STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0329

Lane Pederson, Psy.D., et al.,
Appellants,

vs.

Beverly Long, Psy.D.,
Co-Appellant,
University of Minnesota Physicians,
Respondent.

Filed September 12, 2016
Affirmed
Stauber, Judge
Dissenting, Jesson, Judge

Hennepin County District Court
File No. 27-CV-13-6468

David P. Jendrzejek, Taylor D. Sztainer, Moss & Barnett, P.A., Minneapolis, Minnesota (for appellants Lane Pederson, et al.)

Michael T. Feichtinger, Laura A. Moehrle, Quinlivan & Hughes, P.A., St. Cloud, Minnesota (for co-appellant Beverly Long)

Paul C. Peterson, William L. Davidson, Amber N. Garry, Lind, Jensen, Sullivan & Peterson, Minneapolis, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Johnson, Judge; and Jesson, Judge.

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

STAUBER, Judge

Appellants challenge the district court's summary judgment dismissing vicarious-liability claims against respondent, arguing that there are genuine issues of material fact that preclude summary judgment. We affirm.

FACTS

Appellant Lane Pederson, Psy.D., is a psychologist, president of appellant Dialectical Behavior Therapy National Certification and Accreditation Association, and an officer and co-owner of appellant Mental Health Systems, P.C. Co-appellant Beverly Long, Psy.D., who filed a related appeal, is co-chair of the International Society for the Improvement and Teaching of Dialectical Behavior Therapy, an assistant professor at the University of Minnesota Medical School, a contract employee for Behavioral Tech, LLC, and a part-time employee of respondent University of Minnesota Physicians (UMP). Long also has a small private psychology practice.

UMP is a private-practice group of physicians at the University, with 50 specialty clinics, five family medical clinics, 900 physician employees, and 1,600 health professionals and other staff members. It is a separate entity from the medical school. Long had a 37.5% position with UMP as a psychotherapist treating patients with borderline personalities and other mental-health issues. Long also worked a 37.5% position for the medical school teaching medical students and residents about psychotherapy and conducting research. Long was hired for both of these positions because of her experience with Dialectical Behavior Therapy (DBT).

Both Long and Pederson practice DBT, "a form of cognitive behavioral treatment . . . used by trained mental health professionals to treat a wide variety of mental health issues." Long represents the "adherent" camp of professionals, who espouse certain protocols and training models, and Pederson represents the "non-adherent" camp, which has a different training approach. Both camps are passionate about their respective models.

Long follows the DBT listserv sponsored by Duke University, an online discussion forum about adherent DBT. She was an active commentator on the listserv. Long posted four comments between 2010 and 2012 that were critical of non-adherent DBT training methods and accreditation. Long used her personal email account to post comments to the listserv and signed each comment with her name, but not with a position or title associated with any of her employers. But Long may have used her UMP computer to access her personal email to make the posts.

Pederson sued Long for defamation based on the 2011 and 2012 listserv posts. Pederson also sued UMP, alleging vicarious liability for Long's actions. The district court granted UMP's summary-judgment motion and dismissed Pederson's vicarious-liability claim.[1] Pederson and Long, as co-appellants, filed an interlocutory appeal challenging UMP's dismissal from the suit.

[1] The district court also granted partial summary judgment in favor of Long, concluding that the 2011 post was time-barred, and in favor of UMP on Pederson's deceptive-trade-practice claim, which Pederson did not appeal. Finally, the district court permitted Pederson to amend his complaint to include punitive damages.

D E C I S I O N

Summary judgment must be granted if the record evidence shows that there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. We review the district court's grant of summary judgment de novo to determine whether there are any genuine issues of material fact and whether the district court has erred in applying the law. *Larson v. Nw. Mut. Life Ins. Co.*, 855 N.W.2d 293, 299 (Minn. 2014). In doing so, we view the evidence in the light most favorable to the party against whom summary judgment is granted. *Id.* A party that has the burden of proof on an element of a claim may not rely on "mere averments" or "unsupported allegations" but must satisfy the burden of production with specific facts. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001).

An employer may be vicariously liable for an employee's intentional torts committed within the scope of employment. *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 583 (Minn. 2008). "[A]n employer may be held liable for the intentional misconduct of its employees when (1) the source of the harm is related to the duties of the employee and (2) the harm occurs within work-related limits of time and place." *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 47 (Minn. App. 2009); *see also Lange v. Nat'l Biscuit Co.*, 297 Minn. 399, 404, 211 N.W.2d 783, 786 (1973) (stating that "an employer is liable for an assault by his employee when the source of the attack is related to the duties of the employee and the assault occurs within the work-related limits of time and place").

An employee's acts are within the scope of employment and related to his duties when the employee's acts are foreseeable. *Yath*, 767 N.W.2d at 47. Whether an employee's acts are foreseeable and whether the conduct occurs within work-related limits of time and space are generally questions of fact. *Id.*; *see also Rau v. Roberts*, 640 F.3d 324, 328 (8th Cir. 2011). But a plaintiff must present sufficient evidence to survive summary judgment on a claim of vicarious liability. *Yath*, 767 N.W.2d at 47. In addition, "[t]he elements of the claim are . . . conjunctive. Absence of evidence to support either one of the . . . elements enables a court to determine as a matter of law that the employee did not commit the tort within the scope of his employment." *Rau*, 640 F.3d at 328.

An employer's vicarious liability, also known as respondeat superior liability,

> is not based on fault of the employer, but rather is imposed based on a policy choice that liability for acts committed within the scope of employment ought to be allocated to employers as a cost of doing business. Respondeat superior represents a compromise between two competing policies. On the one hand, we seek to protect and/or compensate those harmed as a result of some business-related activity. On the other hand, we are hesitant to impose liability on an employer not directly at fault for the act that caused the harm. The general policy, then, is that we will not impose such liability unless there is some connection between the tort and the business such that the employer in essence assumed the risk when it chose to engage in the business.

Hagen v. Burmeister & Assoc., Inc., 633 N.W.2d 497, 504 (Minn. 2001) (citations omitted). An act is related to employment duties when it is foreseeable, but the employer need not foresee the specific tortious conduct; rather, an act is foreseeable when "an employee's conduct is not so unusual or startling that it would seem unfair to include the

loss resulting from it among other costs of the employer's business." *Id.* at 504-05 (quotation omitted).

At oral argument, appellants set forth three reasons why they believed that Long's conduct was foreseeable: (1) Ann Schwind, the chief financial officer for UMP, testified in a deposition that UMP was not surprised that Long was a member of the listserv or that she would exchange her views about DBT with other professionals in the field; (2) Pederson provided an affidavit stating that improper use of technical communication systems was a known hazard in clinical practice; and (3) UMP had a restrictive internet-use policy, which cautioned employees about improper use of email and internet, with directives about confidentiality, security, access, and misuse, including harassment or reckless distribution of unwanted email. We consider appellants' arguments in turn.

First, Schwind's testimony that she was not surprised that Long would belong to a listserv or would exchange views about professional matters is too general to support an inference that UMP could foresee that Long would engage in tortious actions through a listserv. Dr. S. Charles Schultz, M.D., Long's supervisor, stated in an affidavit that Long was hired "to provide psychotherapy to patients with borderline personality disorder and other forms of mental illness." Long's duties for her other employer, the University of Minnesota Medical School, included "teaching medical students and residents about psychotherapy and participating in research activities on borderline personality disorder." But Schultz also testified that "UMP is a separate entity from the University of Minnesota Medical School." While discussing DBT training and accreditation issues is related to Long's training duties at the medical school, appellants have not produced evidence that

Long's duties for UMP included more than providing mental-health services. And Pederson's claim does not arise out of Long's provision of mental-health services.

Second, Pederson's self-serving statement that the hazards of operating a clinic include the "improper publication or disclosure of information to third parties that potentially cause[s] harm to the subject of the information" refers primarily to state and federal law protecting patient privacy. His affidavit does not disclose a well-known risk of defamatory communications toward another mental-health professional.

Third and finally, UMP's internet-use policies are concerned with patient privacy. The UMP Information Security Handbook is headed "Providing our patients with quality services includes protecting their information." Most of the policy is directed toward matters of patient privacy and confidentiality. The remainder of the policy is concerned primarily with maintaining a productive, non-discriminatory workplace. Users are warned against harassing or inappropriate use, which includes "the display of offensive, sexual material in the workplace, sending e-mails that are denigrating to an individual's race or religion or accessing an Internet site with graphic or adult content." "Incidental (personal) use is permitted if approved by [a] manager" but "using personal e-mail accounts . . . for conducting UMPhysicians business is prohibited." Schultz testified that he was not a member of the listserv and did not know that Long was posting content on the listserv and that it was not UMP's practice to monitor employees' emails.

Furthermore, the Minnesota Supreme Court has stated that evidence "that an employer proactively adopts . . . a policy is insufficient, in and of itself, to create a genuine issue of material fact regarding whether" an employee's tortious act was

foreseeable. *Frieler*, 751 N.W.2d at 584. The general nature of the UMP policy handbook and its emphasis on patient privacy do not support appellants' claim that UMP could foresee use of its system to engage in a defamatory exchange. This is further supported by the impractibility of monitoring the private e-mail accounts of UMP's 2,500 employees.

Our supreme court has stated that "to survive summary judgment on a claim that an employer is liable for an employee's intentional tort under the doctrine of respondeat superior, the plaintiff must present sufficient evidence to raise an issue of fact with respect to the foreseeability of *such misconduct* by the employee." *Id.* (Emphasis added).

In *Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905, 911 (Minn. 1999), the supreme court considered whether a group-home counselor's sexual assault of a teenage resident was within the scope of employment for purposes of vicarious liability. The supreme court concluded that the counselor was in a position of power and authority over the child, and his job permitted him access to the child; based on this, the conduct was "connected with or related to seemingly legitimate employment activities." *Id.* This was enough to raise a genuine issue of material fact that precluded summary judgment, particularly when supported by an expert's affidavit that inappropriate sexual contact in group homes was an industry hazard. *Id.* Likewise, a psychologist-employee engaging in sexual misconduct with patients was termed a "well-known hazard" in that industry, and, therefore, was sufficiently foreseeable to raise a genuine issue of fact. *Marston v. Minneapolis Clinic of Psychiatry & Neurology*, 329 N.W.2d 306, 311 (Minn. 1982).

Here, although Long's participation in DBT listserv conversations was perhaps foreseeable, no evidence was presented that UMP should have foreseen that her participation would include defamatory comments made about other professionals, or that such conduct was a well-known hazard in the mental-health industry. Thus, appellants have failed to provide sufficient evidentiary support that Long's conduct was foreseeable, the first element of an employer's vicarious liability.

Because the elements of vicarious liability are conjunctive and we conclude that appellants have failed to meet their burden of proof of foreseeability, we need not consider whether Long's conduct occurred during work-related time and space. We note, however, that in an age when electronic communication can occur in at any time and in any location, the physical constraints of work-related time and space are less evident, and that Long's claim that she was accessible 24 hours a day for her patients, regardless of her location, challenges the notion of work-related time and space.

Because neither Pederson nor Long has provided sufficient evidence of foreseeability to withstand summary judgment, we affirm.

Affirmed.

JESSON, Judge (dissenting)

I respectfully dissent. There are genuine issues of material fact as to whether Long's actions were foreseeable to UMP. These factual disputes should be decided by a jury, not by a judge on a summary-judgment motion. I would reverse and remand the vicarious-liability claim for trial.

For the purpose of vicarious liability, foreseeability "merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 583 (Minn. 2008) (quotation omitted). While some evidence of foreseeability must be presented to survive summary judgment, foreseeability is a question of fact that generally falls to the jury. *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 47 (Minn. App. 2009).

UMP hired Long at the same time she was hired to teach at the University of Minnesota Medical School. UMP, while a separate entity from the medical school, is the private-practice group for physicians at the University. As indicated by her offer letter from Dr. S. Charles Schulz, Chair of the Department of Psychiatry at the medical school and Long's supervisor within UMP, Long's work at UMP and the medical school are related. She was hired by both entities specifically because of her expertise in DBT, and she was expected not only to provide treatment to patients at UMP but also to stay abreast of issues relevant to her practice.

Long did so, in part, by participating in a listserv maintained by Duke University for practitioners of DBT. As the majority states, there are two camps of DBT professionals

and both are passionate about their protocols and models. In the August 30, 2012 comments Long posted to the listserv, which are at the heart of this lawsuit, Long uses her experience with specific patients she served at UMP to criticize the "non-adherent" form of DBT. In a portion of her emailed comment, she writes:

> What saddens me, and frankly pisses me off, is when I get a client from a "DBT program" that has been "trained" or "mentored" by these folks, who has gotten worse. The client thinks s/he has received DBT, when what they have received is some bastardized version. It is really, really difficult to tell someone that they did not receive DBT as it has been researched, and I can't use the language I would like to use in telling them. I have one person currently on my caseload that was "treated" for several years in such a program, and her cutting was never addressed. Now, instead of the highly functioning, highly paid professional that she was, she is on disability and has had to declare bankruptcy. I have another on [sic] that was in a "DBT Day Treatment" setting for FOUR YEARS, and never learned the skills!

Long's participation on the listserv did not come as a surprise to UMP. UMP's chief financial officer stated in her deposition that UMP expected Long to communicate with other DBT professionals regarding her patient care responsibilities, that UMP was not surprised Long was participating in a professional listserv related to DBT therapy, and that UMP was not surprised Long was sharing her views about DBT with other professionals in the field.

As this testimony confirms, the fact that a scientist in an academic-related setting would engage in debate and criticism, particularly in a field where passions run high, could hardly come as a surprise. Members of the scientific community often critique, challenge, and build upon each other's work. Conduct is foreseeable if it is "a well-known hazard"

in a particular industry. *Marston v. Minneapolis Clinic of Psychiatry & Neurology*, 329 N.W.2d 306, 311 (Minn. 1982). Evidence in the record consisting of news and journal articles indicates that defamation lawsuits may indeed be a known risk in scientific fields where it is common place for colleagues to engage in robust critiques of each other's work.

While UMP disputes this evidence, its own internet-use policy recognizes the risk of liability stemming from defamation. The policy states: "Workers are responsible for the content of an e-mail and should exercise discretion when creating and sending an e-mail. . . . Poorly worded or inappropriate e-mails can result in liability for UMPhysicians and may result in disciplinary action." The majority rejects the importance of this policy by noting that it is directed at patient privacy and pointing to *Frieler* in which the supreme court concluded that evidence "that an employer proactively adopts . . . a policy is insufficient, in and of itself, to create a genuine issue of material fact regarding whether" an employee's conduct was foreseeable. 751 N.W.2d at 584. But Long was writing about her UMP patients' experiences with "non-adherent" DBT. More fundamentally, in Long's case, unlike *Frieler*, the policy was not the only evidence of foreseeability.

A passionate divide in the DBT professional community existed at the time of Long's comments. UMP hired Long specifically because of her expertise in DBT, was "not surprised" Long was sharing her views on DBT topics in an academic listserv, and adopted a policy warning against "[p]oorly worded or inappropriate e-mail" in order to prevent "liability for UMPhysicians." In addition, evidence in the record indicates that defamation law suits may be a known risk in the scientific research and practice context.

Undoubtedly, this issue of foreseeability presents a close question, upon which reasonable minds can differ. But where this occurs with an issue of fact, as it does here, the appropriate decision maker is the jury. I would reverse the district court's summary judgment order and remand this matter for trial.