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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 18-0603

DA 18-0603

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 45

KELLY SPEER,

Plaintiff and Appellant,

v.

STATE OF MONTANA, DEPARTMENT OF CORRECTIONS,

Defendant and Appellee.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. CDV-2016-442
Honorable Kathy Seeley, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Scott Peterson, Morrison Sherwood Wilson & Deola, PLLP,
Helena, Montana

For Appellee:

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Submitted on Briefs: May 22, 2019

Decided: February 25, 2020

Filed:

Clerk

Justice Dirk M. Sandefur delivered the Opinion of the Court.

¶1 Kelly Speer appeals the judgment of the Montana First Judicial District Court, Lewis and Clark County, granting the Montana Department of Corrections (DOC) summary judgment on her claims for wrongful discharge from employment, violation of Montana constitutional and administrative rights to privacy, and tortious defamation. We address the following restated issues on appeal:

> *1. Whether genuine issues of material fact as to whether DOC discharged Speer for good cause precluded summary judgment on her wrongful discharge claim?*
>
> *2. Whether genuine issues of material fact as to whether DOC discharged Speer in violation of its written personnel policy precluded summary judgment on her wrongful discharge claim?*
>
> *3. Whether the District Court erroneously granted summary judgment on Speer's claim that DOC violated her right to privacy under Montana Constitution Article II, Section 10 and Admin. R. M. 2.21.6615?*
>
> *4. Whether the District Court erroneously concluded that derogatory statements made by DOC to the Montana Peace Officer Standards and Training Council were privileged under § 27-1-804(2), MCA?*

¶2 We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 In October 2000, DOC hired Speer to work as a probation and parole officer. After an intervening promotion, DOC later promoted her in April 2008 to Chief of the Facility Programs Bureau of its Adult Community Corrections Division (ACCD). In that capacity, Speer was a senior to mid-level manager who supervised approximately thirty DOC employees, performed various budget analysis duties, and was the DOC liaison and conducted contract oversight with third-party providers of community pre-release and

treatment center services. She served as DOC Facility Programs Bureau Chief until discharged on May 26, 2015.

¶4 In or about November 2014, DOC Deputy Director Loraine Wodnik became aware of various e-mail statements by Speer to other DOC employees and one or more third-party contractors, which Wodnik viewed as violative of various DOC policies and unprofessional conduct. After pulling and reviewing various agency e-mail communications and consulting with DOC Director Mike Batista and Human Resource Manager (HRM) Kila Shepherd, Wodnik scheduled a meeting with Speer and the others for December 12, 2014, to discuss Speer's conduct. Wodnik scheduled the meeting electronically through Microsoft Outlook and, because DOC's Outlook calendars were open within the Department, vaguely captioned the meeting on the e-mail invitation and calendar as a "brainstorming" meeting rather than a personnel issue meeting. Speer thus had no advance notice of the true purpose of the meeting.

¶5 On December 12, 2014, Speer attended the scheduled meeting with Director Batista, Deputy Director Wodnik, and HRM Shepard. Over the course of the 90-minute meeting, Batista and Wodnik confronted Speer about various particulars of her alleged unprofessional conduct with reference to specific e-mail communications, *inter alia*. Batista and Wodnik ultimately found Speer's responses and accountability to be lacking.

¶6 Accordingly, on February 9, 2015, HRM Shepherd sent Speer a "pre-determination" letter on behalf of Director Batista. The letter informed Speer that the DOC was considering formal disciplinary action against her "based on unprofessional conduct and

violations of state/DOC policy." The letter detailed the following grounds for potential disciplinary action: (1) various cited instances of unauthorized disclosure of confidential information regarding various DOC employees to others without a "right to know"; (2) the failure to properly address third-party contractor concerns; (3) spreading false rumors and "engaging in triangulation" regarding DOC managers and decisions; and (4) knowingly providing false information in response to the issues raised at the December 12, 2014, meeting.[1] The letter set a "pre-determination" meeting and advised that Speer could respond orally or in writing to the issues raised in the "pre-determination" letter.

¶7 After rescheduling at Speer's request, the pre-determination meeting between HRM Shepherd and Speer occurred on February 17, 2015. At the meeting, Speer submitted a one-page written response to the issues raised in the February 9 pre-determination letter. Speer claimed that she could not respond further because she had not been "given enough information . . . to understand the specific nature of the allegations." After the meeting, Shepherd set a "final determination" meeting for February 20, 2015, and informed Speer that she could supplement her initial response in writing no later than February 19. After Speer timely submitted more detailed written responses by e-mail on February 19, Shepard responded with a same-day e-mail advising that the meeting set for the next day would be a formal "investigation interview," rather than a final determination meeting as previously

[1] Without elaboration, the letter referred to the informal December 12, 2014, meeting as "an official department investigation." Batista, Wodnik, and Shepherd subsequently testified that the February 9 characterization of the prior meeting as an official investigation was an erroneous overstatement and that the meeting was more accurately a corrective counseling or "coaching session."

scheduled. The February 19 e-mail further notified Speer that DOC had previously provided her with the pertinent "interview notes, the pre-determination letter containing an outline of the allegations[,] as well as the related policies that you're alleged to have violated, and all related emails." It further advised that "this now formal investigation" is based on the allegation "that you've violated state and DOC policies and demonstrated behaviors which indicate leadership and accountability failure."

¶8 At the February 20 meeting, HRM Shepherd advised that she would record the interview, that she was the assigned DOC investigator, and that Speer had the right to have a third-party representative present.[2] Shepherd also presented Speer with a standard Administrative Investigation Warning[3] form and then read it to her. Speer refused to sign the advisory acknowledgment on the form. She similarly refused to give oral answers to questions at the meeting and stated that she would only respond to questions in writing. Shepherd accordingly reset the investigative interview for March 2, 2015.

¶9 On March 2, Speer appeared for the interview without a representative and, upon inquiry, stated that she wished to proceed without a representative present. HRM Shepherd then repeated the interview advisory previously given and again asked Speer to sign the acknowledgment section of the advisory form. As before, Speer again refused to

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[2] Michelle Jenicek appeared with Speer as her representative.

[3] The express purpose of the form was "to advise [the employee or witness] that [she is] being interviewed as part of an administrative investigation." The form specified various investigative standards and advised that the employee or witness would have an opportunity to ask pertinent questions and get answers from the investigator. The form included a signature line for the employee or witness to acknowledge receipt of the form advisory without acknowledgment of the truth of any allegations at issue.

acknowledge the advisory by signing the form. Based on Speer's prior refusal to answer oral questions, Shepherd provided various questions on separate pieces of paper and asked Speer to give written answers. When Speer refused, Shepherd advised that the refusal to answer questions during the formal investigative interview constituted a separate violation of DOC policy standards for employee performance and conduct.

¶10 On May 11, 2015, Director Batista and Deputy Director Wodnik issued a "due process letter" to Speer informing her that DOC was considering terminating her employment. The seven-page letter detailed the basis of the proposed termination and informed Speer she could submit written or oral responses for consideration at a subsequent due process meeting scheduled for May 19, 2015. At the due process meeting, Speer did not submit or provide specific responses to the grounds set forth in the May 11 due process letter. Director Batista then read aloud from the due process letter each ground upon which DOC was considering discharging her. Without elaboration, Speer responded that she relied on her previously submitted one-page written response to the February 9 pre-determination letter.

¶11 A week later, on May 26, 2015, Director Batista discharged Speer from DOC employment for "just cause" based on her failure to accept accountability for previously noted policy violations and unprofessional behavior and her resulting inability "to meet and sustain the performance and professionalism standards of [her] position as Bureau Chief." The letter stated that those shortcomings "negatively affect[] [DOC's] delivery of essential services." The next day, HRM Shepherd sent Speer a supplemental letter

detailing the underlying grounds upon which DOC discharged her including: (1) an instance where she allegedly accessed and disclosed another DOC employee's pay raise to a fellow employee without authorization or cause; (2) two instances where she allegedly disclosed the pendency of disciplinary investigations of current or former DOC employees to other employees without authorization or cause; (3) an instance where she allegedly disclosed to a third-party contractor the name of an applicant for the position of DOC Probation and Parole Division Administrator before the selection and hiring process was complete; and (4) eight separate instances in which she allegedly engaged in unprofessional conduct. The cited instances of unprofessional conduct included one instance where Speer allegedly withheld information from the director and deputy director and seven instances where she allegedly made false and disparaging e-mail statements to other DOC employees or a third-party contractor about the director, deputy director, and related DOC management decisions.

¶12 Speer subsequently appealed her discharge under the three-step internal disciplinary grievance procedure provided by the state employee personnel policy adopted by administrative rule. After DOC denied her Step I and Step II grievances, Speer requested a formal administrative hearing under Step III. Following a three-day contested case administrative hearing, the independent hearings examiner issued a written Hearing Summary and Recommended Decision on July 7, 2016. The decision ultimately concluded that DOC had "just cause" to discharge Speer and had afforded her all required due process.

The decision thus recommended that DOC deny Speer's Step III grievance. In its findings of fact, the hearings examiner found, *inter alia*, that:

> Speer's job was to be DOC's liaison with [third-party corrections services providers]. The reports of her conduct, her own words disclosed in her e-mails, and messages from those outside the organization make it clear that Speer was no longer acting in the best interests of DOC. Her actions and inactions disrupted the administration's attempts to reorganize the ACCD division and to develop a good working relationship with the [third-party corrections services providers].

(Emphasis omitted.) The hearings examiner further concluded that the progressive process utilized by DOC to investigate, discipline, and discharge Speer afforded her due process of law in accordance with Admin. R. M. 2.21.6507(4) and 2.21.6509(3). In that regard, the examiner concluded:

> At every step of the process, the performance deficiencies were clearly stated [by DOC] and Speer was given multiple opportunities to respond and acknowledge them. [She] was accorded adequate due process throughout the progressive discipline that led to her discharge. As the fact summary reflects, all requirements of notification and the requirement for an opportunity to review and respond to each notice were accorded to Speer at every level of formal discipline.

¶13 In her prior June 3, 2015, correspondence requesting a Step III administrative hearing, Speer asserted that the Step III grievance procedure was unfairly flawed as applied to her case because it would not provide for objective and impartial agency review and action on the hearing examiner's decision due to the fact that the top-three DOC officials (i.e., the director, deputy director, and human resource manager) were directly involved in her case. Sensitive to Speer's concerns, Director Batista effectively recused himself upon issuance of the hearing examiner's decision and forwarded the administrative hearing

transcript, exhibits, and decision to the Director of the Montana Department of Transportion (MDOT) as DOC's designee for final agency review and decision in accordance with Admin. R. M. 2.2.8018(9). Upon review, the MDOT Director concurred with the hearings examiner's findings and recommendation and, on July 15, 2016, thus issued a final agency decision denying Speer's Step III grievance.

¶14 Meanwhile, after her discharge and but before exhaustion of grievance rights, Speer separately applied to the Montana Department of Labor (DOL) for unemployment insurance benefits under Title 39, ch. 51, MCA. Upon consideration of her application, DOL initially determined that Speer was eligible for benefits. However, DOC appealed, thus triggering a separate administrative hearing as to whether she was ineligible for unemployment benefits due to misconduct. Following an administrative hearing on September 8, 2015, the DOL hearings examiner determined that Speer was eligible for unemployment benefits based on his finding that the preponderance of the evidence did not establish that DOC discharged her for misconduct as defined by statute. The hearings examiner found that the evidence "[a]t most . . . show[ed] isolated good faith error in judgment in the language used in some of the e[-]mails" at issue. In that regard, the examiner found that Speer's hearing testimony was "credibl[e] and consistent[]."

¶15 Nonetheless, on May 19, 2016, while a final decision on Speer's Step III grievance was still pending, and based on her mistaken belief that Speer was still certified as a probation and parole officer, DOC HRM Shepherd submitted an e-mail complaint to the Montana Peace Officer Standards and Training Council (POST) stating:

> I am contacting you regarding a former Department of Correction's [sic] employee, Kelly Speer, who provided false testimony under oath during her Unemployment Insurance hearing on September 8, 2015, for personal gain. The actions of Ms. Speer appear to meet the criteria established by P.O.S.T. in 23.13.702 ARM for decertification.

The complaint explained on what basis Shepherd believed that Speer testified falsely by reference to included excerpts from her unemployment insurance hearing transcript. Upon receipt of the complaint, POST ascertained that Speer was no longer POST-certified and closed the complaint without further action or disposition.

¶16 After filing of her initial complaint in May 2016, Speer filed an amended district court complaint in October 2017 alleging that DOC: (1) wrongfully discharged her from employment without "good cause" and in violation of its written personnel policy; (2) violated her rights to privacy under Montana Constitution Article II, Section 10 and Admin. R. M. 2.21.6615; and (3) tortiously defamed her as defined by §§ 27-1-802 and -803, MCA. Upon Speer's motion for partial summary judgment on her privacy and defamation claims, DOC responded with a cross-motion for summary judgment on all claims. The District Court ultimately denied Speer's motion and granted DOC summary judgment on all of her claims. Speer timely appealed.

STANDARDS OF REVIEW

¶17 We review district court grants or denials of summary judgment de novo for conformance to M. R. Civ. P. 56. *Alexander v. Mont. Developmental Ctr.*, 2018 MT 271, ¶ 10, 393 Mont. 272, 430 P.3d 90 (citing *Borges v. Missoula Cty. Sheriff's Office*, 2018 MT 14, ¶ 16, 390 Mont. 161, 415 P.3d 976). Summary judgment is proper only when there is

no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3).[4] The party seeking summary judgment has the initial burden of showing a complete absence of any genuine issue of material fact on the Rule 56 record[5] and that the movant is entitled to judgment as a matter of law. *Weber v. Interbel Tel. Coop.*, 2003 MT 320, ¶ 5, 318 Mont. 295, 80 P.3d 88. The burden then shifts to the opposing party to either show the existence of a genuine issue of material fact or that the moving party is nonetheless not entitled to judgment as a matter of law. *Osterman v. Sears, Roebuck & Co.*, 2003 MT 327, ¶ 17, 318 Mont. 342, 80 P.3d 435 (citing *Bruner v. Yellowstone County*, 272 Mont. 261, 264, 900 P.2d 901, 903 (1995)). To show that factual issues preclude summary judgment, the opposing party must, in proper form and by more than mere denial, speculation, or pleading allegation, "set out specific facts" showing the existence of a genuine issue of material fact. M. R. Civ. P. 56(e)(2). *See also Grimsrud v. Hagel*, 2005 MT 194, ¶ 14, 328 Mont. 142, 119 P.3d 47; *Osterman*, ¶ 34; *Old Elk v. Healthy Mothers, Healthy Babies, Inc.*, 2003 MT 167, ¶¶ 15-16, 316 Mont. 320, 73 P.3d 795; *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262, 1265 (1997); *Eitel v. Ryan*, 231 Mont. 174, 178, 751 P.2d 682, 684 (1988). The court must view the Rule 56 factual record in the light most favorable to the non-moving party and draw all reasonable

[4] A genuine issue of material fact is a fact materially inconsistent with proof of an essential element of a claim or defense at issue. *Mountain W. Bank, N.A. v. Mine & Mill Hydraulics, Inc.*, 2003 MT 35, ¶ 28, 314 Mont. 248, 64 P.3d 1048.

[5] The summary judgment record includes "the pleadings, the discovery and disclosure materials on file, and any affidavits." M. R. Civ. P. 56(c)(3).

inferences against summary judgment but has no duty to anticipate or speculate regarding contrary material facts. *Weber*, ¶ 5; *Gamble Robinson Co. v. Carousel Props.*, 212 Mont. 305, 312, 688 P.2d 283, 286-87 (1984). Whether a genuine issue of material fact exists on the summary judgment record is a question of law. We review district court conclusions and applications of law de novo for correctness. *Alexander*, ¶ 10.

DISCUSSION

¶18 *1. Whether genuine issues of material fact as to whether DOC discharged Speer for good cause precluded summary judgment on her wrongful discharge claim?*

¶19 As pertinent here, an involuntary discharge from employment is "wrongful" if "not for good cause." Section 39-2-904(1)(b), MCA. As pertinent here, § 39-2-903(5), MCA, defines "[g]ood cause" as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." As referenced in § 39-2-903(5), MCA, a "legitimate business reason" is "a reason that is neither false, whimsical, arbitrary or capricious, and . . . [that has] some logical relationship to the needs of the [employer's] business." *Buck v. Billings Mont. Chevrolet, Inc.*, 248 Mont. 276, 281-82, 811 P.2d 537, 540 (1991). Without diminishing "the legitimate interests of [an] employee to [maintain] employment," the statutory "good cause" standard embodies the "right of an employer to exercise discretion over" the employer's particular needs and expectations in carrying on or performing the employer's business or function. *See Buck*, 248 Mont. at 282, 811 P.2d at 540. The employer's right and discretion to "run[] its business as it sees fit" is particularly broad in the case of employees who hold "managerial or confidential positions." *Buck*, 248 Mont.

at 283, 811 P.2d at 541. *Accord Moe v. Butte-Silver Bow County*, 2016 MT 103, ¶ 54, 383 Mont. 297, 371 P.3d 415.[6]

¶20 Upon a supported showing that an employer had "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason" under §§ 39-2-903(5) and -904(1)(b), MCA, the Rule 56 burden shifts to the employee to show specific facts upon which to reasonably conclude that the given reason for discharge was not a job or business related reason, false, not the true reason for discharge, or was arbitrary, capricious, or whimsical. *Becker v. Rosebud Operating Servs., Inc.*, 2008 MT 285, ¶ 24, 345 Mont. 368, 191 P.3d 435 (internal citation omitted); *Mysse v. Martens*, 279 Mont. 253, 262, 926 P.2d 765, 770 (1996). Mere denial, speculation, or cursory assertion to the contrary is insufficient to satisfy the employee's responsive burden. M. R. Civ. P. 56(e)(2); *Mysse*, 279 Mont. at 262, 926 P.2d at 770.

¶21 Here, as noted by the District Court, it is beyond genuine material dispute on the Rule 56 record that, in her capacity as the DOC ACCD Facility Programs Bureau Chief, Speer was "a management team member of an agency division" of state government, who

[6] Whether an employee holds a managerial position is generally a question of fact under the totality of the circumstances including as pertinent, *inter alia*, the nature of employee's role, responsibilities, and discretion in the running or operation of the employer's business or function, the "level of trust placed in the employee," the "nature of the relationship between the employee and her superiors," and the nature and degree of the employee's interaction on behalf of the employer with third parties who do business with the employer. *See Bird v. Cascade County*, 2016 MT 345, ¶ 12, 386 Mont. 69, 386 P.3d 602.

had supervisory authority over numerous subordinate employees, and was subordinate only to "a [DOC] division administrator and [agency]-level administrators." It is further beyond genuine material dispute that she: (1) had significant budget management and oversight responsibility within her bureau; (2) was responsible to oversee contracts between DOC and third-party providers of community pre-release and treatment center services; and (3) was the DOC liaison with those contractors. Accordingly, it is beyond genuine material dispute that Speer was a managerial employee over whom DOC thus had broad discretion to determine whether she satisfactorily performed her duties and exercised granted discretion as a DOC Division Bureau Chief.

¶22 As further noted by the District Court, DOC made a detailed affirmative factual showing that it had reasonable cause to believe, and did in fact believe, that Speer had repeatedly engaged in numerous incidents of unprofessional conduct or conduct violative of DOC policies governing employee conduct. DOC has further shown that, despite notice and multiple opportunities to rebut, explain, or take responsibility for those noted infractions, Speer provided no acceptable justification for those cited infractions and failed to accept responsibility for them. DOC thus met its burden of showing that it ultimately discharged Speer for cause based on noted policy violations and unprofessional conduct, her failure to accept responsibility for those infractions, and what it deemed to be her resulting inability "to meet and sustain the performance and professionalism standards of [her] position as a Bureau Chief," thereby "negatively affecting the delivery of essential [DOC] services." Accordingly, we conclude that DOC satisfied its initial Rule 56 burden

of showing that it had "reasonable job-related grounds" for discharging Speer "based on a failure to satisfactorily perform job duties . . . or other legitimate business reason" within the meaning of §§ 39-2-903(5) and -904(1)(b), MCA.

¶23 In the face of that showing, Speer, seizing on isolated language from the District Court's ruling, asserts on appeal that varying assessments of the relative weight and credibility of her testimony by the hearing examiners in the DOC Step III grievance proceeding and the DOL unemployment insurance proceeding "extend[] to all of the reasons DOC gave for termination, including" its interpretation of her subject e-mail statements. She thus asserts that genuine issues of material fact existed on the Rule 56 record regarding "the facts and circumstances surrounding [her] termination."

¶24 However, as noted by the District Court:

> Speer's e[-]mail communications speak for themselves. A single unprofessional e[-]mail or two, subject to interpretation, should prompt management to intervene and provide progressive discipline as necessary. In Speer's case, administrators discovered many e[-]mails over a long period of time to both co-workers and [third-party] contractors which not only reflected poorly on Speer's professional judgment, but undermined the integrity and operations of the agency.

As further noted by the District Court, Speer does not dispute that she authored the subject e-mails or what she said—she merely disputes what she meant. Disagreement over the correct interpretation of, or conclusion from, facts not otherwise subject to genuine material dispute generally does not create a genuine issue of material fact precluding summary judgment. *Stanley v. Holms*, 1999 MT 41, ¶ 32, 293 Mont. 343, 975 P.2d 1242; *Sprunk v. First Bank Sys.*, 252 Mont. 463, 466-67, 830 P.2d 103, 105 (1992). Regardless of what

different meaning Speer may have meant her e-mail statements to have, it is beyond genuine material dispute on the Rule 56 record that the e-mails said what they said and that it was what they said, who she was in the organization, who she made the statements to, and how they reflected on DOC's mission and management that caused DOC to investigate and ultimately discharge her when she was unable or unwilling to adequately explain or accept accountability when confronted.

¶25 The fact that the hearings examiners in the DOC Step III grievance and DOL unemployment benefits proceedings reached varying conclusions regarding her credibility is similarly of no consequence. As a threshold matter, Speer has not demonstrated on what basis the conclusions of either of the administrative hearing examiners regarding the relative weight and credibility of her after-the-fact interpretation of her e-mail statements would be admissible evidence in this case. As previously noted, what Spear intended the e-mails to mean is not material to what they reasonably meant to DOC under the circumstances of this case. Finally, as a matter of law, the disqualifying statutory standard of discharge for "misconduct" in the DOL unemployment proceeding is significantly different and higher than the administrative standard of discharge for "just cause" in the DOC grievance proceeding, or the similar statutory "good cause" standard here. *See* §§ 39-51-201(19) and -2303, MCA. *Compare* §§ 39-2-903(5) and -904(1)(b), MCA; Admin. R. M. 2.21.6509(1)[7]. *See also Niles v. Carl Weissman & Sons, Inc.*, 241 Mont.

[7] As referenced in Admin. R. M. 2.21.6509(1) (just cause requirement for formal discipline), "[j]ust cause" means "reasonable, job-related grounds for taking a disciplinary action based on failure to satisfactorily perform job duties, or disruption of agency operations. Just cause may

230, 236-37, 786 P.2d 662, 666-67 (1990). Consequently, the varying administrative assessments of the relative weight and credibility of Speer's subsequent testimonial interpretations of her various e-mail statements is insufficient to give rise to a genuine issue of material fact precluding summary judgment in this case.

¶26 Speer has further not asserted, much less shown, any factual basis upon which to reasonably conclude that the reasons given by DOC for terminating her employment were not job or business related, false, not the true reasons for discharge, or were otherwise arbitrary, capricious, or whimsical. She has thus failed to meet her responsive burden of showing the existence of a genuine issue of material fact precluding summary judgment that DOC discharged her for "good cause," as defined by § 39-2-903(5), MCA. We hold that the District Court properly granted DOC summary judgment on Speer's wrongful discharge claim under § 39-2-904(1)(b), MCA.

¶27 *2. Whether genuine issues of material fact as to whether DOC discharged Speer in violation of its written personnel policy precluded summary judgment on her wrongful discharge claim?*

¶28 Regardless of "good cause," an involuntary discharge from employment is "wrongful" if an employer discharged the employee in violation of "the express provisions of its own written personnel policy." Section 39-2-904(1)(c), MCA. Based on DOC's

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include, but is not limited to: an actual violation of an established agency standard, procedure, legitimate order, policy, or labor agreement; failure to meet applicable professional standards; criminal misconduct; wrongful discrimination; deliberate misconduct; negligence; deliberately providing false information on an employment application; willful damage to public or private property; workplace violence or intimidation; harassment; unprofessional or inappropriate behavior; or a series of lesser violations." Admin. R. M. 2.21.6507(8).

after-the-fact characterization in its February 2015 pre-determination letter of the initial December 2014 meeting with Speer as an "official investigation," she asserts that DOC discharged her in violation of its own personnel policy by subjecting her to an official investigation without "provid[ing] the procedural protections that go along with an official investigation." Her assertion focuses on the fact, as noted by the District Court, that, despite its post-termination recharacterization of the initial meeting as a corrective counseling or "coaching" session, DOC made no evidentiary showing in this case that it "in fact" warned or "coached" Speer at the meeting "to better perform her job."

¶29 However, as a threshold matter, Speer has provided no citation or analysis of any specific policy, or policy provision, that she asserts DOC violated when it discharged her. State employees are subject, *inter alia*, to the state employee personnel policy set forth in Admin. R. M. 2.21.6505 through 2.21.6515.[8] State policy accordingly provides for two types of discipline—"informal disciplinary action" and "formal disciplinary action." Admin. R. M. 2.21.6507(6)-(7), 2.21.6508, and 2.21.6509. State policy defines "[i]nformal disciplinary action" as "corrective actions taken to improve unsatisfactory employee behavior, conduct, or performance . . . [and] may include, but is not limited to, coaching, counseling meetings, oral warnings, and training." Admin. R. M. 2.21.6507(7). In contrast, "[f]ormal disciplinary action means, but is not limited to, a written warning, suspension without pay, disciplinary demotion, or discharge." Admin. R. M. 2.21.6507(6).

[8] *See also* § 2-18-102(3)-(4), MCA (department of administration authority to develop state employee personnel policy and rules).

Without any affirmative corrective action taken, an informal meeting with an employee called by management to question the employee about her job performance or misconduct does not constitute informal or formal "disciplinary action" as defined by state policy. *See* Admin. R. M. 2.21.6507(6)-(7), 2.21.6508, and 2.21.6509. As to requisite due process, when management determines that "formal disciplinary action is necessary," state policy mandates that:

> due process,[[9]] and documentation, or other evidence of the facts are required. . . . In each formal disciplinary action, management shall give the employee a written notification that includes, but is not limited to:
>
> (a) the just cause or reason for the disciplinary action;
>
> (b) the disciplinary action to be taken, including the dates, times, and duration where applicable;
>
> (c) the improvements or corrections expected, if applicable; and
>
> (d) the consequences of the employee's failure to make the required improvement or correction, if applicable.
>
> [ ] Management shall offer the employee the opportunity to review the notice of formal disciplinary action and to acknowledge its receipt by signing and dating the notice. The employee's signature does not necessarily mean the employee agrees with the disciplinary action. If the employee refuses to sign the notice, management shall make note of that fact.

Admin. R. M. 2.21.6509(1), (3), (4). In contrast, "informal disciplinary action" has no similar procedural requirements under state policy. *See* Admin. R. M. 2.21.6508.

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[9] Under state policy, "[d]ue process" means "an employee: (a) is informed of the action being taken and the reason for the action; and (b) has the opportunity to respond." Admin. R. M. 2.21.6507(4).

¶30 Applied here, it is beyond genuine material dispute on the Rule 56 record that, regardless of DOC's after-the-fact characterization of it as an "official investigation," the December 2014 meeting called by Deputy Director Wodnik to confront and question Speer did not constitute "formal disciplinary action" as defined by the state personnel policy. As recognized by the District Court, it is further beyond genuine material dispute that, despite the fact that the DOC "investigation and termination proceedings were not conducted as smoothly or clearly articulated as they could have been," the process utilized by DOC, from its February 2015 "pre-determination letter" forward, substantially complied with the procedural requirements of state policy for "formal disciplinary action." Against that backdrop, Speer has made no affirmative factual showing upon which to conclude either that DOC's after-the-fact reference to the December 2014 meeting as an "official investigation," or its subsequent use of its seemingly inapposite "Administrative Investigation Warning" form,[10] in any regard prejudiced her substantial rights under the state employees personnel policy. We hold that the District Court properly granted DOC summary judgment on Speer's wrongful discharge claim under § 39-2-904(1)(c), MCA.

¶31 *3. Whether the District Court erroneously granted summary judgment on Speer's claim that DOC violated her right to privacy under Montana Constitution Article II, Section 10 and Admin. R. M. 2.21.6615?*

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[10] The procedural ambiguity or imprecision in the DOC process apparently resulted from DOC's undiscerning use of a rights advisory form designed for use by the DOC Investigations Bureau in matters other than typical employee disciplinary proceedings governed by the state employees disciplinary policy. *Compare* DOC Investigations Bureau Standard Operations Procedure Guide § 3.1.19(A) and Admin. R. M. ch. 21, subch. 65 and 80 (state employee disciplinary and grievance policies).

¶32 Speer asserts that DOC violated her right to privacy under Montana Constitution Article II, Section 10, and Admin. R. M. 2.21.6615 by forwarding her "confidential personnel information" to the MDOT Director for final agency review pursuant to Admin. R. M. 2.21.8017(3)(e). DOC contrarily asserts that no violation of Speer's right to privacy occurred because § 2-15-112(2)(b), MCA, authorized the DOC director to delegate his function under Admin. R. M. 2.21.6615 to the MDOT director to provide for objective review, and that Admin. R. M. 2.21.6615(10) then authorized him to review the administrative hearing record. We agree with DOC.

¶33 Montana Constitution Article II, Section 10, protects the "right of individual privacy." An individual has a right to privacy under Article II, Section 10 only if the individual has an actual or subjective expectation in non-disclosure of the subject information and that expectation is objectively reasonable in society under the totality of the circumstances. *Raap v. Bd. of Trs., Wolf Point Sch. Dist.*, 2018 MT 58, ¶ 11, 391 Mont. 12, 414 P.3d 788. The question of whether an individual has a right to privacy under Article II, Section 10 is a mixed question of fact and law under the totality of the circumstances. *Raap*, ¶ 12. Whether an individual has or had an actual or subjective expectation of privacy is generally a question of fact dependent upon whether the individual was aware or "had notice of possible disclosure" of the subject information. *Billings Gazette v. City of Billings*, 2013 MT 334, ¶ 18, 372 Mont. 409, 313 P.3d 129 (citing *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 23, 333 Mont. 331, 142 P.3d 864; *Disability Rights Mont. v. State*, 2009 MT 100, ¶ 22, 350 Mont. 101, 207 P.3d 1092).

See also State v. Goetz, 2008 MT 296, ¶¶ 29-30, 345 Mont. 421, 191 P.3d 489 (actual expectation of privacy depends on, *inter alia*, what a person knowingly exposes to others). In contrast, whether a subjective expectation of privacy is objectively reasonable in society is a determination of law based on the totality of the circumstances including, *inter alia*, the nature of the information, the purpose of the disclosure, and the relationship of the recipient to the subject of the information. *Billings Gazette*, ¶ 21 (citing *Havre Daily News*, ¶ 23).

¶34 Speer correctly asserts that employees generally have a subjective and objectively reasonable expectation of privacy in non-disclosure of their personnel records to third parties. *Mont. Human Rights Div. v. City of Billings*, 199 Mont. 434, 442-43, 649 P.2d 1283, 1287-88 (1982). However, due to the nature of the employer-employee relationship, employers, in contrast to third parties, have an express or implied contract right to collect, maintain, evaluate, and act on employee performance and disciplinary information. *See* §§ 39-2-101, -102, -404, -601, MCA; *Buck*, 248 Mont. at 281-82, 811 P.2d at 544. Thus, employees generally can have no actual or subjective expectation that their employers and management-level supervisors will not have access to their employment performance and disciplinary records for job-related reasons.

¶35 Here, consistent with our recognition of an employee's general right to privacy in *Montana Human Rights Division*, 199 Mont. at 442-43, 649 P.2d at 1287-88, the state employee personnel policy expressly provides that "[a]ll employee personnel records are confidential and access is restricted to protect individual employee privacy." Admin. R.

M. 2.21.6615(1).[11] However, nothing in Admin. R. M. 2.21.6615(1) or 2.21.6612(2) precludes or restricts management-level DOC personnel from accessing employee personnel records for purposes of monitoring or assessing employee compliance with performance and disciplinary standards. To the contrary, in addition to expressly authorizing access by the Legislative Audit Division, Human Rights Bureau, and the State Human Resources Division, *inter alia*, the state personnel policy expressly provides that "[o]ther persons may access an employee's personnel record . . . if there is a job-related purpose" for such access. Admin. R. M. 2.21.6615(10). Consequently, as a matter of law, Speer had notice pursuant to Admin. R. M. 2.21.6615(10) and § 2-15-112(2)(b), MCA, that management-level DOC personnel and their designates had internal access to her performance and disciplinary records for purposes of disciplinary review and action as otherwise authorized by the state personnel policy.

¶36 In that regard, the state employees grievance policy, and Speer's June 2015 correspondence requesting a Step III administrative hearing, further manifest beyond genuine material dispute that she was aware that her voluntary initiation of the Step III grievance would trigger a formal administrative hearing and final agency review of her discharge by the DOC director or a designated subordinate employee. *See*

[11] As defined by the state personnel policy, an "[e]mployee personnel record means information relating to an employee's employment with the state of Montana that is . . . an official record of employment policies, practices, and decisions" and, as pertinent here, includes "disciplinary action records." Admin. R. M. 2.21.6608(3) and 2.21.6612(1)(h). "Disciplinary action records resulting from an investigation are part of the employee personnel records and are confidential" and are not subject to disclosure to third parties except upon "agency" review and "balanc[ing] [of] the merits of public disclosure against an individual's right to privacy to determine whether the information or portions of the information may be released." Admin. R. M. 2.21.6612(2).

§ 2-15-112(2)(b), MCA; Admin. R. M. 2.21.8017(3)(b)-(c)(ii) and 2.21.8018(1)-(2), (5), (9). If acknowledged and credited by DOC, her objection to the director, deputy director, or human resource manager conducting the final agency review would have necessarily required DOC to designate a substitute "department head" to conduct the final agency review required by the grievance policy. *See* Admin. R. M. 2.21.8017(3)(b)-(c)(ii) and 2.21.8018(5), (9).

¶37 Speer attempts to avoid that conclusion by narrowly shifting the focus to whether the MDOT director was a subordinate employee of the DOC director for purposes of § 2-15-112(2)(b), MCA ("each [state] department head may . . . delegate any of the functions vested in the department head to subordinate employees"). She thus asserts that, by nature and normal function, the MDOT director was not a subordinate employee of the DOC director and therefore not authorized under Admin. R. M. 2.21.6615(10), 2.21.8017(3)(b)-(c)(ii), and 2.21.8018(1)-(2), (5), (9), to conduct the final agency review and decision on her Step III grievance.

¶38 Certainly, the MDOT director was and is not a subordinate employee of the DOC director under the chartering constitutional and statutory authority creating and charging those departments and directorships. However, it is beyond genuine material dispute on the Rule 56 record that the MDOT director did not become involved or purport to act under his authority as the MDOT director. Rather, he became involved at the special request of the DOC director to function as the authorized DOC designate for the limited purpose of conducting DOC's internal, final agency review and decision on Speer's Step III grievance

in accordance with Admin. R. M. 2.21.8017(3)(b)-(c)(ii) and 2.21.8018(5), (9). Speer has cited no administrative rule or statutory provision that precludes a director of a department of state government from gratuitously employing a director of another department of state government to conduct a required final agency review of a Step III grievance under Admin. R. M. 2.21.8017(3)(b)-(c)(ii) and 2.21.8018(5), (9), when the director and other senior management of the requesting department are personally involved as participant-witnesses in the subject disciplinary action. In the absence of any such limiting authority, the MDOT director was acting as a temporary, gratuitous employee of the DOC director for the limited purposes of conducting a final agency review of Speer's Step III grievance in accordance with Admin. R. M. 2.21.8017(3)(b)-(c)(ii) and 2.21.8018(5), (9). *See* § 2-9-101(2)(a), MCA (defining an "employee" as "an officer, employee, or servant of a governmental entity . . . and persons acting on behalf of the governmental entity in any official capacity temporarily or permanently in the service of the governmental entity whether with or without compensation"); § 2-18-101(28), MCA (definition of "temporary employee"); § 39-2-401, MCA (gratuitous employees); Restatement (Second) of Agency § 225 (Am. Law Inst. 1958) ("[o]ne who volunteers services without an agreement for or expectation of reward may be a servant of the one accepting such services"). *See also* Restatement (Third) Of Agency § 1.01 (Am. Law Inst. 2006) (defining "agency" as "the fiduciary relationship that arises when one . . . manifests assent to another person . . . that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act").

¶39 Aside from cursory assertion that the MDOT director had no authority to conduct DOC's final agency review and decision on her grievance, Speer has made no assertion, much less a responsive factual showing, that she had any actual or subjective expectation that the DOC director would not acknowledge her objection and then designate an uninvolved substitute to conduct the final agency review on her Step III grievance. Even if she had, any such actual or subjective expectation of privacy would not have been objectively reasonable in society under the totality of the circumstances in this case. We hold that Speer has failed to demonstrate that the District Court erroneously granted DOC summary judgment on her claim that it violated her right to privacy under Montana Constitution Article II, Section 10, and Admin. R. M. 2.21.6615.

¶40 *4. Whether the District Court erroneously concluded that derogatory statements made by DOC to POST were privileged under § 27-1-804(2), MCA?*

¶41 Speer finally asserts that the District Court erroneously concluded that certain post-termination derogatory statements made by DOC about her to POST were not defamatory because they were privileged under § 27-1-804(2), MCA. She asserts that the derogatory statements were not privileged under § 27-1-804(2), MCA, because DOC did not make them during an official proceeding and because Speer was in any event not subject to POST's regulatory authority at the time.

¶42 Whether by libel or slander, the pertinent essence of tortious defamation "is a false and unprivileged publication" about another that causes the person to suffer damages. Sections 27-1-801 through -803, MCA. As pertinent here, a "privileged publication is one made . . . in any legislative or judicial proceeding or in *any other official proceeding*

authorized by law." Section 27-1-804(2), MCA (emphasis added). "A privileged communication is one which, except for the circumstances under which it is made, may be defamatory and actionable." *Skinner v. Pistoria*, 194 Mont. 257, 261, 633 P.2d 672, 675 (1981). The privilege afforded by § 27-1-804, MCA, "is absolute and is therefore unaffected by the presence of malice." *Skinner*, 194 Mont. at 263, 633 P.2d at 675-76.

¶43 As referenced in § 27-1-804, MCA, a communication made to "any other official proceeding authorized by law" means, *inter alia*, a communication made to the government authority responsible or authorized by law for regulating and investigating the subject matter of the communication. *See McLeod v. State*, 2009 MT 130, ¶¶ 17-19, 350 Mont. 285, 206 P.3d 956 (holding that written complaint against licensed appraiser to state board of real estate appraisers in re compliance with licensing standards was privileged under § 27-1-804(2), MCA); *Skinner*, 194 Mont. at 262-64, 633 P.2d at 675-76 (holding that written complaint to city commission and chief of police regarding alleged misconduct of city police officers was privileged under § 27-1-804(2), MCA).

¶44 Here, POST is the governmental entity responsible for setting, certifying, and regulating compliance with professional standards for Montana probation and parole officers, *inter alia*. *See* §§ 44-4-401(1), (2)(g), -403(1), and -404, MCA; Admin R. M. 23.12.201, 23.13.203, and 23.13.702(2) (public safety officer standards, code of ethics, and grounds for denial, sanction, suspension, or revocation of POST certification). Administrative rules governing POST define an "[i]nformal proceeding" as "a proceeding that occurs before a MAPA contested case proceeding and includes but is not limited to . . .

investigation [of misconduct] by POST." Admin. R. M. 23.13.102(11).[12] In that regard, POST regulations contemplate and provide for POST investigation of "a statement or accusation of misconduct made against a public safety officer to POST . . . by anyone." Admin. R. M. 23.13.102(1)(a) and 23.13.102(11). POST "will consider any legitimate allegation made against any public safety officer that may result in the denial, sanction, revocation, or suspension of that officer's certification." Admin. R. M. 23.13.702(1). *See also* Admin. R. M. 23.13.703 (procedure for making, processing, and informal disposition of misconduct allegations). Applied here, DOC's written complaint to POST regarding Speer was thus part of an "informal [POST] proceeding" as defined by Admin. R. M. 23.13.102(11). *See also* Admin. R. M. 23.13.102(1)(a), (11), 23.13.702(1), and 23.13.703. As such, the DOC complaint was a communication or "publication . . . made . . . in an[] . . . official proceeding authorized by law" as referenced in § 27-1-804(2), MCA.

¶45 Speer does not dispute that POST is the government entity authorized by law to certify and regulate the qualification and compliance of DOC probation and parole officers with governing professional standards. She does not dispute that she previously held POST certification when previously employed as a DOC probation and parole officer. Nor does she dispute that the subject matter of the allegations set forth in the DOC complaint fall squarely within the administrative jurisdiction of POST. Rather, she points out that POST

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[12] *See also* Admin. R. M. 23.13.102(13) (defining "[m]isconduct" as "any action or conduct that could potentially result in sanction, suspension, or revocation of POST certification pursuant to ARM 23.13.702 or a violation of the code of ethics contained in ARM 23.13.203.").

lacked jurisdiction over her because, contrary to DOC's mistaken belief, she was not then certified by POST, nor did she have an application for certification then pending before POST. However, Speer has provided no analysis for the proposition that DOC's mistaken belief about her current POST certification or application status, or lack thereof, rendered DOC's complaint something other than, or short of, a communication made to the government authority responsible or authorized by law for regulating and investigating the subject matter of the communication. Accordingly, we hold that the District Court did not erroneously conclude that the derogatory statements made by DOC to POST were privileged under § 27-1-804(2), MCA.

CONCLUSION

¶46 We hold that the District Court did not erroneously grant summary judgment to DOC on Speer's wrongful discharge from employment, violation of Montana constitutional and administrative rights to privacy, and tortious defamation claim. We affirm.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ JIM RICE