

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE **FILED**  
MIDDLE DIVISION

JUN 02 2009

Tennessee Claims Commission  
CLERK'S OFFICE

ROBERT MALLORY, )  
) )  
Claimant, )  
) )  
vs. )  
) )  
STATE OF TENNESSEE, )  
) )  
Defendant. )

Claim No. T20070572

COMPLETED ✓  
INDEXED ✓  
S/A-COMM ✓  
DCA ✓  
AS ✓  
ALS ✓  
FEE PAID ✓  
NOTICE SENT ✓  
FILED ✓  
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**ORDER**

Claimant, Robert Kyle Mallory, has filed this claim alleging that he was slandered by employees of the Department of Children's Services ("DCS") in connection with applications for re-employment that he submitted to the Department on or about November 1, 2005, November 3, 2005, February 15, 2006, and March 5, 2006. Mr. Mallory also alleges that on or about December 12, 2005, employees of the Department made slanderous statement concerning his educational background that caused him to be fired from his position with a private contractor.

The defendant has moved to dismissed on the basis that the claims are barred by the statute of limitations for slander, Tenn. Code Ann. § 28-3-103, which requires that such actions be commenced within six months of

utterance of the allegedly defamatory statements. Claimant has opposed the motion, arguing that he was not present when the statements were made and that his allegations were merely estimations as to when the slanderous statements were uttered. Further, he contends, in its response to claimant's interrogatories, defendant acknowledges the statements alleged in the complaint, including the fact that they may have been made after May 30, 2006, which was within the statute of limitations.

## DISCUSSION

### Statute of Limitations

Slander actions are governed by a six-month statute of limitations that expressly declares that the time for filing suit begins to run at the moment the words are uttered. *Leach v. Taylor*, 124 S.W.3d 87, 91 (Tenn. 2004); Tenn. Code Ann. § 28-3-103. Defendant argues that Mr. Mallory's claims, which were not presented to the Division of Claims Administration until November 9, 2006, are time barred.

In response to the motion, Mr. Mallory argues that the dates on which the State relies – November 1, 2005, November 3, 2005, February 15, 2006, and March 6, 2006 -- do not refer to the date that the statements were

allegedly made, but rather refer to the dates that he applied to the DCS for reemployment. Although he apparently does not know when the statements were made, he contends that defendant's response to his interrogatories acknowledges not only that the utterances were made but that they may have occurred after May 30, 2006, and are therefore timely.

### **Statements Made to Phoenix**

Mr. Mallory alleges that on or about December 12, 2005, DHS employees Frank Mix, Elizabeth Mitchell, and Patricia Oldham informed his employer, International Phoenix Group ("Phoenix"), that: "Mallory's master's degree is from an illegal graduate program and he cannot continue as a Divisional Director for Phoenix." Mallory contends that this statement caused him to lose his position with Phoenix.

Because Mr. Mallory's claim that defendant's employees made defamatory statements to his employer at Phoenix on December 12, 2005, clearly occurred more than six months prior to the filing of the complaint on November 9, 2006, it is barred by the statute of limitations.

### Statements Concerning Job Performance

Although prior to the adoption of the Rules of Civil Procedure, slander was required to be pled verbatim, modern pleading rules have relaxed such requirements so that only the substance of the utterance must be set forth. *Handley v. Mays*, 588 S.W.2d 772, 774-76 (Tenn. Ct. App. 1979). In order to put a defendant on notice as to a claim for slander, however, the complaint must allege the time and place of the utterance. *Handley*, 588 S.W.2d at 775; *Rose v. Cookeville Regional Medical Center*, 2008 WL 2078056, 4 (Tenn.Ct.App. May 14, 2008), *Millsaps v. Millsaps*, 1989 WL 44840 (Tenn. Ct. App. May 3, 1989).

Mr. Mallory identifies the following statement as having been made by DCS employees Frank Mix and Carla Aaron at unnamed times to persons whom he does not identify, but who were apparently DCS employees involved in the decision of whether to reemploy him: "Mallory engages in poor business practices, has no concern for kids and only cares about money."

Although Mr. Mallory identifies its substance, his complaint does not identify the times or places that the statement was allegedly made.

Mallory argues that defendant's interrogatory acknowledges that defendant knows what the statements are and when they occurred and indicates sufficient notice on its part. The Commission does not agree.

Although the interrogatory response references a conversation concerning Mr. Mallory's past work performance, there is no indication as to when the conversation occurred and there is no acknowledgement that the slanderous statements alleged by Mr. Mallory were in fact made. The complaint therefore fails to meet the pleading requirements as to time and place with respect to this claim, which is subject to dismissal as time-barred.

### **Publication**

Moreover, had Mr. Mallory sufficiently pled the time and place of the alleged slander, the Commission finds that his claim would still be subject to dismissal for failure to allege the necessary element of publication to a third party. In order to establish a prima facie case of defamation in Tennessee, a plaintiff must demonstrate that: 1) a party published a statement; 2) with knowledge that the statement is false and defaming to the other; or 3) with reckless disregard for the truth of the

statement or with negligence in failing to ascertain the truth of the statement. See Restatement (Second) of Torts § 580 B (1977); *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978).

“Publication” is a term of art meaning the communication of defamatory matter to a third person. *Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818, 821 (Tenn. 1994). The Tennessee Supreme Court has held that a communication of a defamatory matter between the agents and officers of a corporation in the ordinary course of business was not a publication. *Freeman v. Dayton Scale Co.*, 159 Tenn. 413, 19 S.W.2d 255 (1929). Such intracorporate communications among agents of the same corporation made within the scope and course of their employment relative to duties performed for that corporation are not to be considered as statements communicated or publicized to third persons. *Woods v. Helmi*, 758 S.W.2d 219, 223 (Tenn.Ct.App. 1988).

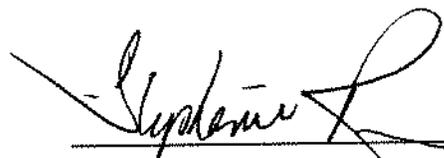
Mr. Mallory alleges that he was defamed by statements made by DCS officials concerning his previous employment with the Department to other DCS officials considering his application for reemployment.

Although, DCS, a state agency, is not a corporation, the Commission finds

that the same rationale applies in this context as would be applicable in the corporate context.<sup>1</sup> Here, statements concerning Mr. Mallory's previous job performance with DCS by person within DCS with knowledge of such performance made to other persons within DCS authorized to consider his application for reemployment cannot be said to be a communication to a third party. The Commission therefore concludes that an agency's communication of allegedly defamatory information concerning a former employee's job performance to an employee within the agency acting under a duty to determine whether the employee should be reemployed is not an actionable "publication."

For the foregoing reasons, the complaint is therefore dismissed.

It is so **ORDERED** this the 2nd day of June, 2009.



STEPHANIE R. REEVERS  
Claims Commissioner

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<sup>1</sup> See *Kurtz v. Williams*, 188 Ga.App. 14, 15(3), 371 S.E.2d 878 (1988)(applying intracorporate communication exception to State hospital administrator's statements to deputy superintendent, personnel director, and chief of employee's division concerning employees extramarital affair with a co-employee during working hours.)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

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This 2 of June, 2009.



Marsha Richeson, Administrative Clerk  
Tennessee Claims Commission