Buffalo Law Review

Volume 2 | Number 2 Article 22

4-1-1953

Libel—No Publication by Dictation to Corporate Stenographer

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LIBEL—NO PUBLICATION BY DICTATION TO CORPORATE STENOGRAPHER

After thirty-two years in the employ of defendant corporation, plaintiff was discharged. Suspecting that the reason was his refusal to contribute to Senator Taft's campaign fund, as suggested by defendant's supervisor of agencies, plaintiff asked Senator Sparkman to investigate. In reply to the senator's inquiry, defendant's president in New York dictated a letter to his stenographer in which he allegedly libeled plaintiff. *Held* (2-1): For defendant. There was no publication because the president and the stenographer were both employees of defendant corporation. *Mims v. Metropolitan Life Ins. Co.*, 200 F. 2d 800 (5th Cir. 1952).

Publication of the defamatory matter is essential to liability in an action for libel. *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265 (1897). The law which governs in an action for libel is that of the state where the defamatory statement was seen by a third person. GOODRICH, CONFLICT OF LAWS 264 (3d ed. 1949). In New York, the dictation of a libelous letter by an individual to his own employee constitutes a sufficient publication in an action against the individual who dictated the letter. *Ostrowe v. Lee*, 256 N. Y. 36, 175 N. E. 505 (1931). However, dictation by an executive to a stenographer, both employees of the same corporation, has been held to be the act of but one entity, the corporation, and no publication occurred because there was no communication to a third person. *Owen v. J. S. Ogilvie Publishing Co.*, 32 App. Div. 465, 53 N. Y. Supp. 1033 (2d Dep't 1898); *Wells v. Belstrate Hotel Corp.*, 212 App. Div. 366, 208 N. Y. Supp. 625 (1st Dep't 1925); *Loewinthal v. Beth David Hospital*, 9 N. Y. S. 2d 367 (Sup. Ct. 1938).

That the latter cases are controlling authority in New York, as assumed by the court in the instant case, is doubtful. It has been noted that the *Ogilvie* case, *supra*, did not reach the Court of Appeals and apparently is in conflict with cases from other jurisdictions. See *Kennedy v. James Butler, Inc.*, 245 N. Y. 204, 206, 156 N. E. 666, 667 (1927), holding that there was publication when the managers of branch retail stores received letters from the manager of the corporation. That case avoided the question of whether or not the *Ogilvie* case would be followed. *Kennedy v. James Butler, Inc., supra* at 206-207, 156 N. E. 666, 667. It is also to be noted that Cardozo, J., in *Ostrowe v. Lee, supra*, at 38, 175 N. E. 505 cited the *Kennedy* case, made no distinction as to who employs the stenographer, and simply stated there is publication, at least when the stenographer examines or transcribes her notes. Another New York court rejected the *Ogilvie* rule, and said

whether the stenographer is employed by a corporation or by an individual, should not, in fairness or reason, be the deciding factor. *Bradley v. Conners,* 169 Misc. 442, 444, 7 N. Y. S. 2d 294, 295 (Sup. Ct. 1938).

Other jurisdictions are equally in conflict. Many follow the rule stated in the instant case. *Freeman v. Dayton Scale Co.,* 159 Tenn. 413, 19 S. W. 2d 255 (1929); *Satterfield v. McLellan Stores Co.,* 215 N. C. 582, 2 S. E. 2d 709 (1939); *Central of Ga. Ry. Co. v. Jones,* 18 Ga. App. 414, 89 S. E. 429 (1916); *Rodgers v. Wise,* 193 S. C. 5, 7 S. E. 2d 517 (1940); *Cartwright-Caps Co. v. Fischel,* 113 Miss. 359, 74 So. 278, L. R. A. 1918F, 566, (1917); *Chalkley v. Atlantic Coast Line R. Co.,* 150 Va. 301, 143 S. E. 631 (1928); *Watson v. Wannamaker,*___S. C.___, 57 S. E. 2d 477 (1950). Others hold there is publication even though the stenographer is employed by a corporation. *Berry v. City of N. Y. Ins. Co.,* 210 Ala. 369, 98 So. 290 (1923); *Ferdon v. Dickens,* 161 Ala. 181, 49 So. 888 (1909); *Rickbeil v. Grafton Deaconess Hospital,* 74 N. D. 525, 23 N. W. 2d 247, 166 A. L. R. 99 (1946); *Gambrill v. Schooley,* 93 Md. 48, 48 Atl. 730, 52 L. R. A. 87 (1901); *Nelson v. Whitten,* 272 Fed. 135 (1921); *Pullman v. Hill,* 1 Q. B. 524 (Eng. 1891). See also, RESTATEMENT, TORTS § 577, comment *h* (1938).

Various reasons are given for holding no publication in such circumstances: (1) The dictation of the letter is but the act of two agents for one corporate entity. *Satterfield v. McLellan Stores Co., supra.* (2) Since employment of stenographers is necessary in the modern business world, their use should not be penalized. *Owen v. J. S. Ogilvie Publishing Co., supra;* note 2 So. CAR. L. Q. 290 (1950). (3) The dictation and transcription are not comprehended by the stenographer, who performs an automatic, mechanical duty. *Freeman v. Dayton Scale Co., supra;* notes, 6 CORN. L. Q. 430 (1921), 15 VA. L. REV. 96 (1928). The authorities to the contrary maintain the stenographer's relation to her employer is unimportant, but that she as a third person sees the defamation. *Bradley v. Conners, supra; Berry v. City of N. Y. Ins. Co., supra.*

The civil action of libel is based upon damage to character or reputation. *Freeman v. Dayton Scale Co., supra.* Therefore, it is submitted that the fiction of the corporate entity should not cloud the fact that a stenographer is a human being to whom an alleged libel is communicated, whether she is employed by a corporation or by an individual.

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