THOMAS I. BASTIAN, SR.,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 98-00,597
	:	
SEARS, ROEBUCK AND CO.,	:	CIVIL ACTION - LAW
	:	
Defendant	:	

MARGO L. FOX,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 98-00,627
	:	
SEARS, ROEBUCK AND CO.,	:	CIVIL ACTION - LAW
	:	
Defendant	:	

JO ANN HEDRICKS,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 98-00,584
	:	
SEARS, ROEBUCK AND CO.,	:	CIVIL ACTION - LAW
	:	
Defendant	:	

Date: July 26, 2000

OPINION and ORDER

The matter presently before the Court concerns the Preliminary Objections of Defendant Sears Roebuck and Co. (hereinafter "Defendant") to the Second Amended Complaints of Plaintiffs Thomas I. Bastian, Sr., Margo L. Fox, and Jo Ann Hedricks

(hereinafter collectively "Plaintiffs").[1] Plaintiffs worked for Defendant until all three were discharged for using store coupons in June of 1996 to obtain a discount on purchases, which was apparently not allowed under store policy. Defendant characterized the violation of store policy as "documented dishonesty," and this characterization was entered into the work record of each Plaintiff on or about August 8, 1996.

In April 1998, Plaintiffs filed the instant actions as a result of the entries on their employment records. The Second Amended Complaints[1] of all three Plaintiffs contain two counts: Count One is a defamation claim and Count Two is a wrongful discharge claim. Plaintiffs aver that they have been defamed as the "documented dishonesty" labels, disseminated by Defendant orally and in writing, falsely imply they are dishonest and were fired because of dishonesty and/or theft.

Plaintiff Fox alleges Defendant disseminated written information that she was a dishonest person to three named coworkers, and other persons to be identified in discovery, on an unspecified date, and also continues to this date to disseminate the defamatory statements through a "self reporting publication" referring to continuing to maintain the statement on the Plaintiffs' employment record held by Defendant. Plaintiff Fox also asserts that Defendant made it known to Plaintiff that the employment records of Plaintiff contained the reference that she was being terminated for documented dishonesty, and as a result of this she felt she would be compelled to disclose the same to any potential employers. As a result, she has not sought employment elsewhere since her termination in 1996.

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[1] The original Complaints were filed by Plaintiffs Hedricks and Bastian on April 20, 1998, and by Plaintiff Fox on April 27, 1998. Amended Complaints were filed by all three Plaintiffs on November 12, 1998; Second Amended Complaints were filed by all three Plaintiffs on March 15, 2000.

Plaintiffs Bastian and Hedricks raises the same allegations concerning the alleged defamatory statements and their dissemination, and in addition allege that since their termination of employment in 1996, they have had to report the existence of such defamatory statements in their personnel file to future prospective employers, with Bastian identifying four such employers and Hedricks two. Neither of these Plaintiffs specified exact dates when these statements to prospective employers were made, but simply allege that they occurred between 1996 and June of 1998.

All three Plaintiffs allege that Defendant also disseminated the information, again at unspecified dates and times to the Unemployment Compensation Board of the Department of Labor and Industry, the Pennsylvania Human Relations Commission, the Plaintiffs' coworkers and to Plaintiffs' future prospective employers.

The wrongful discharge counts aver that Plaintiffs were wrongfully discharged because other employees who utilized the discount coupons were not discharged, and therefore Plaintiffs must have been discharged "as a result of age discrimination or some other type of discrimination specifically prohibited by statute, which will become more apparent as discovery continues." Second Amended Complaints paragraphs 30-31 (emphasis added).

Defendant filed Preliminary Objections to all three Second Amended Complaints, asking that Plaintiffs' claims be dismissed.

The Preliminary Objections are essentially in the nature of a demurrer. Defendant that it has an absolute privilege to publish defamatory matter and notices of termination, and that this privilege extends to those with legitimate interest in the subject matter; since the complaints fail to identify parties to whom the privilege would *not* apply, the

complaints concerning defamation should be dismissed. The preliminary objections also raise an objection that the claims concerning wrongful discharge violate ***Connor v. Allegheny General Hospital***, 501 Pa. 306, 461 A.2d 600 (1983) and Pa.R.C.P. 10019(a) provisions. As would relate to wrongful termination, Defendant asserts that the complaints merely allege discharge from employment due to age, discrimination "or some other type of discrimination" without any facts to support such legal conclusion.

When determining preliminary objections in the nature of a demurrer, a court must accept the averments of a complaint as true, except to the extent that they constitute conclusions of law. ***Shick v. Shirey***, 716 A.2d 1231 (Pa. 1998).

Wrongful Discharge.

Defendant correctly maintains that Pennsylvania recognizes the doctrine of at-will employment, and the few recognized exceptions to this doctrine are inapplicable in the instant case.

In Pennsylvania, absent a statute or contractual provision to the contrary, either employer or employee may terminate the employer-employee relationship for any reason, or no reason. ***Shick v. Shirey***, *supra*. Notwithstanding the doctrine, however, an employer's privilege to dismiss an employee with or without cause is not absolute and may be qualified by the dictates of public policy. ***Ibid***. As stated in Defendant's brief:

> There are few public policies exceptions to the at-will employment doctrine. They generally fall within three categories:
>
> An employer (1.) cannot require an employee to commit a crime; (2.) cannot prevent an employee from complying with a statutorily imposed duty; and (3.) cannot discharge an employee when specifically prohibited from doing so by statute.

> Count II of Plaintiff's Complaint styled "wrongful discharge" simply does not come close to any of the recognized public policy exceptions.

Defendant's Brief filed 5/3/00 at p. 6. As previously noted, Plaintiffs aver that because they were discharged for using the coupons, while others who used the coupons were not, it necessarily follows that they were victims of "age discrimination or some other type of discrimination" violative of statute and/or public policy.

Recently, our Supreme Court considered the application of public policy exceptions to the at-will employment doctrine in the case of ***McLaughlin v. Gastrointestinal Specialists, Inc***., No. 0042 E.D.Pa. 1998 (April 18, 2000). In that case, an employee who was fired filed suit alleging the termination was unlawful because it was done in response to her making safety complaints about her employer's improper use and handling of a chemical. In her complaint for wrongful discharge and other claims, plaintiff averred that she was terminated for her good faith report and concerns about continued exposure to the chemical and its unsafe use and storage. Plaintiff then concluded the termination was therefore contrary to public policy. The trial court dismissed the complaint, finding that plaintiff had not set forth a legal cause of action and that Pennsylvania Worker's Compensation Act barred the claim. The Superior Court affirmed the trial court on all counts of the complaint (except a claim for violation of the Pennsylvania Wage Collection Act). With respect to plaintiff's wrongful discharge, the Superior Court found plaintiff had not articulated a violation of public policy, as she had made internal safety complaints only and had not actually lodged a complaint pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651, 660(c) ("OSHA").

The Supreme Court granted allocatur regarding only the dismissal of the wrongful discharge claim, and affirmed the Superior Court. The Court stated that the presumption of all non-contractual employment relations is that it is at-will, and this presumption is "an extremely strong one." ***McLaughlin*** at [J-196-99]-6. The Court continued that an employee may bring an action for termination "only in the most limited of circumstances where the termination implicates a clear mandate of public policy." ***Id***. at [J-196-99]-6-7. In the case before it, the Court concluded plaintiff could not overcome the strong presumption of at-will employment by making a bald reference to a violation of a federal regulation without articulating how the public policy of the Commonwealth was violated. In so doing, the Court indicated that plaintiff must in some way allege that the public policy of *this* Commonwealth is implicated, undermined or violated because of the termination. Further, to determine what is public policy in Pennsylvania, the Court examines the precedent within Pennsylvania, looking to the state Constitution, court decisions, and statutes promulgated by the Pennsylvania legislature.

Here, Plaintiffs have failed to point to any violation of a regulation, promulgated under either state or federal law. Moreover, simply identifying the law upon which they would rely would not remedy the insufficiency of the Second Amended Complaints, as no discrimination has been demonstrated by the averments. The claim of discrimination is based on Plaintiffs' conclusions that they *must* have been discriminated against because they were fired while others who used the coupons were not. However, Plaintiffs could easily have been fired while their co-workers were retained simply because the co-workers were harder workers, or had better relationships with management, or for any number of reasons, valid or not.

McLaughlin specifically upholds the pronouncement of ***Schick*** that "public policy is to be ascertained by reference to the laws and legal precedents and not from supposed public interest. ***Id***. at [J-196-99-8]. Plaintiffs have not, and apparently cannot, allege such public policy violation and the claims for wrongful discharge must be dismissed.

Defamation Action

Defendant, in support of its demurrer to the counts of defamation, argues that: (1) it has an absolute privilege to publish defamatory matter and notices of termination in light of ***Agriss v. Roadway Express, Inc***., 483 A.2d 456 (Pa.Super. 1984); (2) Plaintiffs' defamation claims are barred by the applicable statute of limitations.[2] In ***Agriss***, the Pennsylvania Supreme Court stated that employers enjoy an absolute privilege to publish defamatory matter in notices of termination and warning letters and also that it is a question of law as to whether the absolute privilege applies. ***Id***. at 463-464.[3] The cases before this Court involve neither a notice of termination nor a warning letter. As noted in ***Agriss***, the reason such absolute privilege is recognized is because of the public policy favoring private resolutions of disputes among employers and employees, as well as unions where they are involved. Accordingly, this Court believes that the placement of the information into the Plaintiffs' personnel records maintained by Defendant is entitled to the same absolute privilege, since it would be logical to assume that notices of termination or warning letters are issued based upon matters appearing in a personnel file and the same public policy would apply. Nevertheless, we find that Defendant mistakenly

[2] Although not raised in Defendant's Preliminary Objections, this contention was argued in its brief and at oral argument.
[3] *See, also,* ***Yetter v. Ward Trucking Corporation***, 585 A.2d 1022 (Pa.Super. 1991).

relies upon the ***Agriss*** case in support of its contention that it enjoys an absolute privilege to publish the defamatory matter under the procedural posture of this case at this time.

Even if Defendant was entitled to an absolute privilege, ***Agriss*** makes clear the privilege may be lost if the scope of the privilege is exceeded by the employer's publishing the defamation to unauthorized parties; abuse of the privilege is a question of fact for a jury. ***Id***. at 463. Thus, granting Defendant's preliminary objection on the grounds of absolute privilege would be inappropriate at this time, as Plaintiffs obviously allege Defendant published the defamation to coworkers, prospective employers and others. It is for the factfinder to establish whether such dissemination was made to unauthorized persons. ***Ibid***.

Unfortunately for Plaintiffs, this finding does not determine the outcome of Defendant's objection to their defamation claims. It is undisputed that the statute of limitations for defamation is one year. 42 Pa.C.S. §5523(1); ***Gallucci v. Phillips & Jacobs, Inc***., 614 A.2d 284 (Pa.Super. 1992). Plaintiffs ask this Court to find that the publication of the defamatory statement is ongoing, as the information remains on their records and each Plaintiff is a "continuing self-reporting publication." Furthermore, Plaintiffs assert they are compelled to disseminate this information every time they apply for employment. Plaintiffs' Brief p. 3.[4] Therefore, Plaintiffs argue they have alleged publication within one year of their commencing these actions in April 1998. We find this argument unavailing.

In determining whether a complaint is brought within the applicable statute of limitations, "the relevant inquiry is…whether plaintiff knew of the injury and the cause thereof." ***Gallucci*** at 288. Here, Plaintiffs knew of the allegedly defamatory statement in their

employment records as of August 8, 1996; accordingly, the statute of limitations expired in 1997. Plaintiffs are required to file suit within one year of a wrongful publication of the defamatory material. If Plaintiffs wish to argue their defamation claims are timely based upon the fact that the defamatory statement continues to exist in their records, the Court fails to see how they can also argue they are not bound by the time limit imposed when they first became aware the statement was placed in their records. Admittedly, Plaintiffs did not do so. Plaintiffs also assert that every time they are forced to "self-report" the reason for their termination from Defendant's employ, the one-year time period begins to run anew. Plaintiffs' contention that their forced self-reporting of the defamatory statement to potential employers can be construed as publication by Defendant enjoys no support in the law nor logic. To hold otherwise would allow Plaintiffs to enjoy an endless statute of limitations period, as the time would run anew any time Plaintiffs would decide to apply for employment.

However, it still is not clear from the pleadings of the Second Amended Complaints that Plaintiffs' claims are barred by the statute of limitations period. This is because the dates when Defendant disseminated the defamatory statements to coworkers and others identified in the pleadings is not set forth. Defendant's objections as to the lack of specificity and generality of the allegations, therefore, must be sustained. Plaintiffs will be given one more opportunity to allege that there was such dissemination within the time period to specific persons that entitles them to continue these actions. If they are unable to so do, this Court will be required to dismiss with prejudice any future untenable amended complaint.

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[4] With respect to Plaintiff Fox, no application for employment has been made since her termination from Defendant's employ.

Nevertheless, although the Court is constrained to dismiss Plaintiffs' wrongful discharge claim, we wish to make perfectly clear, in the strongest terms possible, that Defendant's steadfast refusal to remove the "documented dishonesty" term from Plaintiffs' record on the facts acknowledged by Defendant's various counsel appears to be an unreasonable position. Defendant should consider that it is beneficial to the community in which Defendant conducts its business that members of the community should be encouraged to be productive citizens and maintain suitable employment. To describe the activities of Plaintiffs in such obviously harsh terms unnecessarily casts the actions of Plaintiffs in the worst light possible that of being thieves, when at most they openly violated a store policy. This branding undermines Plaintiffs' chances of securing gainful employment. Defendant cannot claim to be unaware of this problem. The fact that Defendant continues to callously deny any need or obligation to correct this situation is not understandable by this Court. Defendant is certainly mindful that a more accurate statement of the reason for termination, such as violation of a known store policy of using coupons to purchase merchandise, would be far less obstructive to Plaintiffs' chances for employment. Moreover, should the objectionable (and, we believe, inaccurate) information in Plaintiffs' records be disseminated to potential employers or others in the future, we make no determination today as to whether Plaintiffs would be entitled to file defamation claims at that time.[5] Should Plaintiffs be successful in a

[5] In a defamation action, the Court must initially determine whether the communication complained of is capable of a defamatory meaning; a communication is defamatory if it tends to harm the reputation of another so as to lower him/her in the estimation of the community, deter third persons from dealing with him/her, or ascribes conduct, character or a condition that would adversely affect his fitness for the proper conduct of his proper business, trade, or profession. The Court must consider the effect the statement would fairly produce, or the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate. ***Maier v. Maretti***, 671 A.2d 701, 704 (Pa.Super. 1995).

future action, we can only speculate as to the unfavorable impact the litigation would have upon Defendant's reputation. Therefore, rather than continuing to undermine Plaintiffs' employment prospects, Defendant is strongly urged to rectify this situation immediately, and notify Plaintiffs that such has been done. Hopefully, such action would put an end to this litigation.

Finally, Defendant argues that the pleadings of Plaintiffs are insufficiently specific, citing ***Connor v. Allegheny General Hospital***, 461 A.2d 600 (Pa. 1983) and Pa.R.C.P. 1091(a). As referenced above, we agree that several of Plaintiffs' averments lack the requisite specificity, particularly the allegations in paragraphs 8, 13 and 15.

ORDER

AND NOW, this 26th day of July 2000, Defendant's Preliminary Objections are SUSTAINED. In accordance with the foregoing Opinion:

1. Plaintiffs are each given leave to file a more specific complaint as to Count I, Defamation, within twenty days of the filing of this Order.

2. Plaintiffs' Count II of the Second Amended Complaints, alleging Wrongful Discharge, are HEREBY DISMISSED.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator
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