that Lorain Journal relied on the following quotation from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974), in asserting that its statement was protected opinion:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."

The Supreme Court in *Milkovich* went on to state:

> "[W]e do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.' [Citation.] Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact." *Milkovich*, 497 U.S. at 18.

By way of example, the Court stated, "Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' " *Id.* at 19. The Illinois Supreme Court reiterated *Milkovich*'s explanation of protected opinion in *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 581 (2006), stating, "there is no artificial distinction between opinion and fact: a false assertion of fact can be defamatory even when couched within apparent opinion or rhetorical hyperbole."

¶ 51 Here, Lisa told other merchandisers that Kuester should be fired for stealing a vendor check. While she may have been expressing her opinion, whether Kuester stole a vendor check was a fact capable of being proven false and was not protected under the first amendment.

¶ 52 Second, Kuester has alleged that Calvillo told Nelson and Sowards that Walmart had a video and that Walmart "described [his] conduct as dishonest and accused him of being a thief." *Supra* ¶ 5. Even if one discounts, as the majority does, the allegation that Calvillo used the word "stealing," there is no innocent construction of an accusation of being dishonest and a thief. Moreover, the majority says: "[t]here is no indication that Calvillo actually characterized Kuester's taking of the check as 'stealing' when speaking to Nelson and Sowards on April 15."

Supra ¶ 33. Kuester's allegation in the complaint indicates that Calvillo did characterize it as "stealing." That appears to be a factual dispute that could not be more material.

¶ 53 Third, I am puzzled by the majority's finding that the statements are privileged. The described qualified privilege applies to "a corporate employer investigating certain conduct by its employees." *Supra* ¶ 34. Walmart and Kuester do not have an employer/employee relationship and the majority does not address a possible privilege attaching to whatever relationship they do have.

¶ 54 Even if a qualified privilege had been shown, it would be defeated by Walmart's alleged "reckless disregard" demonstrated by its willingness to destroy Kuester's life without undertaking any investigation to determine if his explanation was true. See *Kuwik,* 156 Ill. 2d at 24. Walmart (1) jumped to a conclusion, (2) refused to investigate the situation, instead clinging irresponsibly to its assertedly erroneous belief that Kuester had stolen the check, and (3) communicated its negative assumption to Pepsi, thus actively engineering the issuance of Pepsi's *per se* defamatory "Corrective Action Notice," the public trashing of his reputation, and the termination of his employment.

¶ 55 Finally, with regard to Walmart's policy (*supra* ¶ 38), it is, in my opinion, a question for the jury whether "ban[ning] from its property" includes accusing the person of "dishonesty," "stealing," and being a "thief." It is also a jury question whether "an individual *found* to have committed such an infraction" requires Walmart to conduct an actual investigation to determine if an actual infraction has been committed. (Emphasis added.) See *id.*

¶ 56 For all of these reasons, I would reverse the dismissal of the defamation claim against Pepsi and the award of summary judgment in favor of Walmart and against Kuester.