UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LISA FEATHERSON,	)	
	)	
PLAINTIFF	)	
	)	
v.	)	**Civil No. 98-41-P-H**
	)	
DAVRIC CORPORATION, ET AL.,	)	
	)	
DEFENDANTS	)	

ORDER ON DEFENDANT RICCI'S SECOND MOTION FOR SUMMARY JUDGMENT AND ORDER AFFIRMING IN PART AND REJECTING IN PART THE RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

The United States Magistrate Judge filed with the court on June 24, 1998, with copies to counsel, his Recommended Decision granting in part and denying in part defendant Joseph Ricci's combined Motion for Judgment on the Pleadings, to Dismiss for Lack of Subject Matter Jurisdiction, or for Summary Judgment. Defendant Ricci filed objections to the Recommended Decision on July 13, 1998, and the plaintiff, Lisa Featherson, filed a response on July 30, 1998. Since then, the defendant Ricci has filed a second motion for summary judgment and it has been fully briefed on both sides. I have reviewed and considered the Magistrate Judge's Recommended Decision and the objections thereto, together with the entire record; I have made a *de novo* determination of all matters adjudicated by the Magistrate Judge's Recommended Decision; and I have considered the second motion for summary judgment and the response. I now **ADOPT IN PART** and **REJECT IN PART** the Magistrate Judge's Recommended Decision and **GRANT** the defendant Ricci's second motion for summary judgment **IN PART**.

DISCUSSION

This lawsuit arises out of claims of sexual harassment that the plaintiff Lisa Featherson has leveled against the defendants Joseph Ricci and Davric Maine Corporation concerning her employment at Scarborough Downs. The federal and state harassment claims against the corporate employer in Counts I and II will go to trial. The plaintiff has conceded that these two counts cannot proceed against the defendant Ricci. Instead, she presses a number of other state law claims against him individually.

DEFAMATION

In addition to her claims of sexual harassment, the plaintiff claims that the defendant Ricci defamed her on two occasions. I quote from her legal memorandum:

> He stated in early April 1997, while being introduced to the Plaintiff in the presence of several individuals, that he knew the Plaintiff because he used to live with her. He went on to say that Plaintiff left him because he was not good in bed.
>
> The second occasion . . . occurred on April 29, 1997 when Defendant Ricci stated in the presence of several individuals that the Plaintiff should get an abortion because he did not want a baby and he could not handle having a baby laid on him now.

Pl.'s Mem. in Supp. of Objection to Def.'s Second Mot. for Summ. J. ("Pl.'s Mem.") at 5. The plaintiff maintains that these statements could reasonably be interpreted as meaning that she had an affair with Mr. Ricci and that he was the father of her baby and that any such assertions were false. In fact, she was married to someone else, and relies upon the legal principle that accusations of sexual infidelity against a married woman require no proof of special harm to be slanderous.

Restatement (Second) of Torts § 574 cmt. b (1977). The defendant Ricci responds that both statements were made in jest and that no one who heard them believed otherwise.

This dispute goes to the heart of what is defamation. Under generally accepted principles, liability for defamation requires a "false and defamatory statement concerning another" and "unprivileged publication to a third party." Id. at § 558. The Restatement accordingly speaks of "defamatory communications", see Topic 2, and instructs that "[t]he word 'communication' is used to denote the fact that one person has brought an idea to the perception of another." Id. at § 559 cmt. a. "Another," of course, is the third party or parties referred to in § 558, not the plaintiff who considers herself defamed. "The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." Id. at § 563. As a result, "there is no defamation if the recipient does not so understand it"— even if the speaker intended it to be defamatory. Id. at § 563 cmt. b. "The question to be determined is whether the communication is reasonably understood in a defamatory sense by the recipient. . . . It is not enough that the language used is reasonably capable of a defamatory interpretation if the recipient did not in fact so understand it." Id. at § 563 cmt. c. In determining meaning,

> account is to be taken of all the circumstances under which [a communication] is made so far as they were known to the recipient. Words which if isolated from the circumstances under which they were uttered might appear defamatory, may in fact not have been so understood by the person to whom they were published. A statement prima facie defamatory may have been uttered in jest by the speaker, and may have been so understood by those who heard him.

Id. at § 563 cmt. e. "[S]ince it is the defamatory meaning which must be communicated, it must be shown that the utterance was *understood* in that sense." W. Page Keeton, et al., Prosser and Keeton on The Law of Torts, § 113 at 798 (5th ed. 1984) (emphasis added). See Nanavati v. Burdette Tomlin Mem'l Hosp., 857 F.2d 96, 109 (3d Cir. 1988) (interpreting New Jersey law as disallowing

compensation for slander where "no one who heard the slander believed it, and those who repeated the slander did so only to express outrage at the speaker"); see also Geraghty v. Suburban Trust Co., 208 A.2d 606, 609 (Md. 1965) (holding that to constitute publication "'where the words complained of are ambiguous in meaning . . . there must be averments that third persons understood the language and its defamatory import'") (quoting 53 C.J.S. Libel and Slander § 169b) (ellipsis in original). There is no suggestion in any Maine caselaw that Maine deviates from these standard principles. Moreover, Maine does rely on the Restatement in developing its law of defamation. See Withers v. Hackett, 714 A.2d 798, 801 (Me. 1998) (relying on Restatement definition of "special harm" to vacate jury's verdict for plaintiff in defamation action); Staples v. Bangor Hydro-electric Co., 629 A.2d 601, 604 (Me. 1993) (relying in part on Restatement definition of publication to hold that intracorporate communications are published for defamation purposes).

Because this is a motion for summary judgment, I treat all factual disputes as resolved in the plaintiff's favor. The Ricci statements were undoubtedly crude and offensive. Nevertheless, the undisputed facts show that everyone who heard them treated them as jests and did not construe them to mean that Ms. Featherson had engaged in extramarital sexual conduct with Mr. Ricci. Indeed, it is difficult to interpret the first statement as anything but an uncouth jest: Upon being introduced to the plaintiff, Mr. Ricci allegedly stated: "I know her. She lived with me for two years. She left me a tuna casserole and a note on the refrigerator saying that I was no good in bed. She broke my heart." Statement of Material Facts ¶ 4. Ms. Featherson has testified at deposition that she knows of no one who took the statement to mean that she had an extramarital affair with Mr. Ricci. Dep. at 57. As for the second statement, all three hearers have filed affidavits that they did not construe it to mean that Ms. Featherson had an affair with Mr. Ricci. Indeed, the only response the plaintiff's legal memorandum makes to the Ricci argument that no one believed the two statements to be other than

in jest is that "[t]he Plaintiff did not take them as a joke. Defendant Ricci appeared very serious to her." Pl.'s Mem. at 6. The plaintiff's understanding, however, is not what counts. It is the understanding of third parties that matters.

Moreover, the time for discovery is completed. If there were some previously unknown third party who had interpreted the statements as the plaintiff would have them interpreted, that party or parties should have been identified by the plaintiff by now. Without a third party treating the statements as defamatory, the plaintiff may have other causes of action, but she does not have a claim for defamation. The defendant Ricci's motion for summary judgment on Count VII is therefore **GRANTED**.

REMAINING CLAIMS AGAINST DEFENDANT RICCI

The plaintiff has already conceded that the defendant Ricci is entitled to summary judgment on Counts I and II. The remaining counts, III through VI, are all state law claims against the defendant Ricci alone, not the corporate employer. The Magistrate Judge concluded that most of these claims are barred by the Workers' Compensation Act, and the plaintiff has conceded the point by not objecting. The only basis for any remaining claim against the defendant Ricci in this lawsuit arises out of remarks he allegedly made at a 1996 Christmas party while the plaintiff was *not* employed. There is insufficient relationship between this one remaining incident involving Ricci alone—not the corporation—and the employment-related incidents that form the basis for the federal and state sexual harassment claims against the corporation to support supplemental jurisdiction over these state law claims against Ricci under 28 U.S.C. § 1367(a); they are not part of the same case or controversy under Article III. See Futura Dev. v. Estado Libre Asociado, 144 F.3d 7, 13 (1st Cir.

1998) (finding insufficient relatedness between state and federal claims where (1) there was no common nucleus of operative facts, and (2) the claims did "not overlap in theory or chronology").

As a result, I do not rule on the defendant Ricci's motion for summary judgment on litigation-related damages and punitive damages. Instead, all remaining claims against the defendant Ricci are **DISMISSED** without prejudice.

What remains in this lawsuit, therefore, are Counts I and II, the federal and state sexual harassment claims against the plaintiff's corporate employer.

SO ORDERED.

DATED THIS 23RD DAY OF SEPTEMBER, 1998.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE