STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0197

Emily Anick,
Appellant,

vs.

Frank Bonsante,
Respondent.

Filed December 12, 2022
Reversed and remanded
Smith, Tracy M., Judge

Crow Wing County District Court
File No. 18-CV-20-2964

John H. Bray, Bray & Reed, Ltd., Duluth, Minnesota (for appellant)

Keith Ellison, Attorney General, Michael Goodwin, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Larson, Presiding Judge; Smith, Tracy M., Judge; and Kirk, Judge.*

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant Emily Anick sued her former co-worker, respondent Frank Bonsante, alleging defamation and intentional interference with prospective business relations based

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

on statements that Bonsante made in emails to Anick's supervisor. The district court granted summary judgment for Bonsante on both claims, determining that the statements at issue were opinions and thus not defamatory as a matter of law and that, without a viable defamation claim, the intentional-interference claim also failed as a matter of law. Because we conclude that genuine issues of material fact preclude summary judgment on the defamation claim and, by extension, the intentional-interference claim, we reverse and remand.

FACTS[1]

Anick and Bonsante worked in separate divisions in the same local office of the Minnesota Department of Human Services (DHS). Anick was an at-will temporary worker hired to handle applications for healthcare renewals in the Health Care Eligibility Operations division. Bonsante was a supervisor in the Member and Provider Services division, which handled consumer phone calls about healthcare coverage. Anick and Bonsante were acquainted outside of work.

This dispute centers on a meeting at work between Anick and Bonsante on December 7, 2018. Anick and Bonsante generally agree on the substance of the conversation: they discussed an issue with a case and Anick's application for permanent employment with DHS. Anick's account is that she was friendly, nonconfrontational, and did not use vulgar language. By contrast, Bonsante's account is that Anick was accusatory and used vulgar language.

[1] Our recitation of the facts describes the undisputed facts in the record or, where the facts are disputed, explains the dispute.

After the meeting, Bonsante discussed his version of Anick's behavior with Michael Martin, another DHS supervisor. Martin was not Anick's supervisor, and he recommended that Bonsante inform Anick's supervisor, Heidi Reller, about Anick's behavior. Later that day, Bonsante ran into Reller and described the meeting. Reller requested that Bonsante send her an email documenting his meeting with Anick.

As of December 11, Bonsante had not yet provided Reller the requested documentation. Reller followed up via email that day, and Bonsante responded with an email. In it, he explained that Anick asked to speak with him about a work matter and that they met in his office. Bonsante described their conversation about the work issue, which involved identifying the correct division within DHS to move certain work items forward. In the email, Bonsante wrote that he did not have a problem with Anick communicating with another division's staff, but he thought that Anick's "tone and demeanor was unprofessional." He also said that he thought Anick understood his explanations about workflow and had "good intentions" in raising the issue. Reller responded to Bonsante by email, asking if he had a reason for leaving out "the vulgar language part of the discussion." Bonsante responded:

> At the end of our conversation, Emily asked me if I heard anything about MCRE hiring or who they hired.[2] I said I wouldn't know that. You would know before I do. I said that MCRE and [the Member and Provider Services division] don't share that kind of information until jobs have been accepted by staff, and then maybe an email would come out.

[2] Anick had applied for a permanent position in "MCRE," which was part of DHS's Health Care Eligibility Operations division.

> I asked has she heard anything and she said no that they will probably wait until after renewal season to let us all know so they can get their work out of us, if I didn't get it me [and] a few others would just *&^% quit, she used some vulgar language to end her sentence, and I said wow, you would quit on those members that need our help.

Later that day, Reller emailed Bonsante's full narrative to a DHS human-resources representative and consulted the human-resources representative and Reller's supervisor. Reller decided that Anick should be discharged because she believed that Anick acted unprofessionally and might fail to use professional and respectful language with customers or stakeholders. Anick was terminated from DHS the same day. Bonsante maintains, and Anick does not dispute, that he was not consulted before her termination.

Anick sued Bonsante, alleging defamation and intentional interference with prospective business relations. Bonsante moved for summary judgment, asserting that (1) the defamation claim failed because, as a matter of law, his statements were not defamatory and, in any event, were protected by qualified privilege and (2) the intentional-interference claim failed because there was no independent tort and Bonsante was acting as an agent of DHS when he made his report.

The district court granted summary judgment for Bonsante on both claims. As for the defamation claim, the district court concluded that Bonsante's alleged defamatory statements were not statements of fact but rather were expressions of his opinion that Anick was unprofessional and vulgar and thus were not defamatory as a matter of law. The district court rejected Bonsante's argument that summary judgment was also appropriate because his statements were protected by qualified privilege, concluding that a disputed issue of

fact existed as to application of the privilege. As for Anick's intentional-interference-with-prospective-business-relations claim, the district court concluded that Bonsante was entitled to summary judgment because the sole alleged tort underlying the claim—defamation—failed as a matter of law. The district court did not reach Bonsante's agency argument.

Anick appeals.

DECISION

Anick argues that the district court erred by granting summary judgment against her on both her defamation and intentional-interference claims. Summary judgment is proper if the moving party shows that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. In determining whether the record creates a genuine issue of material fact, courts must "view the evidence in the light most favorable to the nonmoving party" and may not "weigh facts or make credibility determinations." *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 228 (Minn. 2020). A genuine issue of material fact exists "when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

Appellate courts review the grant of summary judgment de novo. *Kenneh*, 944 N.W.2d at 228. A respondent on appeal may assert an alternative ground for affirming summary judgment, different from the ground relied on by the district court, so long as the respondent presented the alternative argument to the district court. *Day Masonry v. Indep. Sch. Dist. 347*, 781 N.W.2d 321, 331 (Minn. 2010).

I. Material facts preclude summary judgment on Anick's defamation claim.

Anick argues that the district court erred by concluding that Bonsante is entitled to summary judgment on the defamation claim on the basis that he merely expressed an opinion and did not make a statement of verifiable fact in his emails to Anick's supervisor. Bonsante counters that this was not error but also asserts that, even if we disagree, we should nevertheless affirm summary judgment because his communication was protected by qualified privilege as a matter of law. We address the opinion and qualified-privilege arguments in turn.

A. The challenged statement was not an expression of opinion.

As an initial matter, we identify the specific statement at issue. The district court determined that Bonsante's emails expressed his opinion—specifically, his opinion that Anick was "unprofessional" and used "vulgar language." On appeal, Anick challenges the district court's ruling only as to Bonsante's statement that Anick said that she and "a few others would just *&^% quit" if not hired for a permanent position. We therefore focus on only that statement in analyzing whether, when the evidence is viewed in a light most favorable to Anick, she has submitted sufficient evidence to support a defamation claim.

Statements of "pure opinion" are not actionable in defamation. *McKee v. Laurion*, 825 N.W.2d 725, 733 (Minn. 2013). Rather, "[o]nly statements that present or imply the existence of fact that can be proven true or false are actionable under state defamation law." *Schlieman v. Gannett Minn. Broad., Inc.*, 637 N.W.2d 297, 308 (Minn. App. 2001), *rev. denied* (Minn. Mar. 19, 2002). "Courts consider four factors when determining whether a statement is one of fact or opinion: (1) the precision and specificity of the statement; (2) the

statement's verifiability; (3) the social and literary context of the statement; and (4) the public context in which the statement was made." *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. App. 2001), *rev. denied* (Minn. Oct. 16, 2001).

Under the *Bebo* factors, Bonsante's claim about Anick's language is a factual statement, not an opinion. First, the statement about Anick's language is specific and precise. Although Bonsante used placeholders, Bonsante's email claims that Anick said that she and "a few others would just *&^% quit." Given the context, the sole logical expletive represented by the placeholder is what we will call "the F-word." Second, the statement could be verified; depending on which witness is believed, witness testimony would establish whether Anick did or did not say the "F-word." Finally, as to the third and fourth factors regarding the context in which the statement was made, the email allegedly documents, at the request of Anick's supervisor, what Anick said during a work meeting about work. This context is distinct from a case like *Lee v. Metropolitan Airport Commission*, where "the social context of [the] statements, office gossip and banter, would not lead a listener to believe them as statements of fact." 428 N.W.2d 815, 821 (Minn. App. 1988). A reader would presume that Bonsante's description was accurate, not exaggerated or hyperbolic. Thus, Bonsante's claim that Anick said she "would just *&^% quit" is a factual statement, and we cannot conclude that statement is not defamatory as a matter of law.

B. Issues of material fact preclude summary judgment based on qualified privilege.

We turn to Bonsante's asserted alternative basis for affirming summary judgment for Bonsante on the defamation claim—namely, that his statement is protected by qualified privilege as a matter of law.[3]

Persons may be protected from liability for a defamatory statement under the doctrine of qualified privilege. Under that doctrine, the party claiming qualified privilege must establish that the statement was made "in good faith" and "upon a proper occasion, from a proper motive, and . . . based upon a reasonable or probable cause." *Bol v. Cole*, 561 N.W.2d 143, 149 (Minn. 1997) (quotation omitted). Qualified privilege is lost, however, if the party seeking relief establishes that the defamatory statement was made with common-law malice. *See Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920 (Minn. 2009); *Hunt v. Univ. of Minn.*, 465 N.W.2d 88, 92 (Minn. App. 1991).

Bonsante argues that the qualified privilege applies to his statement because the undisputed facts establish that his statement was made in the course of investigating Anick's misconduct. It is true that good-faith communications made "in the course of investigating or punishing employee misconduct" may be protected by qualified privilege.

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[3] At oral argument, Bonsante argued that Anick forfeited this argument by failing to reply to Bonsante's appellate brief. Because an appellant does not forfeit an argument by failing to respond, this court will consider the argument on the merits. *Cf.* Minn. R. Civ. App. P. 142.03 ("If the appellant fails or neglects to serve and file its brief in response to a respondent/cross appellant's brief in support of a cross-appeal, the case shall be determined on the merits as to those issues raised by the cross-appeal."); *see* Minn. R. Civ. App. P. 128.02, subd. 3 ("The appellant *may* file a brief in reply to the brief of the respondent." (emphasis added)).

McBride v. Sears, Roebuck & Co., 235 N.W.2d 371, 374 (Minn. 1975). But we are not convinced that there are no material factual disputes about whether Bonsante acted "in good faith" and "upon a proper occasion, from a proper motive, and . . . based upon a reasonable or probable cause." *Bol*, 561 N.W.2d at 149.

Bonsante was not reporting what someone else told him about an employee's conduct—he was reporting what he claimed to have heard Anick say. Bonsante and Anick were the only witnesses to the conduct, and Anick denies that it happened. When Anick's version of events is accepted as true for purposes of summary judgment, Bonsante knowingly fabricated the fact that he reported in the allegedly defamatory statement. Applying qualified privilege to such a circumstance is incompatible with the requirement that the speaker must have "reasonable or probable grounds for believing in the validity of the statement, even though hindsight might show the statement to be false." *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380 (Minn. 1990).

In his brief, Bonsante cited no legal authority for the proposition that a knowingly false statement of fact is, as a matter of law, made in good faith, on a proper motive, and based on reasonable or probable cause when it is made by a first-hand witness to employee misconduct. At oral argument, Bonsante cited to two court of appeals cases to argue that qualified privilege applies to false statements based solely on personal observation. But those cases applied qualified privilege to opinions, not factual statements. *See McGrath v. TCF Bank Sav., FSB*, 502 N.W.2d 801, 809 (Minn. App. 1993) ("As each manager formed an *opinion* of McGrath's behavior from personal experience, the managers did not need further investigation to verify the accuracy of their statements about McGrath." (emphasis

added)), *rev'd on other grounds*, 509 N.W.2d 365 (Minn. 1993); *Hunt*, 465 N.W.2d at 92 ("Finally, given Kegler's years of work at the legislature, his *opinion* of Hunt's performance was based upon reasonable grounds." (emphasis added)). Furthermore, in both cases, the record evidence provided factual support for the allegedly defamatory opinions. *McGrath*, 502 N.W.2d at 808-09; *Hunt*, 465 N.W.2d at 92-93. Here, Bonsante made a factual claim about Anick's behavior, and, for purposes of summary judgment, we presume that he knew that his claim was false. In these circumstances and in this procedural posture, we are not persuaded that the caselaw supports extending qualified privilege to Bonsante's statement even though the statement took place in the context of an employment investigation.

For a similar reason, we conclude that a genuine dispute of fact exists on the question of whether any qualified privilege is defeated by malice. Bonsante argues that the only evidence of malice is that the statement in his emails was presumed to be false and that falsity cannot establish malice. But, though generally a statement's alleged falsity alone cannot establish malice, "[m]aking a false statement knowing that it is false constitutes bad faith" and thus "evidence that the utterer knew the falsity of his statements when published" is "relevant evidence of malice." *Bahr*, 766 N.W.2d at 922. Because on summary judgment we accept Anick's account that Bonsante fabricated her language,

Anick has provided relevant evidence of malice sufficient to defeat summary judgment.[4] *Id.*

In sum, material factual disputes preclude summary judgment on Anick's defamation claim.

II. Summary judgment is inappropriate on the intentional-interference-with-prospective-business-relations claim.

The district court granted summary judgment on Anick's claim of intentional interference with prospective business relations because that claim is predicated on an independent tort or statutory violation, and, without the defamation claim, that predicate was not satisfied. *See Gieseke ex rel. Diversified Water Div., Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 216, 219 (Minn. 2014) (requiring that defendant's "intentional interference" be "either independently tortious or in violation of a state or federal statute or regulation"). But that reasoning no longer holds since our decision here revives the defamation claim. Bonsante, though, asserts as an alternative basis for affirming summary judgment the argument that he cannot be liable because he was acting as an agent of his employer and an employer cannot interfere with its own contract.

Bonsante relies on two cases in which the courts determined that summary judgment was proper for the defendant when a plaintiff-employee asserted an intentional-interference-with-contract claim against another employee. *See Nordling v. N. States Power Co.*, 478 N.W.2d 498 (Minn. 1991); *Petroskey v. Lommen, Nelson, Cole &*

[4] At oral argument, Anick's counsel asserted that bad blood between Bonsante and Anick's husband provided evidence of malice. Because Anick did not brief this issue on appeal, we decline to consider that argument.

Stageberg, P.A., 847 F. Supp. 1437 (D. Minn.), *aff'd*, 40 F.3d 278 (8th Cir. 1994). Both cases relied on the general rule that a party cannot interfere with its own contract. *Nordling*, 478 N.W.2d at 505; *Petroskey*, 847 F. Supp. at 1449.

Under that rule, an agent is "privileged to interfere with or cause a breach of another employee's contract" with the principal employer if the employee acted in good faith and within the scope of their employment. *Nordling*, 478 N.W.2d at 506-07. If the plaintiff-employee establishes that the defendant-employee acted with actual malice, then the privilege is lost. *Id.* at 507; *Petroskey v. Lommen, Nelson, Cole & Stageberg*, 40 F.3d 278, 280-81 (8th Cir. 1994). A plaintiff may satisfy their burden if they show that "the defendant's actions are predominantly motivated by malice and bad faith, that is, by personal ill-will, spite, hostility, or a deliberate intent to harm the plaintiff employee." *Nordling*, 478 N.W.2d at 507.

Here, as with Bonsante's defense of qualified privilege, there is a disputed issue of fact about whether Bonsante knowingly lied about the interaction with Anick. If Bonsante did fabricate the interaction, he may have acted with actual malice. As a result, we cannot affirm summary judgment on this alternative ground.

In sum, the district court erred in granting summary judgment for Bonsante on Anick's claim of defamation based on the Bonsante's statement that Anick said that she and a few others "would just *&^% quit" if not hired for a permanent position. The district court also erred in granting summary judgment on Anick's claim of intentional interference with prospective business relations.

Reversed and remanded.