STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2272

Travis M. Minke,
Respondent,

vs.

City of Minneapolis, et al.,
Appellants.

Filed August 5, 2013
Affirmed
Stauber, Judge

Hennepin County District Court
File No. 27CV1124159

Joshua Hauble, Hauble Law, PLLC, Minneapolis, Minnesota (for respondent)

Susan L. Segal, Minneapolis City Attorney, Sara J. Lathrop, Kristin R. Sarff, Assistant City Attorneys, Minneapolis, Minnesota (for appellants)

Considered and decided by Stauber, Presiding Judge; Hudson, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

In this appeal from the district court's order denying appellants' motion for summary judgment, appellants argue that respondent's defamation claim is barred by absolute privilege. Because absolute privilege does not extend to statements made by

respondent's supervisor in response to a background check for employment purposes, we affirm.

FACTS

Respondent, Travis Minke, was employed by appellant City of Minneapolis (the city) between October 2006 and December 2007 as a Community Service Officer (CSO). The CSO program is designed to prepare individuals to eventually become police officers. Appellant Sgt. Janice Callaway was respondent's supervisor.

In December 2007, respondent resigned from the CSO program after his conditional job offer with the Minneapolis Police Department was rescinded. The events leading up to respondent's resignation are facts in dispute. After separating from his employment with the city, respondent applied to work for other police departments. Respondent received a conditional job offer from the White Bear Lake Police Department (WBLPD). A background investigation was conducted, but Sgt. Callaway did not respond to a request for information regarding respondent.

Respondent also applied for a position with the Mounds View Police Department (MVPD). As part of a background investigation, respondent named Sgt. Callaway as the contact person regarding his prior employment with the city, and authorized her to release information about him. An MVPD investigator, Officer Kirk Leitch, interviewed Sgt. Callaway regarding respondent. During the interview, Sgt. Callaway made several statements that respondent asserts were defamatory, including "attacks on [respondent's] honesty, integrity, character, work ethic, and performance." Respondent contends that Sgt. Callaway's statements to Officer Leitch caused the MVPD not to hire respondent.

Respondent filed a complaint in district court against appellants, claiming that Sgt. Callaway's statements were defamatory and that she intentionally interfered with respondent's prospective economic advantage, and seeking compensatory damages. Appellants moved for summary judgment, and the district court granted appellants' motion with regard to the claim for intentional interference with prospective economic advantage, but denied the motion as to respondent's defamation claim. Regarding appellant's absolute privilege defense, the district court concluded that the privilege was inapplicable because Sgt. Callaway's job duties did not require her to provide recommendations for former employees as evidenced by her failure to respond to the WBLPD's request for information regarding respondent.

This appeal, on the limited issue of whether absolute privilege bars respondent's defamation lawsuit, followed.[1]

D E C I S I O N

We review the question of absolute privilege de novo, and "need not defer to the district court's conclusions of law regarding the existence of absolute immunity."[2] *Bd. Of Regents of Univ. of Minn. v. Reid*, 522 N.W.2d 344, 346 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994).

[1] Although the denial of a motion for summary judgment is ordinarily not directly appealable, an immunity-based motion for summary judgment is immediately appealable. *Kastner v. Star Trails Ass'n*, 646 N.W.2d 235, 240 (Minn. 2002).

[2] We note that caselaw frequently uses the terms "privilege" and "immunity" interchangeably, even though "immunity is from suit, while privilege relates to liability." *Carradine v. State*, 511 N.W.2d 733, 738 (Minn. 1994) (Page, J., dissenting).

Whether a government official is entitled to absolute privilege "depends on a number of factors, including the official's assigned functions, whether the statements made were integral to performing those functions, and the public interest furthered by allowing the official to speak freely about the statement's subject matter." *Id.* at 347 (citing *Carradine*, 511 N.W.2d at 736; *Johnson v. Dirkswager*, 315 N.W.2d 215, 221 (Minn. 1982)). The availability of absolute privilege "does not depend on the truth or falsity of the statement or the nature or intent of the speaker," "[n]or does it depend on an official's rank within the bureaucratic hierarchy." *Id.* (citations omitted). "[A]bsolute immunity demands a sensitive balancing of the public's right to know against a defamed individual's right to seek compensation." *Id.* at 348 (citing *Dirkswager*, 315 N.W.2d at 221).

Appellants argue that Sgt. Callaway's statements were entitled to absolute privilege because they concerned the fitness of a potential hire for a police department, and that the public interest at stake in ensuring the good character of police officers outweighs respondent's interest in having his defamation claim vindicated. For support, appellants rely on *Carradine*, in which the Minnesota Supreme Court extended absolute privilege to an arresting officer's statements in a police report. 511 N.W.2d at 735-36 (concluding that, under the circumstances, "in the end [it is] better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation"). We conclude that this reliance is misplaced.

Carradine was decided on very narrow grounds. The supreme court emphasized that preparing a police report is a "key part of an arresting officer's job," and that without

absolute privilege "instead of preparing a detailed report, the officer will be tempted to leave out certain details," thus frustrating the execution of a police officer's important job duties. *Id.* at 736. The supreme court went on to conclude that, although statements made by an arresting officer in a police report are absolutely privileged, those same statements are not privileged if given to the media, even if making a statement to the media is allowed under police department policy. *Id.* at 737. This is so because making statements to the media is "not at all essential to the officer's performance of his duties as an officer." *Id.* Based on this record, we conclude that responding to requests for information regarding the fitness of former employees was not essential to the performance of Sgt. Callaway's job duties.

While we acknowledge that this is a close case, we note that none of the parties thoroughly briefed the arguments and authorities relevant to the disposition of the issues. We base our decision in large part on two cases that were not raised by either party. In *Bauer v. State*, a case decided the same day as *Carradine*, the Minnesota Supreme Court declined to extend absolute privilege to statements made by mid-level government administrators regarding a former public employee. 511 N.W.2d 447, 450 (Minn. 1994). The supreme court distinguished *Carradine* on the grounds that "the governmental interests involved do not raise public policy considerations of the same urgency as *Carradine*. Instead, we have allegedly defamatory statements made within the context of an administrative personnel matter, not unlike those that occur in the private sector." *Id.* We conclude that, as in *Bauer*, the interests raised in this case involve an employment

issue that does not implicate the same policy interests that underpinned the supreme court's decision in *Carradine*.

Moreover, in a more recent decision, the Minnesota Supreme Court declined to extend absolute privilege to statements made by members of a watershed district board, an "unelected and . . . subordinate government body." *Zutz v. Nelson*, 788 N.W.2d 58, 63, 66 (Minn. 2010). The supreme court observed that "we have consistently declined to extend absolute privilege to all government officials," and that "[w]e flatly concluded that subordinate bodies, including municipal councils or town meetings, are not within the policy underlying absolute immunity since the members of such bodies are sufficiently protected by exemption from liability in the exercise of good faith." *Id.* at 62-63 (quotation omitted). In refusing to extend absolute immunity to the watershed district board members, the supreme court emphasized the narrow holding of *Carradine*, and cautioned that extending the privilege any further "might very well extend [absolute privilege] to administrative employees serving in countless governmental bureaucracies." *Id.* at 65. Recognizing that absolute privilege is very rarely extended to subordinate officials, we decline to extend the privilege on these facts.

Appellants also contend that Minn. Stat. § 626.87 (2012), which provides that law enforcement agencies must conduct thorough background checks of officers, militates in favor of absolute privilege because it demonstrates that there is an important public interest at stake. We disagree. The statute requires employers to provide "employment information" regarding any current or former employee to a law enforcement agency upon request. Minn. Stat. § 626.87, subd. 2. The statute also provides that employers are

immune from liability for statements made while responding to a background request, "[i]n the absence of fraud or malice." *Id*., subd. 4. Because this statute demonstrates the legislature's intent to provide employers with a qualified privilege, which may be defeated by a showing of fraud or malice, this statute supports our conclusion that absolute privilege does not apply in this case.

Affirmed.