SUPREME COURT OF KENTUCKY
2013-SC-000002-D
(2009-CA-001686)

JOSEPH E. TOLER — APPELLANT

v.

ON DISCRETIONARY REVIEW OF OPINION
OF COURT OF APPEALS IN APPEAL NO. 2009-CA-001686
ON APPEAL FROM JEFFERSON CIRCUIT COURT
NO. 2005-CI-008765

SÜD-CHEMIE INC., et al. — APPELLEES

BRIEF OF APPELLEE SÜD-CHEMIE INC.

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CERTIFICATE

It is hereby certified that a copy of the Brief of Appellee Süd-Chemie Inc. has been mailed this 28th day of February, 2014, to Philip C. Kimball, Esq., 1970 Douglass Boulevard, Louisville, KY 40205, Samuel Givens, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601, Amber Shaw, Esq., 420 E. Main St., New Albany, IN 47150, Robert Colone, Esq., P.O. Box 272, Sellersburg, IN 47172, and Hon. Judith McDonald-Burkman, Jefferson Circuit Court, Division 9, Jefferson County Judicial Center, 700 West Jefferson St., Louisville, KY 40202.

Oliver B. Rutherford

STATEMENT CONCERNING ORAL ARGUMENT

Appellee Süd-Chemie Inc. requests oral argument in this case because it believes oral argument will be helpful to the Court in deciding the issue presented. The instant appeal involves the complex question of how to apply the qualified privilege to defamation claims brought in the employment context. More specifically, the instant appeal seeks clarification regarding the appropriate legal standard to be used in jury instructions to establish abuse of the qualified privilege in this context. Appellee Süd-Chemie Inc. believes oral argument may help avoid the potential for confusion regarding this issue.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE[1]

Appellee Süd-Chemie Inc. ("Süd-Chemie" or "the Company") operates two plants in Louisville, Kentucky, and several more in various locations in the United States, and manufactures catalysts for various chemical operations. (VR No. 1: 7-21-09, 1:32:00; 3:09:45).[2] Overall, the Company employs approximately 650 employees. (3:10:00). Appellant Joseph E. Toler ("Appellant" or "Toler") was employed as a Shift Coordinator (formerly called a "Supervisor") at the Company's "South Plant" located on Crittenden Drive. (1:39:10). Toler was responsible for scheduling employees and overseeing production in his position as Shift Coordinator. (1:40:30). The Shift Coordinator position is a management position at Süd-Chemie. (Id.).

As a Shift Coordinator, Toler supervised maintenance, operator, and laborer/helper workers and could recommend to his supervisors (the two Production Managers, Troy Wise or David Massey) that an employee be disciplined.[3] (1:40:50). Toler became a Shift Coordinator in 1999 and initially worked on the day shift. (1:39:00

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[1] Both parties filed motions for discretionary review with the Court. (Toler: 2013-SC-000002-D; the Company: 2013-SC-000007-D). Both motions were granted. Consequently, both parties already have filed briefs as appellant and appellee and the Company has presented a Statement of the Case in its brief as appellant in 2013-SC-000007-D. To comply with CR 76.12(4)(d)(iii), however, the Company's Counterstatement of the Case herein will track its Statement of the Case found in its principal brief in 2013-000007-D.

[2] All references to the video record herein are for "VR No. 1, 7-21-09:" unless otherwise noted.

[3] The terms and conditions of employment for maintenance, operator, and laborer/helper employees of the Company are governed by a Collective Bargaining Agreement ("CBA") with their respective union. As a supervisory employee, Toler was not affiliated with any union, though he was a union member when he worked for the Company in non-supervisory positions.

- 1:41:00). Shortly thereafter, he began working on the night shift from 6:30 p.m. to 6:00 a.m., and he remained on the night shift until his employment was terminated by the Company in April 2005. (1:40:00).

Toler acknowledged that using racist language in the workplace of the Company was a "firing offense" and that the Company had a "zero tolerance" policy with respect to the use of racist language in the workplace. (1:58:22; 2:20:50). Toler also acknowledged that it would be reasonable for an employee to report to management any incidents of racial discrimination or harassment and that the Company, in turn, had an obligation to investigate any such reports from employees. (2:21:20). Toler acknowledged that Scott Hinrichs ("Hinrichs"), the Company's Director of Human Resources, as well as Bill Furlong ("Furlong"), Plant Manager of the Company, would have a duty to investigate allegations of racial discrimination or harassment. (2:21:30).

The events giving rise to the termination of Toler's employment began in February 2005. On February 21, an operator named Allen Trice ("Trice") was sent home for refusing to follow an instruction of Toler. (1:59:40; 2:03:30; 3:14:05).[4] Trice's employment was subsequently terminated by the Company. (3:12:45).

Subsequently, Trice filed a charge of discrimination against the Company with the Equal Employment Opportunity Commission ("EEOC") on March 7, 2005, alleging that his employment was terminated unlawfully on the basis of his race. (Toler's Trial Exhibit No. 2; 2:00:00). The Company received Trice's EEOC complaint on March 17,

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[4] Trice is African-American. (1:59:35). Toler is Caucasian.

2005. (3:12:10). The day before, on March 16, 2005, Hinrichs received notice that an employee of the Company, Mike Watson, was concerned about the involvement of Toler in the termination of Trice's employment. (3:31:15). The Company was then provided with several written statements from Company employees regarding racist comments made by Toler in the workplace. (3:31:15; 3:38:10). Four employees provided written statements to the Company on March 23, 2005: Mike Watson ("Watson"), Bob Dewees ("Dewees"), Glen Shull ("Shull"), and Don Votaw ("Votaw").[5] (3:32:00). Each of these employees, like Toler, is Caucasian.

Because Shull's written statement was unsigned, and the Company did not otherwise learn of his identity until discovery commenced in this litigation, the Company did not interview him along with the other employees as part of its investigation of the allegations against Toler. Nor did the Company rely on Shull's statement in forming its decision to terminate the employment of Toler. (3:23:40; 3:48:25). Importantly, as it relates to Toler's defamation claim, the Company did not read or show the statement it later learned was prepared by Shull to Toler.[6] (3:23:35).

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[5] Watson, Dewees, Shull and Votaw all were named as defendants in this litigation. Dewees was dismissed from the lawsuit because he is deceased. (T.R. Vol. V, pp. 732-737).

[6] This unrebutted testimony establishes that the Company did not "republish" the statement of Shull at any time. As such, it cannot be liable under a theory of defamation for any statement made by Shull. See Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 793 (Ky. 2004) (under Kentucky law, plaintiff can establish *prima facie* case of defamation by showing: 1) defamatory language; 2) about the plaintiff; 3) *which is published*; and 4) causes injury to his reputation) (italics added).

Votaw reported to the Company that Toler had referred to African-American employees as "stupid fucking niggers," "Jungle Bunnies," "dumbass niggers," "dumb nigger bitch," and "gorilla-looking nigger." (Toler's Trial Exhibit No. 1). Watson reported to the Company that Toler had commented, in reference to African-American employees, that "all I work around is a bunch of dumb niggers." (Toler's Trial Exhibit No. 1). Further, Watson testified at trial that he was unaware that Trice had filed an EEOC claim at the time he reported Toler's statements to the Company. (VR No. 2: 7-22-09, 10:13:00). Watson only learned that Trice had done so as a result of this litigation. (VR. No. 2: 7-22-09, 10:13:00).

Dewees provided a written statement relating to the Company that Toler had talked about "the lazy negor's [sic] on his shift and how he would fire their black ass if they didn't jump when he said so." (Toler's Trial Exhibit No. 1).

Votaw, Shull, and Dewees had no involvement in the disciplinary issue between Toler and Trice when they provided their written statements to the Company. (3:38:40). Watson's sole involvement in Trice's disciplinary process was limited to his participation in a meeting with Trice and Company representatives regarding a grievance filed by Trice under the CBA. (VR No. 2: 7-22-09, 10:03:30).

Jude Ware's involvement in the Toler matter was limited to confirming and collecting the statements of Watson, Votaw, Dewees, and Shull and providing them to the union's business agent for delivery to the company. (VR No. 2: 7-22-09, 10:35:10 - 10:38:30, 10:48:45). Ware was not aware that Trice had filed an EEOC charge against

the Company when he gathered and delivered the employees' statements. (VR No. 2: 7-22-09, 10:43:45).

The Company, through Hinrichs, scheduled meetings with Votaw, Watson, and Dewees to discuss the allegations contained in their written statements. (3:32:50). Hinrichs interviewed these three employees between March 29, 2005, and April 5, 2005. (3:33:00). Hinrichs questioned Votaw, Watson, and Dewees regarding the details of their written statements. Each employee not only acknowledged and affirmed the written statement they provided, but also was unequivocal in their conversation with Hinrichs in confirming that Toler had made the racist remarks contained in those statements.[7] (3:33:15).

Hinrichs and William Furlong, the Company's Plant Manager, met with Toler on April 14, 2005, to discuss the allegations raised by the employees and to inform Toler of the filing of the EEOC charge by Trice in order to discuss with Toler the allegations of Trice contained therein. (1:45:45; 3:22:20; 3:28:00). Toler admitted that Hinrichs and Furlong, as Director of Human Resources Manager and Plant Manager, respectively, had an obligation to investigate any reports of racial discrimination and harassment made by employees of the Company and that it was reasonable for them to do so. (2:21:20). No one else was present at the meeting. (1:45:55).

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[7] Notably, Hinrichs testified that the Company has a policy that states an employee may be terminated immediately for filing a false report with the Company. (3:46:30).

Toler testified that during the meeting Hinrichs and Furlong told him the names of the individuals who had provided written statements to the Company and gave him an opportunity to explain why he thought these individuals would make such accusations against him. (1:49:30; 1:50:00; 2:22:10; 2:35:50; 3:25:10). Toler further admitted that he was informed of the racist statements that these individuals attributed to him during the meeting. (1:48:10). Toler simply denied each of the employee's allegations.[8] (1:47:05; 3:25:45).

Toler testified that he told Hinrichs and Furlong that he believed the statements made by the individuals were part of a "union gang-up" against him. (1:50:08). When pressed to state the facts upon which he based this theory, Toler could only provide his own speculation and conjecture. With respect to Mike Watson, Toler acknowledged that he did not work with Watson and that he did not "hardly know the man," but that he believed he was "out to get him" nevertheless solely on the basis that Watson was a union steward. (1:51:54; 2:23:00).

Toler testified that he believed Don Votaw was "out to get him" because, on one occasion in March 2003, more than *two years* prior to the termination of Toler's employment, he reported that Votaw was not doing his job and this report resulted in proposed written discipline to Votaw *by another supervisor*. (1:50:45; 2:29:35; Süd-Chemie Inc.'s Trial Exhibit No. 1). Toler acknowledged, however, that the proposed

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[8] While Toler denied ever using racist language *in the workplace*, he acknowledged using racist language outside the workplace in reference to African-American individuals. (2:36:47).

discipline (a warning) was withdrawn and that Votaw lost no pay, seniority or other benefit because of the situation. (2:30:00; 2:31:00). In other words, Votaw was not disciplined by Toler. Further, Toler offered no evidence that Hinrichs or Furlong were aware of any prior disciplinary issues between Toler and Votaw when they made their decision to terminate his employment.

Toler offered no testimony that Jude Ware made any defamatory remark against him. Toler testified he never disciplined Ware. (2:35:35). Toler's sole basis for his belief that Bob Deweese was "out to get him" was that a "few" times while he supervised him in *2000*, Toler had "words" with Dewees over getting his job done; Toler admitted, however, that he never disciplined Dewees. (1:51:30; 2:23:55; 2:35:00). Again, Toler offered no evidence that Hinrichs or Furlong were aware of any prior disciplinary issues between the two when they made their decision to terminate Toler's employment.

At trial, Toler testified that the sole basis for his belief that Glen Shull was "out to get him" is that, *on one occasion*, he had to instruct Shull to do his job; Toler also admitted, however, that he did not impose any discipline on Shull and he further admitted that, in addition to Shull, he frequently had to instruct other employees in the maintenance department to do their jobs. (1:51:45; 2:26:45). Regardless, Hinrichs testified that he was not aware that Shull had provided the statement because it was unsigned and, as a result, neither he nor Furlong showed or read the statement to Toler, or otherwise relied on the statement in making their decision to terminate Toler's employment. (3:23:40; 3:48:25).

Toler offered no evidence whatever that Hinrichs or Furlong harbored any ill-will towards him, had knowledge that the statements of the individuals about Toler were "false," or otherwise acted with a wrongful motive in forming the decision to terminate his employment. To the contrary, Hinrich's unrebutted testimony at trial was that in his experience with Toler, he found him to be a good employee who had the support of the hourly workers he supervised. (3:17:00).

These are the facts upon which Toler bases his claim that the individual defendants in this case somehow conspired to force the termination of his employment by the Company. Toler offered no testimony and there is otherwise no evidence in the record that the Company had any interaction with the individual defendants beyond the interviews between Hinrichs and them in March and April 2005. It bears mention again that Hinrichs testified that in the event an employee files a false report with the Company regarding any workplace matter, such action is grounds for the immediate termination of the individual's employment. (3:46:30). Hinrichs's unrebutted testimony was that he had no reason to believe that any of the statements provided to the Company by the individual defendants had been falsified in any manner, nor was there any other reason to disbelieve the statements at issue. (3:47:05).

Following its investigation, Hinrichs and Furlong exercised their business judgment and credited the statements of the employees with whom Hinrichs spoke and, in collaboration with each other, decided to terminate the employment of Toler on April

15, 2005. (1:49:20; 3:30:15). This lawsuit followed.[9]

Trial of this matter began on July 21, 2009. At the conclusion of Toler's case-in-chief, Süd-Chemie moved for a directed verdict, asserting that Toler failed to meet his burden of introducing sufficient proof that the Company acted with malice to overcome the qualified privilege.[10] In opposition to the motion, Toler asserted that he introduced proof of falsity (e.g., his denial of making the statements), and this was sufficient to create an issue of fact regarding malice for the jury. (4:13:00). The trial court agreed with the Company's position, and a directed verdict was granted in favor of Süd-Chemie.[11] (4:18:00; T.R. Vol. VI, pp. 783-784).

Trial proceeded the next day and Toler's defamation claim against the remaining individual defendants Watson, Ware, and Votaw was submitted to the jury. By a vote of 10-2, the jury returned a verdict in favor of these defendants. Judgment was entered by the trial court on September 1, 2009. (T.R. Vol. VI, pp. 783-784). Toler appealed. The

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[9] Toler's original Complaint raised a defamation claim along with claims for race and age discrimination under KRS Chapter 344. (T.R. Vol. 1, pp. 1-5). The trial court granted Süd-Chemie's original motion for summary judgment on Toler's reverse race and age discrimination claims on January 23, 2008, leaving only Toler's defamation claim. (T.R. Vol. 3, pp. 445-448). Toler does not allege that the Company independently made defamatory statements about him; rather, the basis of his claim against the Company is that it defamed him by republishing the statements of Votaw, Watson and Dewees during his disciplinary meeting with Hinrichs and Furlong.

[10] All parties agreed that the qualified privilege applied to Toler's defamation claim. (4:13:00).

[11] Directed verdict also was granted in favor of defendant Glenn Shull on the basis that Toler failed to prove any damage resulting from his alleged statements. (T.R. Vol. VI, pp. 783-784).

Court of Appeals, in a decision rendered March 4, 2011, affirmed the jury verdict in favor of Watson, Ware, and Votaw, but reversed the trial court's grant of a directed verdict in favor of Shull and Süd-Chemie.

ARGUMENT

I. Toler was not Required to Prove "Constitutional Actual Malice" in the Trial Court's Jury Instruction.

The primary argument raised by Toler in his brief is that the trial court erroneously required him to prove a "constitutional 'actual malice' standard" in its jury instruction to overcome the qualified privilege applicable to his claim. (Toler Brief, pp. 26-33).[12] This standard was announced in New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and applies in defamation cases where the plaintiff is a public official and the defendant the media. In such cases, the Supreme Court held that the First Amendment to the United States Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 279-80.

[12] The Company was not a party to the lawsuit at the time the case was presented to the jury by virtue of the grant of directed verdict. Nevertheless, because Toler made the Company a party to his motion for discretionary review and a retrial of the case would be required if the Opinion of the Court of Appeals is affirmed, the Company will provide its response to Toler's claim in his appeal.

The Supreme Court later confirmed that such a plaintiff can recover in a defamation action "*only on clear and convincing proof* that the defamatory falsehood was made with knowledge of it falsity or with reckless disregard for the truth." Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (italics added). Under Gertz, the Supreme Court left it up to the States to define "the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." Id. at 347.

In McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882, 886 (Ky. 1981), this Court held that ordinary negligence was the appropriate standard of liability to require in private individual defamation matters, *absent a privilege*. Kentucky recognizes, however, that in certain circumstances, wherein a particular common interest is implicated among the parties, the right of private individuals to be free from injury to their reputation must yield to the interest at stake. Thus, we have a rule of law in Kentucky that where a common interest is implicated, alleged defamatory statements are subject to a qualified privilege. See Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 796 (Ky. 2004); Wolff v. Benovitz, 192 S.W.2d 730 (Ky. 1945); Baskett v. Crossfield, 228 S.W. 673 (Ky. 1921); Baker v. Clark, 218 S.W. 280 (Ky. 1920); Cargill v. Greater Salem Baptish Church, 215 S.W.3d 63 (Ky. Ct. App. 2006).[13] As observed by Professor

[13] This interest is referred to as the "common interest" qualified privilege and is summarized in Restatement (Second) of Torts § 596: "An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest in entitled to know."

David J. Leibson, Kentucky Practice - Tort Law, § 15:13:

> Conditional, or qualified, privileges are based upon the policy that certain interests, in certain situations, are worthy of greater protection than the reputation of the party allegedly defamed. The interests deserving the situational protection are those of the party who makes the statement, the party who receives them, or the public at large. In such situations, there is no liability even if the statement is untrue and defamatory, unless the privilege is abused. Most often, abuse occurs when the defendant acts inconsistently with the purpose of the privilege, or publishes the defamatory matter to persons outside its scope.

(Internal citations omitted).

Kentucky cases extend this conditional or qualified privilege in the employment context: "[B]ecause of the common interests implicated in the employment context, Kentucky courts have recognized a qualified privilege for defamatory statements relating to the conduct of employees." Stringer, 151 S.W.3d at 796; see also Dossett v. New York Mining and Manufacturing Co., 451 S.W.2d 843, 846 (Ky. 1970); Benovitz, 192 S.W.2d at 733; Wyant v. SCM Corp., 692 S.W.2d 814, 816 (Ky. App. 1985); Columbia Sussex Corp. v. Hay, 627 S.W.2d 270, 273 (Ky. App. 1981); Caslin v. General Electric Co., 608 S.W.2d 69, 70-71 (Ky. App. 1980). Employers are thus entitled to a qualified privilege for purported defamatory statements made by their employees during the course of an investigation which is necessary to the proper functioning of their business. The privilege exists to protect the reasonable belief of an employer that a statement was or was not made in a particular situation and insulate the employer from liability for being wrong in its belief. The limitation placed on the privilege in this context is that the employer cannot abuse the privilege (e.g., act with malice) and still enjoy its protection.

Courts have recognized such a privilege to encourage and permit the free flow of information within an organization and to permit organizations to render judgments based on such information without fear of reprisal. Stringer, 151 S.W.3d at 796-97. Employees are thus permitted to give vital information to supervisors without fear of prosecution, and employers are permitted to act on such information without incurring liability, so long as the information is given and used in good faith and without malice. Id. at 797. See also Landrum v. Braun, 978 S.W.2d 756, 757 (Ky. App. 1998) (privilege is necessary "so that every day business can be carried out without the threat of suit"); Walllis v. Dymowski, 918 P.2d 755, 762 (Or. 1996) (rule of law exists because "employees and their private employers have a legitimate interest in free communications on work-related matters, especially when reporting actual or suspected wrongdoing.").

In such cases, an ordinary negligence standard is insufficient to adequately protect the common interest implicated; rather a higher degree of proof is required to establish that the qualified privilege has been abused. Abuse of the privilege can occur through proof that: 1) the publisher knew the statements were false or acted with reckless disregard for their falsity; 2) by publishing the defamatory matter for an improper purpose; 3) by excessive publication; or 4) by the publication of defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged. Restatement (Second) of Torts § 596 cmt. a; Tucker v. Kilgore, 388 S.W.2d 112, 115 (Ky. 1965). These standards, including the "knowledge of falsity" and "reckless disregard for truth or falsity" standards, have been used in defamation cases involving

private individuals for decades and also have been adopted by our legislature. See e.g. Calor v. Ashland Hosp. Corp., 2011 WL 4431143 (Ky., September 22, 2011); National Collegiate Athletic Ass'n v. Hornung, 754 S.W.2d 855, 860 (Ky. 1988) (defining "in good faith" to mean whether statements were made for a proper purpose, with knowledge of their falsity, or with reckless disregard for their truth or falsity); Carghill, 215 S.W.2d at 68; Clark, 218 S.W. 280, 285-86 (Ky. 1920); McClintock v. McClure, 188 S.W. 867, 871 (Ky. 1916); Tanner v. Stevenson, 128 S.W. 878, 883 (Ky. 1910); Browning v. Commonwealth, 76 S.W. 19, 20 (Ky. 1903); and Stewart v. Hall, 7 Ky. L. Rptr. 323 (Ky. 1885); Harstad v. Whiteman, 338 S.W.3d 804, 812-13 (Ky. App. 2011); KRS 411.225.[14]

These standards also are often utilized in other states when instructing juries on the manner by which a private defamation plaintiff may establish malice sufficient to overcome the qualified privilege. See e.g. Alaska pattern jury instruction 16.10 (malice can be established by knowledge or reckless disregard as to the falsity of the defamatory matter) (http://www.courts.alaska.gov/juryins.htm#16); New Jersey pattern jury instruction 2.16(C) (malicious intent means proof that the defendant knew the statement to be false or that the defendant acted in reckless disregard of its truth or falsity) (http://www.judiciary.state.nj.us/civil/civindx.htm); Connecticut pattern jury instruction

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[14] KRS 411.225 provides a qualified privilege to employers who give inaccurate information regarding the job performance, professional conduct, or evaluation of a former or current employee to a prospective employer. In announcing the privilege, the legislature stated that such privilege can only be overcome by demonstrating knowledge of falsity, a reckless disregard of the truth or falsity of the information, or an intent to mislead the prospective employer on the part of the employer. KRS 411.225.

3.11-9 (malice includes making a statement with knowledge that it is false or with reckless disregard as to the truth or falsity of the statement) (https://www.jud.ct.gov/JI/Civil/part3/3.11-9.htm); Michigan pattern jury instruction 118.07 (plaintiff has burden of proving that the defendant had knowledge that the statement was false, or acted with reckless disregard as to its falsity) (http://courts.mi.gov/courts/michigansupremecourt/mcji/pages/intentional-torts.aspx); California pattern jury instruction 1723, "Sources and Authority" (malice is established by a showing that the defendant lacked reasonable ground for belief in the truth of the publication and thereafter acted in reckless disregard of the plaintiff's rights) (http://www.courts.ca.gov/partners/documents/caci_2014_edition.pdf); Delaware pattern jury instruction 11 (privilege abused if defendant made or published the false and defamatory communication intentionally, that is, with knowledge of its falsity; or recklessly, that is, disregarding whether it was true or false) (http://courts.delaware.gov/Superior/pattern/patternjury_rev_81506.pdf); Vermont draft pattern jury instruction 10.4 (jurors must be "clearly convinced" that defendant knew the statement to be false or acted with a reckless disregard as to whether it was false) (http://www.vtbar.org/UserFiles/Files/WebPages/Attorney%20Resources/juryinstructions/civiljuryinstructions/Defamation.htm) (copies of each pattern jury instruction are attached at Appendix A).

In this case, there is no dispute among the parties that a qualified privilege attaches to the statements at issue and relied upon by the Company in terminating Toler's

employment. (Toler's Brief to Kentucky Court of Appeals at 16). Certainly employers have a legal obligation under Title VII of the Civil Rights Act of 1964 and KRS Chapter 344, as well as a moral obligation, to investigate claims of race discrimination in the workplace, particularly when the claim of racism is said to emanate from a manager, who is the figurative embodiment of the company.[15] To be sure, elimination of racial discrimination in the workplace is the common interest implicated in this case and it is this interest that provides the foundation for imposing upon Toler a greater evidentiary burden than might otherwise exist. Stringer, 151 S.W.3d at 796-97.

Contrary to his assertion, however, Toler was not required to prove "constitutional actual malice" because he was not charged with establishing the Defendants acted with knowledge of falsity of the alleged defamatory statements or with reckless disregard as to their truth or falsity *by clear and convincing evidence*. That is the constitutional standard announced in Sullivan and its progeny. See Gertz, 418 U.S. at 342 (plaintiff in constitutional defamation case must prove malice by "clear and convincing proof that the defamatory falsehood was made with knowledge of it falsity or with reckless disregard for the truth"). There is nothing in the record reflecting that the trial court required Toler to satisfy this "clear and convincing" level of proof.

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[15] Toler claims that the interests involved in this case are purely private because they involve a private individual working for a "private" employer. The Company disagrees. Elimination of discrimination in the workplace is a matter of public concern for employees of the Company, but also is an important consideration in the broader context of bettering our society. These policies are reflected in our state and federal anti-discrimination laws which bear on Toler's claims herein.

Toler does not appear to argue that the "knowledge of falsity" or "reckless disregard" language used by the trial court in its jury instruction was erroneous.[16] After all, Toler himself incorporated this standard of "falsity" and "reckless disregard" in the instructions he tendered to the trial court. (Toler Brief, Appendix Tab 4).[17] Toler even acknowledges in his brief that an abuse of the privilege can be shown in a "non-constitutional" defamation case by proof of "reckless disregard for the truth or falsity of the defamatory matter." (Toler Brief, p. 36).[18] He apparently quibbles with the

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[16] The language from the trial court's jury instruction defined malice sufficient to overcome the qualified privilege as "knowledge of falsity" or a "reckless disregard for the truth or falsity" of the statements at issue. (Toler Brief, Appendix Tab 4).

[17] Toler does argue that where a plaintiff denies making the alleged defamatory statement at issue, a jury issue necessarily arises because malice can be implied from the fact of falsity (a standard which Toler refers to as "implied malice"). (Toler's Brief to the Court of Appeals at 19). In such a case, according to Toler, the sole benefit of the qualified privilege for an employer-defendant is that it receives a qualified privilege instruction before the jury. The Company presented its arguments in response to this position in 2013-SC-000007-D and, to the extent those arguments bear on the instant appeal, they are incorporated herein. Suffice it to say here that the flaws in Toler's argument are: 1) that it is not supported by Kentucky law; and 2) ignores the fact that an employer may not be liable *even for defamatory statements* unless it acted with malice with regard to the truth or falsity of the statement. It is Toler's burden of proof to introduce evidence of malice sufficient to overcome the privilege and this burden is not obviated by a mere denial of making the alleged defamatory statement(s). Stringer, 151 S.W.3d at 797. Indeed, Toler's position has been expressly rejected by Prosser, Law of Torts, § 115 at 794 (4th Ed. 1971): "Furthermore, the qualified privilege will be lost if the defendant publishes the defamation in the wrong state of mind. The word 'malice,' which has plagued the law of defamation from the beginning, has been much used in this connection, and it frequently is said that the privilege is forfeited if the publication is 'malicious.' *It is clear that this means something more than the fictitious 'legal malice' which is 'implied' as a disguise for strict liability in any case of unprivileged defamation.*" (Italics added).

[18] These standards also are referred to in Stringer, wherein the Court wrote, "While actual malice 'requires a showing of knowledge of falsity of the defamatory statement

definitions ascribed to the phrase "reckless disregard" in the trial court's jury instructions. (Toler Brief, p. 36: "[Toler should have] no necessity of proving that the defendant entertained serious doubts as to the truth or falsity of the statement or had a high degree of awareness as to whether the statement was probably false!").[19] The definition used by the trial court in its jury instruction, however, is in keeping with case law in Kentucky and other states defining the concept of "recklessness." Such a heightened evidentiary standard also is consistent with the purpose of affording the qualified privilege to employers in the employment context in order to protect the free flow of information in the workplace, particularly where important interests, such as the elimination of discrimination in the workplace, are at stake.

In Hoke v. Sullivan, 914 S.W.2d 335 (Ky. 1995), the Court stated that "recklessness" consists of "conscious indifference." Id. at 339 (considering "the

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or reckless disregard of its truth or falsity . . . ." Id. at 799. They also are referenced in the Court's Memorandum Opinion in Calor supra p. 15. In Calor, the Court stated that "Abuse of the privilege can occur in a number of situations: 'The privilege may be abused and its protections lost by the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter; by the publication of the defamatory matter for some improper purpose; by excessive publication; or by the publication of defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged.'" Id. at *8, citing Restatement (Second) of Torts § 596 cmt. a. Notably, our courts often look to the Restatement in analyzing tort claims. See e.g. Stringer, 151 S.W.3d at 794.

[19] Interestingly, the trial court incorporated a negligence standard of ordinary care into its instruction in addition to the language regarding "knowledge of falsity" and "reckless disregard for the truth." Toler does not assert that he was required only to establish this negligence standard to overcome the qualified privilege. To the extent, then, that the instructions were in err by the inclusion of this lesser evidentiary burden, such error actually enured to Toler's benefit.

qualitative differences between negligence and recklessness, the former consisting of a failure to exercise ordinary care, and the latter consisting of a conscious indifference, we doubt that an allegation of simple negligence gives notice that recklessness is charged."). Similarly, in Kirschner v. Louisville Gas & Electric Co., 743 S.W.2d 840, 842-43 (Ky. 1995), the Court, citing Prosser & Keeton on the Law of Torts, 5th Ed. (1984), Chapt. 5, § 34, pp. 212-13, stated:

> The usual meaning assigned 'wilful,' 'wanton,' or 'reckless,' according to taste as to the words used, is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences... .

The language used by the trial court also was recently endorsed by the Court in Calor, albeit in a Memorandum Opinion:

> This difference is significant as slander in private matters ordinarily requires no proof of recklessness, only mere negligence in the dissemination of the statement, whereas the existence of a relationship supporting the privilege requires recklessness, or some other form of abuse to lose it. Thus, one could say the existence of the privilege implicitly raises the bar on the 'knowledge of falsity' level to that recognized under other circumstances by *New York Times Co. [v. Sullivan]*, 376 U.S. 254[,] [] 280 [(1964)] ("That is, with knowledge that it was false or with reckless disregard of whether it was false or not."), albeit for other reasons and in other ways.... This is because the privilege, if applicable, protects one's erroneous beliefs. *See [Weinstein v. Rhorer*, 42 S.W.2d [892,] [] 895 [(Ky. 1931)].

Calor, 2011 WL 4431143 at *11. Black's Law Dictionary, 6th Ed., also supports the definition of "recklessness" used by the trial court in this case:

> **Recklessness.** . . . The state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or

> which, through foreseeing such consequences, persists in spite of such knowledge. Recklessness is a stronger term than mere or ordinary negligence, and to be reckless, the conduct must be such as to evince disregard of or indifference to consequences, under circumstances involving danger to life or safety of others, although no harm was intended.

Under any of these iterations, the concept of "recklessness" entails a degree of knowledge on the part of the actor that his or her conduct will result in harm. In the defamation context, if an actor harbors knowledge that an alleged defamatory statement is likely false, or deliberately does nothing to ascertain the veracity of the statements, abuse of the privilege can be established – the actor knows that harm will follow to the reputation of the victim based on his conduct. Both situations require an examination of some deliberate action or inaction by the individual receiving the statements – such as purposeful avoidance – and ascribe a level of culpability to that actor's state of mind, such as a deliberate attempt to avoid a suspected truth. See Frakes v. Crete Carrier Corp., 579 F.3d 426, 431 (5th Cir. 2009) (in defamation case involving private plaintiff in employment context, Court stated, "Reckless disregard . . . is a subjective standard that focus[es] on the conduct and state of mind of the defendant. It requires more than a departure from reasonably prudent conduct. Mere negligence is not enough. There must be evidence that the defendant in fact entertained serious doubts as to he truth of his publication, evidence that the defendant actually had a high degree of awareness of . . . [the] probable falsity of his statements.") (internal citations and quotation marks omitted); see also Bratt v. International Business Machines Corp., 467 N.E.2d 126 (Mass. 1984) (in private plaintiff defamation case involving qualified privilege in employment context,

Court, quoting Restatement (Second) of Torts § 592A at 258, stated, "[t]o apply the negligence standard to a conditional privilege would defeat the concept and its objective of promoting the free flow of information to further a legitimate private or public interest. . . ." Thus, "[o]ne manner of such abuse is publication with knowledge of falsity or with reckless disregard of the truth.") (internal citations omitted). The trial court's recitation of this standard accurately encompassed this concept and set an appropriately stringent evidentiary burden in order to protect the common interest among the parties.[20] As such, there is no error in the trial court's instructions.

Toler also claims that the trial court should have included alternate grounds for Toler to overcome the privilege. (Toler Brief, p. 33) (e.g., "bad faith" by the Company, "lack of probable cause," or "improper motive"). Notably, Toler includes "reckless or knowing disregard for the truth or falsity of these accusations" in his list of all the ways he claims abuse of the privilege may be established. Certainly our case law identifies these categories of proof as alternate grounds for establishing abuse, if appropriate given the context of a particular case. But Toler has no argument here that the trial court's inclusion of the "reckless disregard" or "knowledge of falsity" standard was clearly erroneous. In fact, these standards, as we have seen, are in keeping with established case

[20] The definition of "recklessness" used by the trial court has been adopted in other states as well. For example, Alaska's pattern jury instruction 16.10 regarding the "common business interest" defines malice as follows: "the defendant either knew the statement was false or had serious doubts about the truth of the statement." (Appendix A; http://www.courts.alaska.gov/juryins.htm#16).

law on this point.[21] The fact that the trial court did not choose to utilize all possible alternate grounds for demonstrating abuse was not an error. See Calor, 2011 WL 4431145 *9 ("A proper instruction would reflect the relevant category of 'abuse' applicable in a given case.").

II. A Requirement of Proof of "Constitutional Actual Malice" Would Not Likely Have Been in Error in Any Event Considering the Public Interest at Issue.

Even if the trial court had required Toler to prove malice in this case by "clear and convincing evidence," such a requirement would not appear to have been legal error. Some states, in private plaintiff defamation cases involving a qualified privilege (e.g., "non-constitutional" defamation cases), require the plaintiff to prove abuse of the privilege by "clear and convincing evidence." This is so notwithstanding the fact that no constitutional interest is at stake.

For example, New Jersey model jury instruction 2.16(C) entitled "Defamation and Employment," requires that a plaintiff prove malice by clear and convincing evidence to overcome the qualified privilege in the employment context. The instruction reads as follows:

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[21] Toler appears not to advocate in favor of using the common law actual malice standard in the trial court's jury instructions. (Toler Brief, pp. 31-32). This standard requires a defamation plaintiff to establish ill-will, hatred, or wrongful motive by the defendant in order to overcome the qualified privilege. Ideal Motor Co v. Warfield, 277 S.W. 862, 864 (Ky. 1925). Toler most certainly advanced no evidence whatever that the Company harbored such "common law actual malice" towards him. The record evidence establishes the contrary is true.

> You will recall that I charged earlier that plaintiff must prove the first five elements of defamation by a preponderance of the evidence. However, the plaintiff bears a different and heavier burden of proof in order to establish that defendant lost or abused the privilege to communicate the defamatory statement. Plaintiff must show by clear and convincing evidence, not merely by a preponderance of the evidence, that defendant abused the privilege.... The privilege may be lost in one of two ways. The first way the [privilege] is lost is if the statement made by defendant was primarily motivated by a malicious intent. In other words, the plaintiff must prove by clear and convincing evidence that the defendant knew the statement to be false or that the defendant acted in reckless disregard of its truth or falsity.

(Appendix A; http://www.judiciary.state.nj.us/civil/civindx.htm). Similarly, Mississippi would require a private plaintiff to establish malice by "clear and convincing evidence" in its proposed pattern jury instruction 1407. (Appendix A; http://courts.ms.gov/mmji/Proposed%20Plain%20Language%20Model%20Jury%20Instructions%20-%20Civil.pdf). This proposed instruction states:

> A person may have a conditional right to make a defamatory statement under certain circumstances. If [name of defendant] had a conditional right to [say/write] the defamatory statement based on [describe basis for the conditional right], then [name of plaintiff] cannot recover damages from [name of defendant] unless [name of plaintiff] *proves by clear and convincing evidence* that [name of defendant] acted with hatred or malice towards [name of plaintiff].

(Id.) (Italics added).[22]

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[22] Vermont's draft pattern jury instruction 10.4 also would require such proof (jurors must be "clearly convinced" that defendant knew the statement to be false or acted with a reckless disregard as to whether it was false) (http://www.vtbar.org/UserFiles/Files/WebPages/Attorney%20Resources/juryinstructions/civiljuryinstructions/Defamation.htm).

Courts have extended the qualified privilege to the employment context so that persons can transact business in an efficient manner without having to be unduly concerned over liability. In such cases, the importance of the information to be conveyed, and the interests such information implicates, outweigh the risk of damage to an individual's reputation. These considerations support the implementation of a heightened burden of proof on private defamation plaintiffs in the employment context. Any lesser standard of proof would render the qualified privilege meaningless. This is especially so in cases such as this where the interest involved, elimination of discrimination in the work place, has profound effects upon the public interest as a whole. Consequently, there is no error ascribable to the trial court's jury instruction.

CONCLUSION

The trial court's jury instructions properly communicated the burden on Toler to overcome the qualified privilege applicable to his defamation claim. Süd-Chemie Inc. respectfully requests that the Judgment of the trial court be affirmed in all respects.

Respectfully submitted,

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SUPREME COURT OF KENTUCKY
2013-SC-000002-D
(2009-CA-001686)

JOSEPH E. TOLER — APPELLANT

v. APPENDIX TO APPELLEE SÜD-CHEMIE INC.'S BRIEF

SÜD-CHEMIE INC., et al. — APPELLEES

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Tab A

Alaska Model Jury Instruction 16.10
New Jersey Model Jury Instruction 2.16(C)
Mississippi Model Jury Instruction 1407
Connecticut Model Jury Instruction 3.11-9
Michigan Civil Jury Instruction 118.07
California Model Jury Instruction 1723
Delaware Model Jury Instruction 11
Vermont Draft Model Jury Instruction 10.4