STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0375

David Feinwachs,
Appellant,

vs.

Minnesota Council of Health Plans,
Respondent,

Blue Cross Blue Shield of Minnesota,
Respondent,

HealthPartners, Inc.,
Respondent,

UCare,
Respondent.

Filed September 24, 2012
Affirmed
Collins, Judge[*]

Ramsey County District Court
File No. 62-CV-11-910

Alf E. Sivertson, Sivertson and Barrette P.A., St. Paul, Minnesota (for appellant)

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[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

David M. Wilk, Larson King, LLP, St. Paul, Minnesota (for respondent HealthPartners)

David R. Crosby, Melanie A. Full, Leonard, Street and Deinard, P.A., Minneapolis, Minnesota (for respondent UCare)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Collins, Judge.

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

COLLINS, Judge

Appellant argues that the district court erroneously granted summary judgment to respondents on his claim that they tortuously interfered with his employment relationship. Seeing no genuine issue of material fact regarding the reasons for appellant's discharge, we affirm.

FACTS

David Feinwachs was employed as general counsel and lobbyist by the Minnesota Hospital Association (MHA). MHA is a trade association that represents the interests of its 144 hospital members. MHA was directed by president and CEO Lawrence Massa, but Feinwachs and other lobbyists were given considerable discretion in pursuing MHA's legislative goals.

The Minnesota Council of Health Plans (MCHP) is a similar trade association, representing seven health-plan organizations, including the three health-plan respondents here: HealthPartners Inc., Blue Cross Blue Shield of Minnesota (BCBS), and UCare. MCHP's president during the relevant events was Julie Brunner, but MCHP is also

governed by a board of directors. Each of the seven health plans holds three seats on the MCHP board, and one of the three seats for each health plan is occupied by that health plan's CEO. The Board chair position changes annually in August, but is always occupied by one of the health plan CEOs.

During the 2010 legislative session, one of MHA's goals was to lobby for transparency in the administration of Minnesota's Prepaid Medical Assistance Program (PMAP). In that program, the state paid a lump sum to the health plans (MCHP members), from which the plans reimbursed providers (MHA members) for the cost of care for certain citizens. Also receiving payments for providing care to PMAP participants were the members of the Minnesota Provider Coalition (MPC), which is an unincorporated association of providers such as chiropractors, podiatrists, dentists and doctors. The MHA sought to increase the share of PMAP funds received by MHA members by calling attention to MCHP members' profits for administering the program. In furtherance of this goal, MHA tasked Feinwachs with lobbying for, and educating legislators about, legislation that would advance this goal. Feinwachs, in turn, began working with the membership of the MPC on this issue.

In February 2010, Feinwachs testified in a legislative-committee hearing in favor of legislation that would have increased PMAP funds for providers. MCHP's Brunner testified against the same legislation. Following the hearing, Brunner met with Massa and expressed her displeasure with Feinwachs' testimony regarding the legislation. Thereafter, Massa informed Feinwachs that he could not testify at the legislature regarding transparency for the PMAP program. Feinwachs was not directed to stop

working on the PMAP issue altogether, however, and Feinwachs worked on two other bills related to the issue before the 2010 session ended in May.

MHA and MCHP leadership held a meeting on June 22, 2010, after the legislative session, to discuss pertinent developments in their industry. At the meeting MCHP representatives raised concerns about the actions of MHA lobbyists, particularly Feinwachs, during the legislative session. According to an email from Brunner to other MCHP constituents after the meeting, Massa "apologized" for the conduct of Feinwachs and the other lobbyists and promised "to do better in the future." A handwritten note from Massa indicates that he "[i]nstructed [Feinwachs] to back off with regard to Provider Coalition work and activities following this meeting." Feinwachs, however, denies receiving such instruction or that Massa ever mentioned the meeting to him.

Feinwachs recorded a video on July 20, 2010, to address "transparency issues from the legislative session" and "raise[] legitimate questions about the regulatory mechanism for the health plans' use of the public PMAP funds." Feinwachs began the video by stating: "Hello, my name is Dave Feinwachs. I am here this morning to talk to you about Minnesota's health care system, our state's medical assistance program, . . . and transparency and accountability in our health care system. I am here in my capacity as a representative of the Minnesota Provider Coalition . . . ." Massa testified that Feinwachs "forwarded a copy of the video to [him] . . . on or about July 20th," but that Massa did not view the video until early August. Around the same time, Feinwachs enlisted an attorney to interview a former employee of the Minnesota Department of Human Services (DHS) about the operation of the PMAP program and how rates were set

for payments to the health plans. Feinwachs hired the attorney directly, independent of the MHA.

Karen Peed, Director of Managed Care and Payment Policy for DHS, called Brunner to tell her about the interview; Brunner in turn encouraged another DHS employee, Brian Osberg, to tell Massa about the interview, which he did. At a subsequent, but previously scheduled meeting on July 22, 2010, Brunner and Massa discussed Feinwachs' hiring of an attorney; Brunner reported to Brainerd and Feldman that Massa told her he would "get tough" with Feinwachs. Within two days after that meeting, Massa met with Feinwachs. Massa asked Matt Anderson, who was MHA's Vice President for Strategic and Regulatory Affairs, to attend the meeting as a witness to ensure that Massa's directive to Feinwachs was clear. According to Massa, at that meeting he "indicated to Mr. Feinwachs in the clearest possible way that I could that the [MHA] would have nothing further to do with the [MPC]." Feinwachs does not dispute that Massa gave him this direct order, but Feinwachs testified that Massa told him that he had been playing both sides against the middle.

On September 2, 2010, Feinwachs produced a second video. Feinwachs opened the second video by stating: "Hello and welcome back, I am Dave Feinwachs speaking with you once again on behalf of the Minnesota Provider Coalition . . . ." Feinwachs went on to address further developments on the topic of the health plans and the PMAP program, including a government report confirming assertions made in the earlier video. On September 8, 2010, a meeting occurred between Massa, Feinwachs, and Brunner. According to Feinwachs, Brunner wanted to meet with him to complain about his

conduct and admonish him for "bad-mouthing" the health plans. Feinwachs responded that he was not bad-mouthing Brunner, but was simply giving legislators information about transparency. Feinwachs alleges that Massa told him after the meeting that he liked the way that Feinwachs handled the meeting.

At the end of September and beginning of October of 2010, MPC members discussed by email the two videos produced by Feinwachs. MPC members expressed concerns about the tone of the videos, and Brunner eventually viewed the videos. On October 11, 2010, Brunner emailed Massa with the videos and indicated that she "received [the videos] last week." Emails about the videos among Brunner and MCHP members from October 11-13, 2010, indicate that the MCHP membership expected Massa to take some sort of action due to the videos. One email indicated that Pat Geraghty, who had become Board Chair of MCHP, intended to contact Mark Eustis, who was the CEO of Fairview Health Services and a member of MHA, about the videos.

On October 14, 2010, Massa exchanged emails with Eustis. In his initial email, Eustis indicated that he had received a phone call from Geraghty, who expressed displeasure with the videos and Feinwachs' work on transparency. Massa responded that Brunner wanted him to "get rid of" Feinwachs, but that Feinwachs had been an "effective advocate" for the MHA and that he believed the videos were produced prior to his instruction to Feinwachs to back off the issue. The next day, Eustis was part of a meeting of the leadership of MCHP and MHA constituents, at which the parties discussed their concerns about Feinwachs and his actions. Eustis apparently agreed to pressure Massa to discharge Feinwachs.

A few days later, Eustis and other MHA constituent CEOs met with Massa about Feinwachs. By that time, Massa had watched the second video and only then realized that Feinwachs produced it after Massa's July directive to stop working with the MPC. At this meeting, Massa "express[ed his] concern that the second video was made after the time I had asked Mr. Feinwachs to cease and desist and that I was obviously going to have to take some sort of action relative to blatant insubordination." Massa testified that he had reached that conclusion and was considering taking some sort of action prior to the meeting.

Feinwachs testified that, subsequent to the above meeting, Massa told him that he felt that he had to do something, and therefore Massa placed him on administrative leave. Feinwachs testified that this was merely a "cover" and that Feinwachs was allowed to take vacation to keep working on the issue outside of the MHA. In a letter dated October 20, 2010, Massa placed Feinwachs on administrative leave for being insubordinate in continuing to work with the provider coalition. Massa reported this action to Brunner. On October 26, Massa emailed Feinwachs, stating that he was "working on a document to outline prohibited activities if [Feinwachs were] to remain employed by MHA." No document of that sort was ever produced; rather, Massa met with Feinwachs on November 9 to discharge Feinwachs and offer a severance package. Massa also reported this action to Brunner.

Feinwachs filed suit on February 8, 2011, alleging that MCHP had tortiously interfered with his employment relationship with MHA and defamed him following his discharge. After extensive discovery, Feinwachs amended his complaint on May 23,

2011, to allege the same claims against HealthPartners, UCare and BCBS. On August 29 and September 13, MCHP and the health plans moved for summary judgment on Feinwachs' claims; and Feinwachs filed a motion to amend the complaint to assert a claim for punitive damages. The district court heard the motions and on December 30, 2011, granted summary judgment to MCHP and the health plans on both the tortious interference and defamation claims. Feinwachs appeals only the summary judgment dismissing his tortious interference claim.

D E C I S I O N

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03.

> [Appellate courts] review a district court's decision to grant summary judgment to determine (1) whether any issues of material fact exist, and (2) whether the district court misapplied the law to the facts. [Appellate courts] construe the facts in the light most favorable to the party opposing summary judgment and review questions of law . . . de novo.

Bearder v. State, 806 N.W.2d 766, 770 (Minn. 2011) (citations omitted).

"The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). "Accordingly, a court deciding a summary-judgment motion must not make factual findings or credibility determinations or otherwise weigh evidence relevant to disputed facts." *Geist-Miller v. Mitchell*, 783

N.W.2d 197, 201 (Minn. App. 2010). "The party moving for summary judgment has the burden to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009). However, a party opposing summary judgment "may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05.

> [T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.

DLH, Inc., 566 N.W.2d at 71. "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." *Nicollet Restoration, Inc. v. City of St. Paul*, 553 N.W.2d 845, 848 (Minn. 1995).

"A cause of action for wrongful interference with a contractual relationship requires: '(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages.'" *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994) (citing *Furlev Sales & Assoc., Inc. v. N. Am. Auto. Warehouse, Inc.*, 325 N.W.2d 20, 25 (Minn. 1982)). "A successful claim requires proof of all five elements." *Bebo v. Delander*, 632 N.W.2d 732, 738 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). Tortious interference extends to at-will employment agreements because "at-will employment subsists at the will of the employer and employee, not at the will of a third party meddler who

wrongfully interferes with the contractual relations of others." *Nordling v. N. States Power Co.*, 478 N.W.2d 498, 505 (Minn. 1991).

Feinwachs argues that the district court erred in granting summary judgment on his tortious interference claim because there is sufficient evidence to create a genuine issue of material fact that MCHP and the health plans intentionally interfered with his employment, causing his discharge. Respondents argue that there is insufficient evidence showing that they interfered with Feinwachs' employment and any such interference did not procure a breach.

In arguing that respondents intentionally procured his discharge, Feinwachs focuses on internal emails, which show that the MCHP members and staff were displeased with Feinwachs' tactics. But internal discussion does not show that respondents took action to interfere with Feinwachs' employment. Respondents' displeasure translated to action in the July 22, 2010 meeting between Brunner and Massa. At this meeting, Brunner indicated to Massa that she was concerned about the interview of the former DHS employee that occurred at Feinwachs' direction. Feinwachs alleges that Brunner stated that his behavior was "inappropriate" and "unethical," but Feinwachs does not allege that Brunner urged Massa to discharge him. Feinwachs points out that Brunner complained about him to Massa again on August 18 and September 8, 2010, but there is no allegation that Brunner sought to have Feinwachs discharged. Moreover, according to Feinwachs, Massa told him after the September 8 meeting that he liked the way Feinwachs handled Brunner's complaints. None of these assertions demonstrate interference with Feinwachs' employment relationship that procured a breach.

Although one email from Brunner to other MCHP staff states that Geraghty told Eustis "that he want[ed] Feinwachs fired," there is no direct evidence of that. Eustis did email Massa stating that Geraghty was "very concerned about a video that Feinwachs has produced." But Massa responded that he had asked Feinwachs "to stop participating in the activities of the [MPC]" and that "[t]hese videos date back to July and August and I am not aware of any further involvement by Mr. Feinwachs." Eustis questioned Massa's understanding of the timing of the videos, asking whether Massa was "sure [Feinwachs] isn't continuing to advance this cause." Massa again affirmed his support for Feinwachs, stating that he was "sure that [Feinwachs] has backed off since [Massa] told him to do so and that the videos precede that conversation." Beyond this particular issue, Massa further stated that, "[w]hile his approach is unquestionably unconventional, [Feinwachs] has been with MHA a long time and has been an effective advocate for our members." To the extent that there was interference with Feinwachs' employment relationship evidenced by these exchanges, it clearly did not account for his discharge.

Massa's deposition testimony was that he had not yet viewed the second video and that, despite his confidence that Feinwachs followed his direction, he later viewed the second video and realized that he was mistaken. Massa testified that when he realized that the second video was produced after Feinwachs had been directed to stop working with the MPC, Massa was "very concerned that [Feinwachs] had been blatantly insubordinate" and believed that he "was obviously going to have to take some sort of action relative to blatant insubordination." Massa told three MHA constituent CEOs on October 18, 2010, that he was considering the alternatives of administrative leave,

suspension or discharge of Feinwachs. On October 20, 2010, Feinwachs was placed on administrative leave.

Feinwachs testified that Massa told him that placing him on administrative leave was a ruse, to make it seem like Massa was dealing with Feinwachs harshly while privately encouraging his activities. In contrast, Massa characterized his decision as due to a lack of trust in Feinwachs because he had disobeyed Massa's direct order to cease working with the MPC. But assuming Feinwachs' account to be correct, Feinwachs remained employed by MHA and was supported by Massa. Feinwachs was ultimately discharged on November 9, 2010. Feinwachs alleges in his brief that "someone had gotten to Massa" but does not offer any evidence for that allegation.

At this stage, we view the evidence in the light most favorable to Feinwachs. *See Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). With that in mind, the evidence shows that Geraghty spoke to Eustis and sought to have Feinwachs discharged; but that Massa defended Feinwachs, called him an "effective advocate," and stated that the videos preceded Massa's direction to stop working with the MPC. In accordance with the evidentiary presumption, we also presume that on October 20, 2010, Massa placed Feinwachs on administrative leave as a ruse to show he was getting tough with Feinwachs while actually supporting his activities. But on November 9, Massa discharged Feinwachs. If Massa supported Feinwachs on October 20, but discharged him three weeks later, it is incumbent on Feinwachs to show some evidence that intentional interference by respondents caused Massa's position to change. *See DLH, Inc.*, 566 N.W.2d at 71 ("[t]here must be evidence on which the jury could reasonably find for the

nonmoving party/plaintiff." (quotation omitted)). Such evidence is entirely lacking in the alleged facts.

Thus, we conclude that the district court did not err in determining that no genuine issue of material fact exists on whether a breach of Feinwachs' employment relationship was procured before Massa decided to place him on administrative leave or on whether respondents thereafter interfered with Feinwachs' employment relationship with MHA. Because we conclude that that there are no genuine issues of material fact for trial, we decline to address the remaining issues of whether any interference was justified or whether the health plans were individually liable based on their agency relationship with MCHP.

Affirmed.