Opinion issued February 3, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00806-CV

CATHERINE M. FLAITZ, Appellant

V.

CORNELIUS C. SULLIVAN JR., Appellee

On Interlocutory Appeal from the 80th District Court
Harris County, Texas
Trial Court Case No. 2007-11197

MEMORANDUM OPINION

Appellant, Catherine M. Flaitz, brings this interlocutory appeal from the trial court's denial of her motion for summary judgment based on her affirmative defense of official immunity. Flaitz asserted this defense in response to a claim for

defamation asserted against her by appellee, Cornelius Sullivan Jr. In her first and second issues, Flaitz contends that she satisfied her burden in summary judgment and that Sullivan failed to produce evidence raising a factual issue as to the good faith requirement for official immunity. We conclude that the trial court erred in denying summary judgment because the evidence undisputedly shows that Flaitz was relying on the evaluations provided to her by an intermediate supervisor whom she had no reason to doubt. We do not reach Flaitz's remaining issues.[1] We reverse and render summary judgment in favor of Flaitz.

Background

In September 2004, Sullivan's employment was terminated after nearly 15 years as an non-tenured, associate professor at the University of Texas Health Science Center at Houston—Dental Branch. In the years before his termination, Sullivan worked in the Department of Restorative Dentistry and Biomaterials. Each year, the department chair conducted a faculty evaluation. The chair gave each faculty member a score on a scale of 1 to 5: 1 designated "unacceptable"; 2 designated "below standard"; 3 designated "standard"; 4 designated "above

[1] In her third and fourth issues, Flaitz contends that the allegedly defamatory comments cannot constitute defamation as a matter of law based on the qualified privilege regarding evaluation of employees. Flaitz did not assert this defense in her motion for summary judgment. These issues, therefore, are not preserved for appeal. *See* TEX. R. CIV. P. 166a(c) ("Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.").

standard"; and 5 designated "exemplary." Sullivan received the following evaluation scores:

Academic Year	Evaluation Score	Dep't Chair
2001 – 2002	3.34	Triolo
2000 – 2001	3.34	Triolo
1999 – 2000	3.50	Triolo
1998 – 1999	4.10	Triolo
1997 – 1998	4.00	Triolo
1996 – 1997	4.85	Fulton
1995 – 1996	5.00	Fulton
1994 – 1995	4.50	Kaminski

Although the record does not reflect Sullivan's evaluation score for the academic year 2002 through 2003, it contains students' evaluations of Sullivan from fall 2002.[2] Like the chair's faculty evaluations, students were asked to evaluate Sullivan on a scale of 1 to 5: 1 designated "inadequate"; 2 designated "marginal"; 3 designated "adequate"; 4 designated "proficient"; and 5 designated "outstanding." When asked their overall impression of Sullivan as a health care educator, 40 percent of responding students reported "Outstanding," 40 percent reported "Proficient," and the remaining 20 percent reported "Adequate." Sullivan's average student evaluation score was thus 4.2. The students were also asked to record any comments they had regarding Sullivan. One student, complaining about Sullivan's absenteeism, wrote, "Patient care should never be

[2] Sullivan did not receive an evaluation score for fiscal year 2003 through 2004, his last year of employment.

compromised regardless of scheduling problems one might have personally." Another requested of Sullivan, "Please don't embarrass student [sic] in front of their patient." While another student felt that "Sullivan show[ed] great care for the students and patients alike," he or she expressed concern regarding the fact that Sullivan was very opinionated about his opposition to the use of composite resin fillings, which Sullivan referred to as "plastic." Nevertheless, this student concluded, "Other than his slight disrespect of this future of dentistry [i.e., composite resin fillings,] he is a very proficient [instructor.]" During summer 2003, Flaitz informed Sullivan that his employment would be reduced to part-time for the academic year 2003 to 2004.

In addition to the yearly departmental faculty evaluations, every six years, the Faculty Appointment, Promotion and Tenure Committee ("the Committee") conducted a faculty performance review. The Committee gave each faculty member a performance designation: satisfactory, less than satisfactory, or deferred with comment. In 2003, the Committee reviewed Sullivan. As part of that process, the chair of Sullivan's department, Peter Triolo, mailed a letter to the Committee, expressing "serious concern" about Sullivan's performance and explaining that Sullivan's annual evaluations scores, although never falling below "standard," placed him at the bottom his department. Triolo also noted that student evaluations and his own personal observations indicated Sullivan's inconsistent

attendance.

Despite Triolo's concern, in October, Flaitz sent Sullivan a congratulatory letter informing him that that the Committee had given him a "satisfactory" review, the highest possible designation. Nevertheless, the next July, Flaitz mailed a letter to University President James Willerson, informing him that the Dental Branch did not intend to renew Sullivan's faculty appointment. Although Willerson informed Sullivan in July that his employment would be terminated, in mid-August, the Board of Regents approved a budget for following year that listed Sullivan as a salaried associate professor. The same day that the board approved the budget, Sullivan met with Triolo, who informed him that his termination was due to budget problems. Sullivan then met with Flaitz, who informed him his termination was due to his inadequate performance. On his last day of employment, Triolo mailed a letter to Flaitz explaining that Sullivan's "faculty evaluation over the past few years ha[d] been in bottom 10% of the faculty ratings." On September 1, 2004, Sullivan's employment was terminated. After his termination, the budget was amended, distributing the sum formerly allocated for Sullivan's salary to other members of the faculty.

In September, Sullivan mailed to Willerson a letter reciting the inconsistent explanations that he had received and requesting a full and accurate explanation. Willerson forwarded Sullivan's letter to Flaitz, who in an October 15, 2004 letter

wrote to Sullivan:

> Let me assure you that "budget problems" and "inadequate performance" are, in fact, not separate issues but are ultimately tied together.
>
> The [Legislature's] mandate to reduce budgets required that department heads review all costs. As personnel are the greatest expense, most reductions occurred in this area. It is my understanding that Dr. Triolo conducted a review of all faculty and staff in his department. After careful consideration, he was forced to make some difficult decisions. Since your average evaluation score over the past six years was one of the lowest in the department, he decided to release you in order to meet the departmental budget.

Sullivan filed suit against Triolo and Flaitz, asserting claims for defamation.[3] Both Triolo and Flaitz sought a motion for summary judgment based on their affirmative defenses of official immunity, which the trial court denied. Flaitz, but not Triolo, has appealed the trial court's denial of summary judgment.

Summary Judgment

In her first and second issues, Flaitz contends that the trial court erred by denying her motion for summary judgment based on her affirmative defense of official immunity.

A. Standard of Review

[3] Although not before us on appeal, Sullivan has also asserted claims under 42 U.S.C. § 1983 against Triolo, Flaitz, and Willerson for their acts committed under color of state law depriving him of his right to due process and denying him equal protection. *See* 42 U.S.C. § 1983.

An appellate court reviews de novo a trial court's ruling on a summary-judgment motion. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). To succeed on a summary judgment motion under Texas Rule of Civil Procedure 166a(c), a movant must establish that there is no genuine issue of material fact so that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). To conclusively establish a matter, the movant must show that reasonable minds could not differ as to the conclusion to be drawn from the evidence. *Henry v. Masson*, No. 01-07-00522-CV, 2010 WL 5395640, at *16 (Tex. App.—Houston [1st Dist.] Dec. 30, 2010, no pet.) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 814 (Tex. 2005)). The evidence is reviewed in the light most favorable to the non-movant, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009) (citing *City of Keller*, 168 S.W.3d 802, 827 (Tex. 2005)).

Initially, the burden of proof is on the movant. *Henry*, 2010 WL 5395640, at *16 (citing *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002)). However, if the movant establishes a right to summary judgment, the burden shifts to the non-movant to raise a genuine issue of material fact in order to defeat

summary judgment. *Id.* (citing *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995)).

B. Applicable Law

Generally, official immunity protects public officials from personal liability for their performance of (1) discretionary duties (2) in good faith (3) within the scope of their authority. *Klein v. Hernandez*, No. 01-06-00569-CV, 2010 WL 4400453, at *4 (Tex. App.—Houston [1st Dist.] Nov. 4, 2010, no pet.) (citing *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 422 (Tex. 2004)). A public official acted in good faith only if a reasonably prudent official under the same or similar circumstances could have believed based on the information he possessed when the conduct occurred that his conduct was justified. *Ballantyne*, 144 S.W.3d at 426.

To establish a defamation claim, a private-individual plaintiff must demonstrate that (1) the defendant published a factual statement (2) that was capable of defamatory meaning (3) concerning the plaintiff (4) while acting with negligence. *Vice v. Kasprzak*, 318 S.W.3d 1, 12 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). A statement is defamatory if the words tend to injure a person's reputation, exposing the person to public hatred, contempt, ridicule, or financial injury. *Henriquez v. Cemex Mgmt., Inc.*, 177 S.W.3d 241, 252 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). The truth of a statement is an

absolute defense to a claim for defamation. *Klentzman v. Brady*, 312 S.W.3d 886, 898 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

C. Analysis

On appeal, it is undisputed that Flaitz was performing discretionary duties within the scope of her authority as dean in writing the October 15, 2004 letter. Thus, the only issue is whether Flaitz conclusively established the element of good faith. *See Klein*, 2010 WL 4400453, at *4 (citing *Ballantyne*, 144 S.W.3d at 422). In her first two issues, Flaitz asserts that she conclusively proved the good faith requirement for official immunity and that Sullivan did not produce evidence showing that no reasonable person in her position could have written the October 15, 2004 letter critical of his job performance. Sullivan's defamation claim against Flaitz concerns only two comments in her October 15, 2004 letter: first, the reference to Sullivan's "'inadequate performance'"; and second, the phrase "your average evaluation score over the past six years was one of the lowest in the department . . . ." Thus, the specific question at issue is whether Flaitz conclusively established that a reasonably prudent official under the same or similar circumstances could have believed, based on the information she possessed as of October 15, 2004, that these comments were true. *See Ballantyne*, 144 S.W.3d at 426; *Klentzman*, 312 S.W.3d at 898; *Vice*, 318 S.W.3d at 12.

Ordinarily, it is reasonable for a university dean to rely upon the evaluations

provided to her by intermediate supervisors. *See McCartney v. May*, 50 S.W.3d 599, 610 (Tex. App.—Amarillo 2001, no pet.) (holding medical school administrator conclusively showed good faith requirement for official immunity defense to former employee's defamation claim where administrator relied on opinions provided by other faculty members despite fact that former employee continued to receive favorable reviews). It is undisputed that Flaitz, as dean, was relying on the opinions and information provided to her by Triolo, Sullivan's department chair and immediate supervisor. Reliance on evaluations by intermediate supervisors may be unreasonable where, for example, the university dean possesses information calling into question the intermediate supervisor's credibility or the evaluations he provides. *See Ballantyne*, 144 S.W.3d at 426. A public official, however, can conclusively establish good faith despite possessing inconsistent information at the time so long as the inconsistency is not so great as to render the official's belief unreasonable. *See McCartney*, 50 S.W.3d at 610. Sullivan contends that Triolo's characterization of his evaluations scores as being among the lowest in his department, which were relied on by Flaitz, was contradicted by the scores themselves, which were never lower than "standard." Although Sullivan asserts that Triolo's characterization is false, there is no contradiction between Sullivan's scores and Triolo's characterization. The record contains no evidence of the average score of other faculty in the same department,

and, therefore, the standard scores were not inconsistent with being one of the lowest ranks.

Sullivan contends that Flaitz should have known that Triolo's characterization was false because the Committee gave him a "satisfactory" designation even after they had received Triolo's letter. According to Sullivan, the Committee must have disbelieved Triolo's characterization. However, there is no contradiction between the Committee's conclusion that from 1997 through 2003, Sullivan's performance overall was "satisfactory" and Triolo's characterization that Sullivan's scores were some of the lowest in his department. Indeed, as Triolo explained in his August 31, 2004 letter to Flaitz, it was only in the last "few" years, not the past six, that Sullivan's scores were in the lowest 10 percent of his department. Here, because any inconsistency is slight, Flaitz has conclusively established good faith. *See id.* Sullivan contends that Flaitz's bad faith was shown by inconsistencies regarding the other explanation for his termination: budget problems. Sullivan points out that he was told in July his employment would be terminated; that a budget including him was approved in August; and that after his termination, the money allocated for his salary was redistributed to other faculty members. No evidence shows when the budget including him was prepared. More importantly, Sullivan does not dispute that the Legislature mandated the university to reduce its budget. Flaitz's representations concerning the budget cuts are

consistent with a decision to distribute money that would have been spent on Sullivan to cover other expenses, including salary costs. We also note that an explanation concerning budget cuts is not a defamatory statement towards Sullivan. *See Henriquez*, 177 S.W.3d at 252.

We conclude that the evidence conclusively establishes that a reasonably prudent official under the same or similar circumstances could have believed based on the information Flaitz possessed as of October 15, 2004, that the challenged comments were not defamatory. *See Ballantyne*, 144 S.W.3d at 426. Accordingly, we hold that the trial court err in denying Flaitz's motion for summary judgment.

We sustain Flaitz's first and second issues and do not reach Flaitz's remaining issues.

Conclusion

We reverse and render summary judgment in favor of Flaitz.

Elsa Alcala
Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.