

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Jacqueline Buie,

Plaintiff,

vs.

Walmart Stores East, LP

Defendant.

COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

Civil Action No. 2014-CP-21-2504

OPINION AND ORDER

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SC Court of Appeals

This matter is before the Court upon the Motion for Summary Judgment of Defendant Walmart, Inc., (hereinafter "Walmart"), pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, and upon the Motion to be Relieved as Counsel of Plaintiff's counsel, J. David Murrell, Esquire. For the reasons set forth herein, the Court finds that Plaintiff has not presented a scintilla of evidence in support of her claim of defamation; therefore, there is no genuine issue of material fact by which Plaintiff can preclude summary judgment. Additionally, Plaintiff's cause of action for assault is barred by the exclusivity provision of the South Carolina Workers' Compensation Act. Therefore, the Court grants Walmart's Motion for Summary Judgment as to all of Plaintiff's claims. Further, the Court finds that Plaintiff's counsel has set forth valid and sufficient grounds to be relieved as counsel, and, thus, the Court grants his Motion to be Relieved as Counsel.

FACTS

After reviewing the evidence in a light most favorable to the Plaintiff, the Court finds the following facts: Buie began working for Walmart as a full-time, overnight stocker in 2008. In 2009, she also became a bus driver for the local school district and as

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Christie Paul Stearns

a result, transitioned to working part-time at Walmart. During the relevant time frame of 2012, Buie was working as an overnight stocker at Walmart every Friday and Saturday night from 10:00 p.m. until 7:00 a.m. for a total of sixteen (16) hours per week.

The incident that is the subject of this lawsuit occurred on November 2, 2012. At 10:15 p.m. that evening, Buie arrived at the subject store for her shift. She was immediately requested to the office by manager Kathy Roller. Roller explained that six associates¹ had called out from their shift, and, therefore, Roller needed Buie to work quickly because she needed assistance in other areas. Buie understood Roller to mean that if Buie finished her work early, she was to work on the assignments of the associates who did not report for work that night.

Buie then started her shift by stocking diapers in the Infants Department. Another associate, Carthenia Smith, was on her way to clock-out and stopped to chat with Buie. During this time, Roller walked past the two associates and yelled "go back to work" in a rude voice. Buie testified that she and Smith "looked at each other and started smiling and laughed and I continued to stock." The two did not respond to Roller. A few minutes later, assistant manager Amber Barnhill came to the area and told Buie that Roller wanted to see Buie in the office. In frustration at being called to the office, Buie told Barnhill that with all of the stopping and starting work, she (Buie) may as well clock out and go home.

When Buie and Barnhill arrived at the office, Roller and Barnhill told Buie that she needed to go to work and to stop talking. Buie was directed to sit down but "chose to stand." Barnhill accused Buie of insulting her, and Roller told Buie that Buie was not working as expected. Buie testified that they "got in a confrontation, sort of a

¹ Walmart refers to its employees as "associates."

misunderstanding." Buie asked to speak with the store manager, who was not working that evening. Roller was in charge of the store that night and told Buie that she would not call the store manager, who lived in North Carolina and was presumably at home in the late evening.

Buie walked out of the office to the break room, and called a Human Resources telephone number for Walmart's corporate offices that was listed on the wall in the break room. Buie left a voice message indicating that she had "two managers assaulting me, talking to me like a dog, accusing me of not working and I was very well working." Roller then told Buie to go back to the office, but Buie disregarded Roller's instruction and returned to the Infant Department where she continued stocking diapers.

Thereafter, Roller came to the Infant Department and told Buie that because she had previously indicated that she wanted to go home, she should clock out and proceed home. Roller attempted to move the pallet with diapers, but Buie continued to take the merchandise off of the pallet and stock the shelves. Buie then went and retrieved more freight and began stocking it. Buie continued to work and "thought everything was fine" when Roller walked toward her with two police officers.

Buie asked the officers if there was a problem, and the officers requested to speak with her, to which Buie responded, "[a]bout what?" Buie then followed Roller and the officers to the back of the store upon the officer's request. Once in the back of the store, one of the officers explained that Roller had called law enforcement because she wanted Buie to go home. Buie asked for a reason and then informed the officer that Roller told her she may as well go home as she had previously said she was going to clock out and go home. Buie further explained that Roller was using Buie's words against her because

Buie had not done anything wrong. An officer responded, “[M]a’am, you don’t want to get in trouble for insubordination, why don’t you go home and come back in the morning.” Following the officer’s statement, Roller offered to pay Buie for the entire shift. Buie again stated that she had not done anything wrong, and the officers told her to leave. The officers then began walking out into the store with Buie, but Buie recalled that she did not have her keys. She told the officers she needed to get her keys, and the officers told her that they would wait for her. Buie then retrieved her keys and exited the store through another door at approximately midnight. Buie was paid for the entire shift. This lawsuit followed.

STANDARD OF REVIEW

“The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder.”² “[S]ummary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.”³

In determining whether a genuine issue of fact exists, a court must assume as true the evidence of the nonmoving party and draw all *reasonable* inferences in favor of that party.⁴ “Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”⁵ “All ambiguities, conclusions, and inferences arising from

² *S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 427, 626 S.E.2d 19, 22 (Ct. App. 2005) (quoting *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

³ *Ellis v. Davidson*, 358 S.C. 509, 517, 595 S.E.2d 817, 821 (Ct. App. 2004); *see also Rumph v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 392, 593 S.E.2d 183, 186 (Ct. App. 2004).

⁴ *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006) (emphasis added).

⁵ *Ellis*, 358 S.C. at 517-18, 595 S.E.2d at 821.

the evidence must be construed most strongly against the moving party.”⁶ “However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.”⁷ In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.⁸ In the present case, even taking Plaintiff’s allegations as true, she has failed to set forth a scintilla of evidence to allow her claims to proceed to a jury. As such, summary judgment is warranted.

ANALYSIS

Defamation Claim

“A person makes a defamatory statement if the statement ‘tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.’”⁹ “The tort of defamation therefore permits ‘a plaintiff to recover for injury to his or her reputation as the result of the defendant’s communications to others of a false message about the plaintiff.’”¹⁰ “We therefore require a plaintiff to prove the following four elements to state a claim for defamation: ‘(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm

⁶ *Id.* at 518, 595 S.E.2d at 821.

⁷ *Id.* at 518, 595 S.E.2d at 822.

⁸ *Fronenberger v. Smith*, 406 S.C. 37, 46, 748 S.E.2d 625, 629 (Ct. App. 2013).

⁹ *Fountain v. First Reliance Bank*, 398 S.C. 434, 441, 730 S.E.2d 305, 309 (2012) (quoting *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002)).

¹⁰ *Id.* (quoting *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 464, 629 S.E.2d 653, 664 (2006)).

caused by the publication.”¹¹ Slander is spoken defamation, and libel is written defamation.¹²

To establish slander that is actionable *per se*, a plaintiff must show that the defendant’s alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: “(1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one’s business or profession.”¹³ Here, Buie has alleged a single cause of action for defamation but has titled her claim “slander *per se*/libel *per se*.”¹⁴

As a preliminary matter, Buie’s counsel acknowledged that there was no written statement at issue in this case and indicated that the inclusion of the libel claim was an error. Because there is no evidence to support a libel *per se* claim, summary judgment is granted as to that claim.

In support of her slander *per se* cause of action, Plaintiff’s Complaint alleges that Walmart, through its agents and servants, defamed her by “implying and portraying that Plaintiff had stolen from Defendant, which is a crime of moral turpitude.”¹⁵ Buie further alleges that Walmart slandered her by “knowingly publishing a false and defamatory portrayal and statements concerning the Plaintiff, placing Plaintiff in a false light and wrongfully implying, portraying and stating that Plaintiff stole from Defendant, thereby harming the Plaintiff’s reputation.”¹⁶

¹¹ *Id.* (quoting *Erickson*, 368 S.C. at 465, 629 S.E.2d at 664).

¹² *Holtzschleiter v. Thomson Newspapers*, 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998).

¹³ *Id.* at 511, 506 S.E.2d at 502.

¹⁴ Compl. ¶ 1.

¹⁵ Compl. ¶ 7.

¹⁶ Compl. ¶ 8.

As our appellate courts have recognized, a defamatory insinuation may be made by actions or conduct as well as by word.¹⁷ Thus, defamation need not be accomplished in a direct manner. To render the defamatory statement actionable, it is not necessary that the false charge be made in a direct, open and positive manner.¹⁸ “A mere insinuation is as actionable as a positive assertion *if it is false and malicious and the meaning is plain.*”¹⁹

This case does not involve an alleged false accusation of theft by statement as it is undisputed that Walmart never made a statement that in any way suggested Buie had stolen merchandise. Rather, Buie’s claim of slander *per se* is based solely upon her contention that Walmart gave the impression that she had stolen or was being arrested when the officers responded to the store following her refusal to take her manager’s instruction to clock out and go home. Buie testified that co-workers asked her what she had stolen and why she was being arrested. However, Buie has failed to set forth any evidence to show that Walmart acted in a false and malicious manner or that the plain meaning of Walmart’s call to the police was that Plaintiff had stolen. Law enforcement may be called for any number of reasons, including the reason for the call in this instance — Buie’s admitted refusal to leave the store when instructed. Moreover, Buie acknowledged that (1) the police officers requested she leave the store to avoid getting in trouble for insubordination, (2) Roller agreed to pay her for the entire shift, and (3) she returned to work the next day.

¹⁷ *Tyler v. Macks Stores of S.C., Inc.*, 275 S.C. 456, 458, 272 S.E.2d 633, 634 (1980).

¹⁸ *Id.*

¹⁹ *Id.* (quoting *Timmons v. News and Press, Inc.*, 232 S.C. 639, 644, 103 S.E.2d 277, 280 (1958)) (emphasis added).

By Buie's own admissions, she was frustrated that she was called to the office for talking, and as a result, made a statement to the effect that if she was going to be interrupted during her work she could simply clock out and go home. The assistant manager, Amber Barnhill, reported Buie's conduct to the manager in charge, Kathy Roller. As Roller attempted to counsel Buie about talking to other associates during a shift, Buie refused to sit down and then left the office during the discussion. Buie called Walmart's corporate offices from the break room, leaving a voice message of complaint. Thereafter, Roller instructed Buie to go back into the office, but Buie ignored the instruction only to return to the department where she was previously working. Roller then called the police to assist her in having Buie leave the premises, which she was legally entitled to do. At her deposition, Buie admitted that Roller directed her to clock out and go home and that she refused to do so. Following the incident, Buie sent an email to Walmart's Human Resources Department, in which she once again admitted that she refused to go home as directed. Thus, Buie has failed to show that Walmart made a false and malicious insinuation that had a plain meaning suggesting that Buie had stolen.

Moreover, Walmart's call to the police was subject to a conditional privilege, which the Court finds applies here.²⁰ The elements of a conditionally privileged communication are: (1) good faith; (2) an interest to be upheld; (3) a statement limited in scope to this purpose; (4) a proper occasion; (5) publication in a proper manner to proper parties. Here, there is no evidence that Walmart's managers acted in anything other than good faith. They had an interest in ensuring that Buie followed the instructions she was

²⁰ See *Woodward v. S.C. Farm Bureau Ins. Co.*, 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981) (holding that in the absence of a controversy as to the facts it is for the court to say in a given instance whether or not the privilege has been abused or exceeded).

given and that there would be no further altercations or insubordination. There is no evidence that any statement was made to the police other than a request to respond to the store, and, thus, the call to the police was limited in scope to its purpose and made in a proper manner to the proper parties. Plaintiff fails to present a scintilla of evidence to show that Walmart made a false or defamatory statement or that Walmart's alleged call to the police exceeded the scope of the conditional privilege granted to it.

In her opposition to the Motion for Summary Judgment, Plaintiff relies upon her deposition testimony in response to questioning by her own counsel, during which Plaintiff testified she told Roller she did not want to go home and that Roller allowed her to go back to work and then called the police. To the extent that Plaintiff's testimony in response to questioning by her counsel contradicts her earlier testimony, the testimony is insufficient to create a material dispute of fact. Plaintiff acknowledged both in her deposition testimony and in an email she sent to Walmart's Human Resources Department days after the incident that Roller told her to clock out and go home and that she instead went back to work. In short, there is no genuine issue of material fact and Walmart's actions in calling the police to have Buie leave as directed does not give rise to a claim for slander and thus, necessarily, cannot support a slander *per se* claim. Accordingly, summary judgment is granted in favor of Walmart on Plaintiff's claim for slander *per se*.²¹

Assault Claim

Plaintiff next alleges that Walmart, through its agents and servants, committed an assault by creating a reasonable apprehension and fear in her of immediate harmful or

²¹ Notably, even assuming Plaintiff could overcome the hurdles of establishing the publication of a false and defamatory statement through fault of Walmart and without privilege, she cannot establish that she suffered harm to her reputation and thus, the claim fails for this additional, independent reason.

offensive conduct to her person. This claim fails as a matter of law because the claim is barred by the exclusivity provision of the South Carolina Workers' Compensation Act, section 42-1-540 of the South Carolina Code as Plaintiff was an employee of Walmart at the time of the alleged assault, and the alleged assault arose out of her employment at Walmart.

Section 42-1-540 governs the exclusivity of the remedy of workers' compensation and provides in pertinent part that rights of employees under the Workers' Compensation Act are the exclusive remedy for compensation for personal injury that occurs in the workplace. The South Carolina appellate courts have consistently held that personal injuries such as assault and battery that arise out of a party's employment fall within the exclusivity provision of the Act and thus, civil actions such as the subject claim are barred.²² Accordingly, summary judgment is granted on the claim of assault.²³

Motion to Be Relieved by Plaintiff's Counsel

The court also considers here the Motion to be Relieved as Counsel filed by Plaintiff's counsel. At the hearing on the motion, indicated that she did not want her counsel to be relieved. However, she acknowledged that she previously told her counsel that she no longer wanted him as her attorney after he refused to take steps to have her deposition transcript amended. Plaintiff asserts that the deposition transcript does not accurately reflect her testimony, but counsel for Plaintiff indicated that his notes and recollection confirm that the deposition transcript is accurate and that he saw no basis to

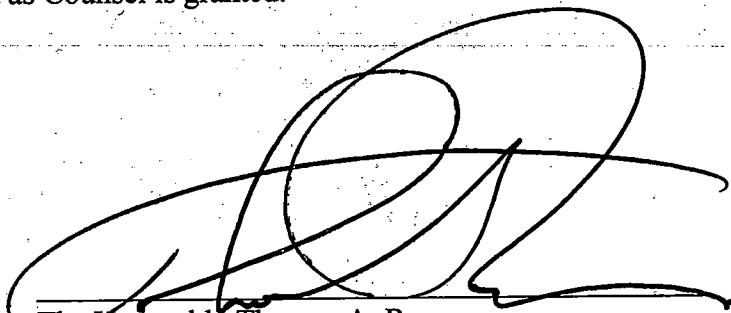
²² See e.g., *Loges v. Mack Trucks*, 308 S.C. 134, 139, 417 S.E.2d 538, 541 (1992) (holding employee's claims of assault and battery and intentional infliction of emotional distress against employer were barred by the exclusivity provision of the Workers' Compensation Act).

²³ Moreover, aside from the procedural bar to Plaintiff's assault claim, the claim fails substantively as a matter of law. Plaintiff admitted that she was not placed in fear of physical harm by Walmart's managers and that the only basis for her assault claim is that she thought she was going to be arrested and that one of the officers made a gesture with his hand for her to go to the back of the store. This evidence is insufficient to sustain Plaintiff's assault claim as a matter of law and summary judgment is warranted.

challenge or seek amendment of the deposition transcript. Walmart's counsel also indicated that based on her recollection, the deposition transcript accurately reflected Plaintiff's testimony at the deposition. Plaintiff also testified at the hearing that she wanted to engage in mediation of the case but that she did not agree with her attorney's assessment of the value of the case. Plaintiff indicated that she is in school and that it would be difficult for her to obtain new counsel.

While the Court appreciates Plaintiff's concerns, the Court agrees with counsel for Plaintiff that the attorney-client relationship has become unworkable and that counsel for Plaintiff cannot effectively proceed with the representation of Plaintiff. For these reasons, the Motion to be Relieved as Counsel is granted.

IT IS SO ORDERED.



The Honorable Thomas A. Russo
Circuit Court Judge

11/13, 2015

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