STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0829

Anne-Marie Lorene de Jong,
Appellant,

vs.

Metropolitan State University,
Respondent.

Filed December 3, 2012
Affirmed
Hudson, Judge

Ramsey County District Court
File No. 62-CV-10-8877

Michael B. Padden, Padden Law Firm, P.L.L.C., Lake Elmo, Minnesota; and

Kenneth R. White, Law Office of Kenneth R. White, P.C., Mankato, Minnesota (for appellant)

Lori Swanson, Attorney General, James Patrick Barone, Assistant Attorney General, St. Paul, Minnesota (for respondent)

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

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

HUDSON, Judge

Appellant Anne-Marie Lorene de Jong challenges the summary-judgment dismissal of her defamation claim arising out of an investigation into her conduct while

she was a student at respondent Metropolitan State University (MSU), arguing that a genuine issue of material fact exists regarding whether MSU and its employees made false statements and whether there was non-privileged publication of those statements. Because de Jong failed to raise a genuine issue of material fact regarding whether MSU published any defamatory statements that were not qualifiedly privileged, we affirm.

FACTS

From 2007 to 2009, de Jong was a student enrolled in a program at MSU to obtain licensure as an alcohol and drug counselor. Diagnosed with multiple sclerosis in 2008, de Jong stated that she needed assistance with tasks such as driving and taking notes in class. On March 17, 2009, de Jong arrived at MSU to attend an evening class being taught jointly by instructors Deborah Mosby and David Schreiber. De Jong was accompanied by Matthew Loegering, a driver with 24 Seven Town Car. Schreiber was the only instructor present when de Jong and Loegering sat down in the back of the classroom, and he asked Loegering why he was present. Loegering stated that he was present to help de Jong take notes and provide security for de Jong. Schreiber asked Loegering if he had a gun. Loegering and de Jong replied "no," and that Loegering did not have a conceal-and-carry permit. Schreiber stated that Loegering was not authorized to be in the classroom and told de Jong that she and Loegering would need to leave the classroom and speak to Mosby. Schreiber called MSU campus security. De Jong was upset by what had occurred, and she and Mosby discussed the incident in the hallway until de Jong and Loegering were escorted to the campus security office. As they were leaving the area outside the classroom, de Jong stumbled and fell into a wall. Later that

evening, de Jong left eight voice mail messages with Schreiber and seven messages with Mosby regarding the incident.

On March 23, 2009, the vice president of student affairs appointed Rebecca Nordin to conduct an internal investigation of the incident. After collecting evidence from de Jong, Mosby, Schreiber, other faculty, and students, Nordin concluded her investigation on July 13, 2009, and presented her written findings to the school. Based on those findings, on July 27, 2009, the school sent de Jong a letter stating that she had violated four provisions of the MSU Student Conduct Code: (1) disruption or obstruction of teaching; (2) verbal abuse, threats, intimidation and/or coercion; (3) use or possession of alcoholic beverages or public intoxication; and (4) disorderly conduct or breaching the peace. The letter stated that de Jong's behavior during the incident was "unpredictable, erratic, out of control, disrespectful, anxious, angry, and agitated," and that the voice mail messages to Schreiber and Mosby were "irrational, incoherent, and threatening." The letter also stated that during the incident, appellant "appeared to be under the influence of alcohol. The smell of alcoholic beverages emanated from her person. Her eyes were described as blood shot and glassy. She displayed behavior that was loud and disruptive." De Jong's disciplinary sanctions included a warning, conduct probation, referrals to the disability-services office and the counseling office, and restrictions on communications with Mosby and Schreiber.

De Jong appealed MSU's determination. During an appeal meeting on October 5, 2009, de Jong introduced evidence that the symptoms attributed to alcohol consumption were in fact caused by de Jong's multiple sclerosis. De Jong further argued that the letter

mischaracterized her behavior during the incident as well as the nature of the voice mail messages she left. At the conclusion of the appeal hearing, de Jong was assured that record of the incident would be kept internal and would not be disseminated to prospective employers. Three days after the hearing, a letter was sent to de Jong informing her that the conduct committee concluded that she had not violated the conduct rule relating to the use or possession of alcohol, but the other conduct findings were upheld. The conduct probation sanction was removed, but the other disciplinary sanctions were upheld.

After the incident, de Jong was not permitted to attend classes taught by either Mosby or Schreiber, but she was permitted to complete her coursework, and she graduated from the alcohol and drug counselor program on April 20, 2009. The conduct violations do not appear on de Jong's transcript.

In her complaint, de Jong alleged that MSU made defamatory statements about her regarding the classroom incident. On March 19, 2012, the district court granted summary judgment for MSU on de Jong's defamation claim. It held that there was no genuine issue of material fact regarding whether false statements were made, stating that the descriptions of appellant's behavior and mannerisms were accurate, even if the behavior was caused by de Jong's multiple sclerosis and not the consumption of alcohol. The district court also held that no genuine issue of material fact existed regarding whether the statements were published, finding that the allegedly defamatory statements were only published internally pursuant to the internal investigation and were therefore

protected by qualified privilege. On appeal, de Jong challenges the district court's summary-judgment dismissal of her defamation claim against MSU.

D E C I S I O N

Summary judgment requires a court to dismiss a claim "if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such facts." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). "[T]he reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). On appeal from an order for summary judgment, "[w]e review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). The party opposing summary judgment must produce "substantial evidence" to show an issue of material fact. *DLH*, 566 N.W.2d at 70 (stating that "substantial evidence" refers to "legal sufficiency and not quantum of evidence"). "Mere speculation, without some concrete evidence, is not sufficient to avoid summary judgment." *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993). There is no issue of material fact if 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*, 566 N.W.2d at 71.

De Jong argues that the district court erred in granting summary judgment for MSU on her defamation claim. A plaintiff must prove three elements to establish a

defamation claim: (1) the defamatory statement is communicated to someone other than the plaintiff, or "published," (2) the statement is false, and (3) the statement tends to harm the plaintiff's reputation and to lower the plaintiff in the estimation of the community. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919–20 (Minn. 2009). Because de Jong failed to raise a genuine issue of material fact regarding whether MSU published any defamatory statements that were not qualifiedly privileged, we do not address whether the district court erred in finding no genuine issue of material fact regarding whether false statements were made.

De Jong proposes three theories as to how the publication element is satisfied. First, de Jong argues the statements were communicated to persons outside MSU including prospective employers. Second, de Jong argues that, even if the statements were not externally published, she was compelled to publish the defamatory statements. Finally, de Jong argues the statements were published within MSU during the internal investigation. We address each theory in turn.

External publication

The district court held that there was no genuine issue of material fact regarding whether the allegedly defamatory statements were communicated to persons outside of MSU. De Jong argues that ample evidence supports her argument that external publication occurred. First, de Jong testified that on two separate occasions after she graduated, an alcohol and drug counselor in the community made reference to the MSU incident. Second, de Jong testified that she was interviewed for a job several months after graduation, was told at the interview by the employer that they wanted to extend her

an offer, but was told three days later that her references "did not check out." De Jong contends that none of her references were actually contacted. Thus, she claims she did not get the job because the employer received information about the MSU incident from MSU. Third, in response to a release signed by de Jong, MSU released the entirety of her educational records, including information regarding the March 2009 incident, to de Jong's attorney.

This evidence does not raise a genuine issue of material fact regarding whether the allegedly defamatory statements were communicated to persons outside MSU. Viewed in the light most favorable to de Jong, the evidence demonstrates, at most, that external parties had heard about the incident; no evidence suggests that MSU was the source of that information. Given that there were other possible sources of that information, including students who witnessed the incident, this evidence amounts to mere speculation, and is therefore not sufficient to survive summary judgment. *See Bob Useldinger & Sons*, 505 N.W.2d at 328. And publication to de Jong's attorney does not satisfy the publication element, as publication to a third party at the request of the person allegedly defamed does not satisfy the publication element. *See* Restatement (Second) of Torts § 577 cmt. e (1977); *see also Irish-American Bank v. Bader*, 59 Minn. 329, 331, 61 N.W. 328, 328 (1894) (uttering defamatory words is not actionable where the communication is "induced" by agents of the plaintiff). De Jong provided no evidence that MSU distributed her records to anyone other than de Jong's counsel upon his written request. We conclude that de Jong has failed to produce evidence sufficient to

substantiate her claim that MSU communicated the allegedly defamatory statements to persons outside MSU.

Self-publication

Second, de Jong claims that she was required to publish MSU's allegedly defamatory statements. Generally, when a defendant communicates a statement to a plaintiff, who communicates the statement to a third party, the publication element is not satisfied. *Kuechle v. Life's Companion P.C.A., Inc.*, 653 N.W.2d 214, 219 (Minn. App. 2002), *review dismissed* (Minn. Jan. 14, 2003). But publication occurs if "the plaintiff is compelled to publish the defamatory statement to a third person and if it was foreseeable to the defendant that the plaintiff would be so compelled." *Id.* The self-publication doctrine only applies when the party making the defamatory statement knows that "the defamed person has no reasonable means of avoiding publication of the statement." *Lewis v. Equitable Life Assurance Soc'y of the U.S.*, 389 N.W.2d 876, 888 (Minn. 1986).

The district court held that de Jong was not compelled to communicate information about the incident, and that, even if she had been, self-publication was not foreseeable. We concur. De Jong graduated successfully and on time from the MSU program, and information about the incident did not appear on her transcript. Thus, there was no need for de Jong to communicate information about the incident to potential employers, nor was it foreseeable that she would be so compelled. Furthermore, de Jong fails to identify a single employer or prospective employer to whom she was compelled to disclose information about the incident. On this record, the self-publication doctrine is inapplicable.

Internal publication

Third, de Jong claims that the defamatory statements were published within MSU as part of the investigative process. Intra-company communications made during an investigation satisfy the publication element, though qualified privilege may apply. *Frankson v. Design Space Int'l*, 394 N.W.2d 140, 143–44 (Minn. 1986) (adopting the rule that intra-corporate communications are publications that may be qualifiedly privileged); *Hebner v. Great N. Ry. Co.*, 78 Minn. 289, 291–92, 80 N.W. 1128, 1129 (1899) (reading of defamatory statement to clerks in employer's office satisfies publication element, but qualified privilege applies where the statements are read for proper purpose); *Harvet v. Unity Med. Ctr., Inc.*, 428 N.W.2d 574, 579 (Minn. App. 1988). MSU concedes that the allegedly defamatory statements were published during the internal investigation, but it argues that the statements were made only to those responsible for investigating the incident and conducting the subsequent disciplinary proceedings, and were therefore protected by qualified privilege.

To be privileged, a communication must be made upon proper occasion, from a proper motive, and be based upon reasonable or probable cause. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 256–57 (Minn. 1980). When a statement is protected by qualified privilege, the plaintiff must prove actual malice to recover. *Id.* at 257. "The doctrine of privileged communication rests upon public policy considerations. . . . [T]he existence of a privilege results from the court's determination that statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory." *Lewis*, 389 N.W.2d at 889. The existence of qualified

privilege is a matter of law for the court to determine. *Bahr*, 766 N.W.2d at 920. Statements made during an internal investigation are generally privileged given an employer's interest in protecting itself and the public against dishonest or harmful employees. *McBride v. Sears, Roebuck & Co.*, 306 Minn. 93, 97, 235 N.W.2d 371, 374 (1975).

While de Jong concedes that the statements were made upon proper occasion, she argues the statements made by Mosby and Schreiber were improperly motivated by their desire to prevent de Jong from becoming a counselor. Whether a statement is made from a proper motive is a question of law. *Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 55 (Minn. App. 1995), *review denied* (Minn. July 27, 1995). The facts do not support de Jong's theory. Mosby and Schreiber were the principal witnesses; securing their statements was a logical and critical step in the investigation. Significantly, neither Mosby nor Schreiber participated in the investigation after making their statements to Nordin. De Jong was permitted to graduate, and no mention of the incident was contained in de Jong's transcript. We acknowledge that the incident and subsequent investigation was undoubtedly stressful for de Jong, but the lack of material, educational consequences to de Jong arising from the incident and the fact that no MSU official advocated for more severe disciplinary action demonstrates that the statements did not arise from an improper motive. Indeed, the record shows that MSU had several proper motives for investigating the incident: ensuring the safety of its students and instructors; maintaining proper conduct within the institution; and protecting the public from students whose conduct demonstrates that they may not be fit to act as counselors. *Cf. McBride*,

306 Minn. at 97, 235 N.W.2d at 374 (investigating misconduct protects the employer, its employees and the public from future misconduct).

De Jong also argues that the statements were not made upon reasonable or probable cause. "Reasonable grounds can exist if a person has valid reasons for believing a statement, even though the statement later proves to be false." *Elstrom*, 533 N.W.2d at 55. To determine whether statements made pursuant to an internal conduct investigation were supported by reasonable or probable cause, we look at whether the company took investigative steps to ascertain the accuracy of the statements. *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380 (Minn. 1990). The record here indicates that MSU conducted a thorough investigation to substantiate the claims made by Mosby and Schreiber regarding de Jong's conduct. Nordin interviewed several faculty members as well as students. The misconduct allegations were based on first-person witness testimony. *See id.* (concluding an employer lacked probable grounds for making its statements when it relied entirely on the accusations of employees who may have been biased and on second-hand hearsay). Nordin informed de Jong of the investigation and solicited her response to the allegations. Nordin personally listened to the voice mail messages left with Schreiber. De Jong was allowed to appeal the initial results of the conduct investigation. MSU acted in a reasonably prudent fashion in conducting its investigation, and therefore as a matter of law had reasonable or probable grounds for making the allegedly defamatory statements. *See id.* at 380–81.

We conclude that the statements made during the internal investigation were made upon proper occasion, upon proper motive, and upon reasonable grounds, and were therefore protected by qualified privilege.[1]

Our holding that the statements were protected by qualified privilege does not, however, end our analysis. This is because qualified privilege is abused and thereby lost if the defamatory statement is made with actual malice, requiring that the statement was made from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff. *Id.* at 890–91. The question of whether a statement is made with malice is a jury question, though the totality of evidence must support a finding of malice before the matter should be submitted to a jury. *Harvet*, 428 N.W.2d at 579; *see also Bahr*, 766 N.W.2d at 922 (holding that malice becomes a jury question if the plaintiff's evidence, viewed in the light most favorable to the plaintiff, could lead a reasonable jury to conclude the defamatory statements were made with malice). Malice may be proven by evidence that is extrinsic to the statement, such as personal ill feeling, or intrinsic to the statement, such as exaggerated language, the character of the language, and the mode and extent of publication. *Bahr*, 766 N.W.2d at 920.

De Jong argues that the record demonstrates that Mosby and Schreiber did not like her, and "did everything in their power to defeat her efforts to become a chemical dependency counselor." Qualified privilege is defeated, and an employee's malice is imputed to the corporation, "if the employee's malice 'is so mingled with [the

[1] In reaching this conclusion, we recognize a strong public policy interest in encouraging educators to make statements pursuant to a student conduct investigation despite the risk that the statements might be defamatory. *See Lewis*, 389 N.W.2d at 889.

employee's] regular work and the scope of [] employment that it must follow that the wrongful act is done in the course of employment.'" *Id.* at 925 (quoting *Friedell v. Blakely Printing Co.*, 163 Minn. 226, 234, 203 N.W. 974, 977 (1925)). De Jong points to several factors to support her claim that Mosby and Schreiber acted with malice. First, Schreiber and de Jong had several contentious in-class exchanges that ultimately led Schreiber to dislike her, as Schreiber himself admitted in his deposition. Second, Schreiber testified during his deposition that he believed de Jong would be a "disaster in the field." Third, Mosby allegedly stated to Nordin that de Jong "poisons and dominates conversations" during class, and this comment was reproduced in Nordin's report. Fourth, de Jong argues that the statements relating to alcohol use were particularly likely to damage her career prospects within the field of alcohol and drug counseling, and thus demonstrate an intent to injure her.

De Jong's arguments are not persuasive. We note first that the majority of extrinsic evidence does not support de Jong's argument. Mosby and Schreiber took no role in the investigative process after giving their initial reports. The instructors' statements were corroborated by several student witnesses. After the incident, de Jong was able to graduate from the program. Viewed in the light most favorable to de Jong, the evidence does show that both instructors had a negative opinion of de Jong, but that is a far cry from actual malice. Moreover, instructors are expected to objectively evaluate their students, and tensions often develop between teachers and students. For evidence of a personality conflict to constitute malice, the evidence must show "direct proof of personal spite." *Bauer v. State*, 511 N.W.2d 447, 451 (Minn. 1994); *see also Bahr*, 766

N.W.2d at 921 (interpreting *Bauer* as requiring evidence of personal spite for a personality conflict to serve as extrinsic evidence of malice). None of the evidence presented by de Jong shows that the negative opinions held by Schreiber and Mosby rose to the level of personal spite.

Similarly, the intrinsic evidence does not demonstrate that Mosby and Schreiber's statements were made with malice. The reports of Mosby and Schreiber, as recorded by Nordin, are factual in nature and do not contain exaggerated language or a venomous tone. Mosby and Schreiber only made their statements to Nordin, who was investigating the incident. There is no evidence that the statements were published outside of MSU; therefore the mode and extent of publication do not evidence malice on behalf of the instructors. Finally, the fact that the comments relating to apparent alcohol use were potentially damaging professionally does not itself evidence malice, absent external evidence that those comments were made from ill will or improper motives, or for purposes of injuring de Jong. *See Bol v. Cole*, 561 N.W.2d 143, 150 (Minn. 1997) (stating that "[m]alice cannot be implied from the statement itself").

On this record, de Jong has failed to present sufficient evidence to raise a jury question regarding whether the allegedly defamatory statements were made with actual malice. Accordingly, we hold that internal publication of the allegedly defamatory statements was subject to qualified privilege.

Because the only communication of the allegedly defamatory statements was privileged, and because de Jong failed to present sufficient evidence to raise a jury question regarding whether the statements were made with actual malice, the district

court properly entered summary judgment in favor of MSU on de Jong's defamation claim.

Affirmed.