

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE HORTON

Plaintiff,

vs.

Case No.: 2:05-CV-72356
Honorable John Feikens
Magistrate Steven D. Pepe

48th DISTRICT COURT and
JAMES P. HARKINS, JR.,
Individually and in is official capacity,

Defendants.

_____/

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Attorney for Plaintiff

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_____/

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT,
BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

_____/ NOW COME the Defendants, 48TH JUDICIAL DISTRICT COURT and JAMES P. HARKINS, JR., by and through their Attorneys, GARAN, LUCOW, MILLER, P.C., and moves this Honorable Court to enter summary judgment pursuant to Federal Rules of Civil Procedure Rule 56 as there exists no genuine issue of material fact and the defendants are entitled to judgment as a

matter of law and for the reasons more specifically set forth in the attached brief in support.

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Dated: February 2, 2006

**BRIEF IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

The plaintiff, Michelle Horton, has brought this action against the 48th Judicial District Court seeking compensation after she was terminated for engaging in illegal and improper use of court facilities. She has made claims under 42 USC 1983, alleging breach of implied contract for just cause only termination and defamation by the defendants. However, the evidence is now clear that the plaintiff was employed “at-will” and that there was no non-privileged communication that could constitute the basis for the defamation. Therefore, defendants request this Honorable Court dismiss this action as there is no genuine issue of material fact and defendants are entitled to a judgment as a matter of law.

Factual Analysis

Plaintiff was hired to work as a clerk in the Probation Department of the 48th District Court for the State of Michigan (the “court”), on December 26, 1990. Plaintiff received an Employee Manual in the latter part of the 1990's. (Exhibit A, Plaintiff's dep, pg. 35, 38.) As she testified, the

manual described the terms and conditions of her employment and clearly reserves the right to terminate employees at-will. (Exhibit B, pg. 43.) The handbook also describes a “Code of Conduct” which commands that employees “should avoid impropriety and the appearance of impropriety and the appearance of impropriety in all activities.” (Exhibit B, pg. 8.) “By in part not influencing or attempting to influence the assignment of cases . . . perform any discretionary or administrative function of the court . . . or implied that they are in a position to do so.” Employees are further instructed in the handbook not to accept gifts or favors from any person whose interest have or may come before the court. Finally, they are instructed that court personnel must never use the court’s LEIN/SOS capabilities to access any information for personal reasons. (Exhibit B, pg. 9A.)¹ The handbook specifically warns that “misuse of the LEIN/SOS is a dischargeable offense.” (Exhibit B, pg.9A.)

In early October 2004, the court administrator, Jim Harkins and then chief judge, Kimberly Small, learned of rumors in the community that Laurie Barron (wife of then judicial candidate Marc Barron), should have been charged with a second OUIL offense. Coincidentally, on October 6, 2004, Judge Diane D’Agostini was at a fund raiser for David Law, a state legislative candidate when she had an opportunity to speak with David’s mother, Sharon Law, then clerk for West Bloomfield Township. Judge D’Agostini was told that the Michelle Horton had sent a Register of Actions (or an internal court document summarizing court actions, orders and docket entries) relating to Mrs. Barron to people who were not court related. Judge D’Agostini was also told by Ms. Law that

¹LEIN/SOS is the “Law Enforcement Information Network” which provides information on individuals such as arrest histories, current warrants, convictions and incarcerations. SOS is a data base maintained by the State of Michigan Secretary of State recording automobile title and driving histories of individuals.

plaintiff had taken advantage of her romantic relationship with a police officer to intercede on behalf of a well-known defense attorney, Neil Rochkind's wife in defending his wife in a matter pending before the 48th District Court. Ms. Law further recounted the plaintiff apparently received a weekend at the Drake Hotel in Chicago paid for by Mr. Rochkind as compensation for her services.

These allegations concerned the judges and Mr. Harkins, and they began an investigation. Initially, as he gathered information, Mr. Harkins learned plaintiff may have received gift cards and certificates to Andiamo Restaurant from attorney D. Todd Williams purportedly in return for favors the plaintiff had performed for him. Mr. Harkins also learned that plaintiff had asked Orchard Lake Police Officer, Sergeant Riegler to dismiss traffic tickets issued to Horton family members and friends and as a result, plaintiff's family received new doors for their home. Mr. Harkins learned that the plaintiff may have been "running" LEIN/SOS searches for family, friends or for her own personal reasons.

Judge Small and Mr. Harkins realized that there were possible criminal implications with these assertions and thus, asked the Bloomfield township Police Department to investigate.² Captain Kirt Bowden and Detective Dwayne Barker undertook the investigation and prepared a formal report. They interviewed 15 witnesses including the plaintiff. (Exhibit C.) During their investigation, as they interviewed the plaintiff, plaintiff admitted to the officers that:

1) attorneys who practice before the court bought her drinks at the Capital Grill and 220 Merrill Street Restaurants in Birmingham;

2) asking Sergeant Riegler to "do something" with a ticket;

²MCLA 750.117 makes bribery of a public officer a felony. MCLA 28.214 Sec. 4(3) makes disclosure of information from LEIN in a matter not authorized by law or rule a misdemeanor. Second violations are punishable as felonies.

3) she spoke with Police Officer Scott Wilson to ask if he would dismiss a charged against Neil Rochkind's wife;

4) she admitted to accepting the weekend at the Drake Hotel from Mr. Rochkind; and

5) that she had run the names of a construction foreman doing work at the court, his purported fiancé, people who "cut her off" in traffic and friends through the LEIN/SOS system. (Exhibit C)

Mr. Harkins confirmed with LEIN administration that, in fact, plaintiff had run names of individuals through LEIN and that at the time she had run those names they had no active matters pending in that court. (Exhibit D.)

Once Mr. Harkins was provided with this information from police officers, he consulted Judge Small. Mr. Harkins stated that because plaintiff had clearly violated the court's policy regarding the LEIN/SOS security that plaintiff should be terminated. Judge Small concurred. On December 13, 2004, plaintiff was asked to meet with Mr. Harkins. She refused, explaining that she had too much work. Mr. Harkins, and Nicole O'Dea went to the plaintiff's office. Mr. Harkins asked the plaintiff if she would like to explain any of the information she gave the Bloomfield Township Police Department. Mr. Harkins added that he was "curious and what's going on with the LEIN/SOS." Plaintiff refused to give Mr. Harkins any information unless she "had an attorney present." By sheer coincidence, just as Mr. Harkins was in her office, plaintiff's attorney called. Again the plaintiff refused to give any further information but allowed Mr. Harkins to speak with her attorney, Dove Lustig. Mr. Harkins informed Mr. Lustig that plaintiff would be suspended with pay while they continued their investigation. Mr. Lustig said he would be filing an Appearance, (an action he never accomplished). Plaintiff nor her attorney ever provided any additional information

to the court regarding their concerns on the improper use of the LEIN/SOS. It was not until immediately prior to the filing of this lawsuit that plaintiff asked for any type of hearing. (Exhibit E) The plaintiff nor any attorney representing her has ever sought to provide any information to the court since that time until she filed this action.

Plaintiff initially filed this lawsuit alleging breach of implied contract, just cause only discharge, violation of 42 USC 1983 and defamation. Essential discovery has been completed and defendants now ask this court to grant summary judgment as there is no genuine issue of material fact and an Order dismissing this case pursuant to Federal Rules of Civil Procedure Rule 56 is appropriate.

Legal Analysis

1. Plaintiff was at all times an at-will employee

Michigan law presumes employment relationships are terminable at the will of either party. *Lytle vs. Malady (on rehearing), 458 Mich 153, 163 (1998)*. The presumption of employment at will may be rebutted only by:

1. Proof of a “contractual provision for a definite term of employment or a provision forbidding discharge absent just cause”
2. An expressed agreement, either written or oral regarding job security that is clear and unequivocal; or
3. A contractual provision, implied at law, where an employee’s policies and procedures instill a “legitimate expectation” of job security in the employee.

Id at 164

In the present case, the plaintiff has identified no expressed agreement neither written or oral regarding job security that is clear and unequivocal. Nor has she provided any proof of any

contractual provisions for a definite term of employment or a provision forbidding discharge without just cause. Therefore, it must be assumed that plaintiff's only claim of breach of contract arises out of a contractual provision that was inferred based upon a "legitimate expectation" of job security.

In resolving the issue of whether an employee has demonstrated a legitimate expectation of job security, the court must inquire into what, if anything, the employer promised and whether the promise is reasonably capable of installing a legitimate expectation of just-cause employment in the employee. *Rude vs. General Dynamics Corp*, 444 Mich 107, 138-139 (1993). In the present case, the plaintiff received and was aware of a specific disclaimer indicating that plaintiff's employment was at-will. (Exhibit B) The plaintiff has demonstrated no promises, statements or other actions that would raise a legitimate expectation of continued employment. Plaintiff has failed to submit any evidence refuting her at-will employment status. See *Schultes vs. Naylor*, 195 Mich App 640, 643 (1992); *Singal vs. General Motors Corp*, 179 Mich App 497, 504-505 (1989). Without specific evidence of a basis for any legitimate expectation of continued employment, plaintiff's inference as to the contractual term other than at will must be given little if no credence.

2. Plaintiff had no property or interest in the continued employment by the 48th District Court and therefore, cannot prevail on a claim for deprivation of such a property under 42 USC 1983.

Plaintiff has alleged in Count II of her Complaint that she enjoyed a constitutionally protected property interest in continued employment. (Exhibit F, paragraph 26.) She alleges in Count I of her Complaint that the defendants' action terminating her employment deprived her of her constitutionally protected property interest in continued employment. Thus, plaintiff asserts that the right she was deprived of without due process was her continued employment at the 48th District

Court. In Michigan, even with public employment, if an individual in question is an employee whose employment is terminable at-will, that individual is held to have no property right in their continued employment. *Scott vs. Ann Arbor*, 76 Mich App 535, 539-540 (1977). See also *James vs. City of Burton*, 221 Mich App 130, 134 (1997); *Bracco vs. Michigan Technological University*, 231 Mich App 578, 585 (1998). Plaintiff's allegations that she was deprived of her property interest cannot be sustained as she had no property interest in continued employment.

3. Any statement made by the defendants' regarding plaintiff's termination do not constitute defamation.

Under Michigan law, in order to sustain a claim for defamation a plaintiff must show:

1. A false or defamatory statement concerning the plaintiff;
2. An unprivileged communication to a third party;
3. Fault amounting to at least negligence on the part of the publisher; and
4. Either action ability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Rouch vs. Inquirer News of Battle Creek, (after remand), 440 Mich 238, 251 (1992); *Linebaugh vs. Sheraton Michigan Corp.*, 198 Mich App 435, 338 (1993).

A qualified privilege exists as to claims of defamation where:

1. The parties acted in good faith;
2. An interest can be identified that is to be upheld;
3. A statement is limited in its scope to the purpose identified above;
4. There was a proper occasion for the publication; and
5. The publication was in a proper manner to the proper parties only.

See *Prysak vs. R L Polk Co*, 193 Mich app 1, 14-15 (1992).

The determination of whether a privilege exists is one of law for the court. *Prysak, supra*. In the present case, the defendants made a statement by issuing a memo to the employees of the 48th District Court indicating that Ms. Horton's employment had been terminated due to her violation of the LEIN/SOS system. (Exhibit G) This statement fits all of the criteria as set forth in *Prysak*.

In order to overcome a qualified privilege, the plaintiff must show actual malice with specificity. *Royal Palace Homes vs. Channel & of Detroit, Inc.*, 197 Mich App 48, 52 (1992).

“Actual malice is defined as knowledge that the published statement was false or as reckless disregard as to whether the statement was false or not. Reckless disregard for the truth is not established merely by showing that the statements were made in the preconceived objectives or insignificant investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. ‘Reckless disregard’ is not measured by whether a reasonable prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published. *Ireland vs. Edward*, 230 Mich App 607, 662 (1998).

General allegations of malice are insufficient to establish a genuine issue of material fact. *Prysak, supra at 15*.

Qualified privilege has been found to extend to a student's communication with the University Department Chair id at 182 Mich App 113, 118 and two communications regarding an employee between an employer and other employees whose duties interest them in the subject matter of the communication. *Gonyea vs. Motor Parts Federal credit Union*, 192 Mich App 74, 78-79 (1991). In the present case clearly, the memorandum regarding the plaintiff's reason for discharge was not only true, but it was on a subject matter that interested all the employees to remind of the

seriousness that the employer viewed violations of the policy and the employers intent to follow the policy to the letter including termination of violations of the policy.

Finally, the statements were in fact true. Plaintiff admitted the documentation from LEIN/SOS demonstrated that the plaintiff had in fact run names that were not individuals with active matters before the 48th District Court. Clearly there was a violation of the policy, a violation of the law, and the termination was not only expected, but consistent with the policy previously expressed.

CONCLUSION

Even though defendants were not contractually or otherwise bound to give reasons for her termination, plaintiff was terminated for legitimate non-discriminatory reasons. The court was presented with clear evidence that plaintiff had violated its internal code of conduct. It appeared that she engaged in conduct that caused the community to question the impartiality and judicial integrity of the 48th Judicial District Court. Plaintiff admitted she used the LEIN system to obtain information for personal reasons. She refused to provide the court with information to the contrary even though she was given the opportunity to do so. Since Mr. Harkins and the court were well within their rights to terminate plaintiff's employment, they should be dismissed from this matter with prejudice and awarded their costs and attorney fees so wrongfully incurred.

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Dated: February 2, 2006

Document: 626593.1

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2006 I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notification of such filing to the following: Deborah Gordon and I certify that I have mailed by U.S. Mail the document to the following non-ECF participants:

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