Affirmed in Part, Reversed and Rendered in Part, and Memorandum Majority and Concurring and Dissenting Opinions filed June 30, 2022.

In The

Fourteenth Court of Appeals

NO. 14-20-00588-CV

LI "LILY" CAI, Appellant

V.

JASPER CHEN, Appellee

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 2019-82179

MEMORANDUM MAJORITY OPINION

Appellant Li "Lily" Cai appeals the trial court's order denying her motion to dismiss the claims of appellee Jasper Chen pursuant to Civil Practice and Remedies Code section 101.106(f). Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. § 101.106(f).[1] In one issue, Cai argues the trial court erred by

[1] An interlocutory order denying a motion to dismiss under section 101.106(f) is appealable. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(5); *Franka v. Velasquez*, 332 S.W.3d 367, 371 n.9 (Tex. 2011) (explaining interplay between sections 51.014(a)(5) and

denying her motion to dismiss on the grounds that Chen's claims are based on conduct within the general scope of Cai's employment with a governmental unit. Concluding that some, but not all, of the conduct alleged by Chen was within the scope of Cai's employment with a governmental unit, we affirm the trial court's order in part and reverse and render in part.

I. BACKGROUND

Cai and Chen worked together as employees of The University of Texas M.D. Anderson Cancer Center, which the parties do not dispute is a governmental unit.[2] Chen claims that Cai made false statements about him to M.D. Anderson personnel, alleging that Cai falsely reported to her supervisor that Chen sexually harassed her, and made further false statements about him in the course of the sexual-harassment investigation. Chen also alleged that, in the course of the sexual-harassment investigation, Cai made false statements to representatives of The University of Texas Health Science Center at Houston (UTHealth) and The University of Texas Police Department. Chen also alleged that Cai made false negative comments about Chen to colleagues in the lab where they worked.

Based on the above conduct, Chen filed this lawsuit against Cai, asserting claims of slander, slander per se, defamation, disparagement, libel, libel per se, malicious criminal prosecution, tortious interference with contract, and tortious

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101.106(f)); *see also Austin State Hosp. v. Graham*, 347 S.W.3d 298, 300–01 (Tex. 2011) (per curiam).

[2] *See* Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. § 101.001(2) (defining "employee" as "a person . . . who is in the paid service of a governmental unit"), (3)(D) (defining "governmental unit" to include "any . . . institution . . . the status and authority of which are derived from the Constitution of Texas"); *see also* Tex. Const. art. VII, § 10 ("The Legislature shall as soon as practicable establish, organize and provide for the maintenance, support and direction of a University of the first class, to be located by a vote of the people of this State, and styled, 'The University of Texas'[.]"); Tex. Educ. Code Ann. § 65.02(a) ("The University of Texas System is composed of the following institutions and entities: . . . (11) The University of Texas M.D. Anderson Cancer Center[.]").

interference with existing and prospective opportunities and relationships.

Asserting that the conduct at issue was within the scope of her employment with M.D. Anderson, Cai filed a motion to dismiss Chen's claims pursuant to section 101.106(f), which provides:

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. § 101.106(f). The trial court denied the motion.

II. ANALYSIS

A motion to dismiss filed by an employee of a governmental unit under section 101.106(f) is a challenge to the trial court's subject-matter jurisdiction, which we review de novo. *See Singleton v. Casteel*, 267 S.W.3d 547, 550 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). To prove her immunity from suit under section 101.106(f), Cai was required to present conclusive evidence that Chen's suit (1) is based on conduct within the scope of Cai's employment with M.D. Anderson, a governmental unit, and (2) could have been brought against the governmental unit under the Texas Tort Claims Act. *See Laverie v. Wetherbe*, 517 S.W.3d 748, 750, 752 (Tex. 2017) (applying section 101.106(f)); *Garza v. Harrison*, 574 S.W.3d 389, 406 (Tex. 2019) (police officer's motion to dismiss was meritorious when "the record conclusively establishe[d]" section 101.106(f) requirements).

A. Scope of employment

The scope-of-employment inquiry under section 101.106(f) focuses on whether the employee was doing her job, not the quality of the job performance. *Laverie*, 517 S.W.3d at 753. Even if work is performed wrongly or negligently, the inquiry is satisfied if, when viewed objectively, "a connection [exists] between the employee's job duties and the alleged tortious conduct." *Id.*

As above, it is undisputed that M.D. Anderson is a governmental unit for purposes of section 101.106(f). *See supra* note 2. Cai bases her immunity argument on M.D. Anderson's sexual-harassment and sexual-misconduct prevention policy, which provides that employees may, in their discretion, report incidents of sexual harassment.[3] Because the policy applied to employees such as Cai, she argues that reporting sexual harassment was a duty within the general scope of her employment. Cai further argues that, for immunity purposes, it does not matter whether her reports were true or false because any report of sexual harassment

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[3] Section 1.1 of the policy provides:

> As outlined in detail below, there are many resources and options available to support Workforce Members and Students impacted by a violation of this policy to address their concerns. Such individuals may contact local law enforcement agencies or The University of Texas Police Department (UTP-H). Additionally, Workforce Members and Students may utilize local crises intervention or counseling services, or MD Anderson's Employee Assistance Program. If an individual wishes, he or she may also file a Complaint with MD Anderson that will be appropriately investigated. If there is a finding that the policy was violated, appropriate action will be taken.

Section 4.1 of the policy provides, in relevant part:

> MD Anderson Workforce Members and Students should report the incident [of sexual harassment] to EEO and HR Regulations or the Title IX Coordinator.
>
> Complaints may also be reported to the following responsible employees:
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> - For employees, his or her manager, supervisor, Department Chair, any management personnel or their assigned Human Resources Consultant in the Generalist Organization (HRGO).

under the policy was within the scope of her employment, even if tortious.

1. Reports of sexual harassment

We begin with Cai's reports of sexual harassment. It is undisputed that: (1) Cai voluntarily emailed her supervisor to report that Chen had sexually harassed her; (2) in the course of the resulting investigation Cai spoke with other representatives of M.D. Anderson and UTHealth about Chen's alleged harassment of her; (3) an M.D. Anderson human-resources director, at Cai's request, put Cai in contact with The University of Texas Police Department; (4) Cai made statements to The University of Texas Police Department about Chen's alleged harassment of her; and (5) M.D. Anderson's sexual-harassment policy states that (a) reporting harassment under the policy is discretionary, (b) reports may be made to either an employee's supervisor or The University of Texas Police Department, among others; and (c) provides for an investigation when an employee makes a report of harassment.

Our court has previously held that making a discretionary report of sexual harassment under an employer's policy is an activity within the course and scope of employment. *Brooks v. Scherler*, 859 S.W.2d 586, 588–89 (Tex. App.—Houston [14th Dist.] 1993, no writ). In *Brooks*, this court determined that such a policy, while discretionary, nonetheless "required the participation of all employees" because the "effectiveness of the program depended on the ability of the employees to exercise that discretion free of worry about resulting litigation." *Id.* at 588.

Chen, however, argues that making a knowingly false report of harassment under an employer's policy, as he alleges Cai did here, does not fall within the scope of employment. He contends this case is governed by the supreme court's decision in *Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573 (Tex. 2002). In

Minyard, a supermarket employee alleged that a store manager defamed her by falsely stating during a workplace misconduct investigation that he had "kiss[ed] and hugg[ed]" her on several occasions. 80 S.W.3d at 574–75. The supreme court determined that the statements were not within the course and scope of employment, explaining that although the employer's policies required employees to participate in workplace misconduct investigations, the policies "d[id] not demonstrate that [the manager]'s defaming [the employee] during the investigation would further [the employer]'s business and accomplish a purpose of [the manager]'s job." *Id.* at 579.

Cai, on the other hand, argues this case is controlled by the supreme court's decision in *Laverie*. In *Laverie*, a professor sued a dean for defamation after the professor was passed over for a promotion, arguing the dean had made defamatory remarks about him during the hiring process. 517 S.W.3d at 750–51. The dean, an employee of a governmental unit, moved to dismiss under section 101.106(f), arguing the statements were made within the course and scope of her employment. The professor argued the dean was not entitled to dismissal because she had not proven "why" she had made the statements, and accordingly she had not proven that the statements were within the course and scope of her employment. *Laverie*, 517 S.W.3d at 752. The supreme court rejected this argument, explaining:

> Nothing in the election-of-remedies provision or the statutory definition of "scope of employment" suggests subjective intent is a necessary component of the scope-of-employment analysis. Rather, the Tort Claims Act focuses on "performance . . . of the duties of an employee's office or employment," which calls for an objective assessment of whether the employee was doing her job when she committed an alleged tort, not her state of mind when she was doing it.

Laverie, 517 S.W.3d at 752–53.[4] The supreme court accordingly dismissed the claims.

Whether *Minyard* or *Laverie* governs this case is not immediately obvious, as harmoniously resolving their conflicting holdings is challenging. Ours is not the first court to recognize this. As explained by the Corpus Christi–Edinburg Court of Appeals:

> It is difficult to reconcile *Minyard* and *Laverie*. In both cases, an employee allegedly lied about a colleague engaging in illicit actions in the workplace. In both cases, the employee made the alleged defamatory statements in response to direct questioning by a superior employee about the colleague. And there was evidence in both cases that the defendant was required—by store policy or by virtue of the employee's position—to answer the superior's questions. Yet the defendant's actions in *Laverie* were held to be within the scope of employment, while the defendant's actions in *Minyard* were not.

Vinson v. Tucker, No. 13-16-00639-CV, 2018 WL 2170007, at *6 (Tex. App.—Corpus Christi–Edinburg May 10, 2018, no pet.) (mem. op.) (footnotes and citations omitted). We need not delve into whether this case is more analogous to *Minyard* or *Laverie*, however, given that neither case directly addresses reports of sexual harassment, as did this court in *Brooks*. Rather, our holding in *Brooks* that voluntarily reporting sexual harassment per an employer's policy is conduct within

[4] Relying on *Laverie*, the supreme court likewise dismissed claims brought by a medical resident against faculty doctors based on allegedly false statements, explaining:

> In this case, Rios' tort claims against the Doctors are all based on his allegation that they made false statements about him, including to the Texas Medical Board, in retaliation for his having raised concerns regarding patient welfare at the Center. Whatever the Doctors' subjective intentions and motivations may have been, the statements Rios alleges they made arose from their employment as faculty members at the Center in connection with the operation of its residency program. The connection between their job duties and allegedly tortious conduct, as claimed by Rios himself, places the statements squarely within the scope of their employment at the Center.

University of Tex. Health Sci. Ctr. at Houston v. Rios, 542 S.W.3d 530, 535–36 (Tex. 2017).

the scope of employment, combined with *Laverie*'s holding that state of mind is immaterial to the scope-of-employment analysis, compels the result that Cai's report of sexual harassment per M.D. Anderson's policy, and subsequent statements related to the investigation of that report, were within the scope of her employment regardless of her motivations, if any, in making the statements, and regardless of their truth or falsity.[5]

We conclude Cai has satisfied the first prong of section 101.106(f) as to her report of harassment and her communications relating to that report made during the investigation of the report.

2. Comments to co-worker

We next address disparaging comments Chen alleged Cai made about him to a co-worker in the lab where they worked. In his second amended petition, Chen alleged that Cai made false statements to unspecified third parties. In his response to Cai's motion to dismiss, Chen attached the affidavit of Jincheng Han, who worked in the same lab as Cai and Chen. *Cf. Fink v. Anderson*, 477 S.W.3d 460, 465 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (when reviewing motion to dismiss under section 101.106(f), "we consider the plaintiffs' pleadings and the evidence pertinent to the jurisdictional inquiry, without regard to the case's

[5] Chen further argues that, even if section 101.106(f) provides immunity for a report to an employer, it does not provide immunity for reports to UTHealth or The University of Texas Police Department, because those entities were not Cai's employer. M.D. Anderson's policy, however, provides that individuals making reports of harassment may "may contact local law enforcement agencies or The University of Texas Police Department (UTP-H)." Moreover, nothing in the policy restricts Cai's communications about sexual harassment to her direct employer, M.D. Anderson. The question is not whether the comments in question were made to her direct employer; the question is whether, under the policy, they were within the scope of her employment. We conclude Cai's conduct relating to her report of sexual harassment to her supervisor or pursuant to the subsequent investigation of the report are within the scope of her employment, regardless of whether those comments were made to representatives of her direct employer, M.D. Anderson, or to representatives of UTHealth or The University of Texas Police Department.

merits") (citing *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002)).[6] Han states in his affidavit that, before making her report that Chen was harassing her, Cai said negative things about Chen to him:

> I recall fairly distinctly that [Cai] started saying very negative things about one particular fellow researcher working there, Jasper Chen. My work area was next to Jasper's area. Cai relayed to me a number of statements about Jasper Chen that portrayed Jasper as a very mean person. She would talk about Jasper in a way that I believe was intended to scare me about Jasper, and to dissuade me from wanting to talk with him or interact with him. . . . Cai talked about Jasper in a very negative way. She would say negative things about Jasper in a way that I believe was designed to have me avoid Jasper and stay away from him. She would say things about Jasper to the effect that Jasper was the type of person everyone should stay away from; that Jasper was very mean to others; that Jasper had said negative things about me to others (which Cai was now relaying to me); that Jasper was a sinister person who was following her, like stalking her; and other types of statements that I understood meant that he was a scary, intimidating, bad person.

Some of these statements, such as the alleged statement that Cai told Han that Chen had said negative things about Han, do not appear related to a report of sexual harassment, nor do they appear in any way connected to Cai's job duties for M.D. Anderson. *See Laverie*, 517 S.W.3d at 753 (employee seeking dismissal must prove "a connection between the employee's job duties and the alleged tortious conduct"). Moreover, even comments by Cai to Han potentially related to sexual harassment do not appear to fall under M.D. Anderson's policy. While the policy provides for reporting harassment to supervisory personnel, among others, it does not explicitly provide for reporting harassment to non-supervisory co-workers.

[6] Because our review is confined to the jurisdictional inquiry, we express no opinion as to the merits of Chen's claims. *See also Wilkerson v. University of N. Tex.*, 878 F.3d 147, 162 (5th Cir. 2017) ("Section 101.106(f), then, asks not whether [plaintiff] can succeed on the merits, but whether his claim sounds in tort.").

We conclude that Cai has not met her burden to show that allegedly disparaging comments about Chen unrelated to her report of sexual harassment under M.D. Anderson's policy fall within the scope of her employment with M.D. Anderson, and accordingly she is not entitled to dismissal of Chen's claims to the extent they are based on such conduct.[7]

B. Claims could have been brought against governmental unit

As to the conduct that was within the scope of Cai's employment, we must also determine whether claims based on that conduct could have been brought against the governmental unit at issue, M.D. Anderson. *See* Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. § 101.106(f). The parties do not dispute that Chen's tort claims could have been brought against M.D. Anderson as the supreme court has interpreted that requirement. *See, e.g.*, *Franka v. Velasquez*, 332 S.W.3d 367, 379–80 (Tex. 2011) (holding that, barring independent statutory waiver of immunity, tort claims against government are brought under Tort Claims Act for section 101.106(f) purposes even when Tort Claims Act does not waive immunity for those claims). We agree and conclude that Cai has satisfied the second prong of section 101.106(f) as to the conduct that was within the scope of her employment

[7] The dissent would hold that these comments fall within the scope of Cai's employment. There are at least two problems with that position. First, the dissent characterizes the comments attested to by Han as within the scope of Cai's employment apparently on the sole basis that Cai, Chen, and Han worked together. The fact that a statement was made to a co-worker does not automatically make that communication a function of an employee's job duties. *See, e.g.*, *Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573, 574–75, 579 (Tex. 2002) (supermarket employee's statements made during workplace-misconduct investigation that he had "kiss[ed] and hugg[ed]" another employee on several occasions were outside scope of employment). Second, while the dissent describes this opinion's discussion of whether the comments fall within the scope of the sexual-harassment policy as a "red herring," this question is central to the analysis of the statements, given that (1) to be entitled to dismissal, Cai was required to prove that the conduct alleged by Chen was within the scope of her employment and (2) Cai's sole argument in favor of dismissal is that the conduct in question fell under the sexual-harassment policy. *See Laverie v. Wetherbe*, 517 S.W.3d 748, 750, 752 (Tex. 2017) (applying section 101.106(f)).

with M.D. Anderson.

Accordingly, we sustain Cai's sole issue in part as to the conduct that was within the scope of her employment, and overrule the issue in part as to conduct that was outside the scope of her employment.

III. CONCLUSION

We sustain Cai's sole issue in part on the basis that she has proven she is entitled to dismissal of Chen's claims to the extent they are based on conduct within the course and scope of her employment, namely, (1) her reports of sexual harassment under M.D. Anderson's policy to her supervisor and The University of Texas Police Department and (2) her statements made in conjunction with the subsequent investigation of her reported sexual harassment. Applying this holding to Chen's claims, we conclude Cai is entitled to dismissal of Chen's claim for malicious prosecution in its entirety, as this claim is based solely on Cai's conduct in reporting sexual harassment to The University of Texas Police Department, which we have determined was within the scope of her employment. As to Chen's remaining claims, it is not clear that they are based solely on conduct within the scope of Cai's employment, as opposed to alleged comments to co-workers that are not within the scope of Cai's employment, and Cai's sole issue as to the remaining claims is overruled in part.

Accordingly, we reverse the trial court's order in part and render judgment dismissing for want of jurisdiction Chen's malicious-prosecution claim in its entirety and his remaining claims to the extent they are based on Cai's reports of sexual harassment or conduct relating to the subsequent investigation of those reports. Tex. R. App. P. 43.2(c). We otherwise affirm the order.[8]

/s/ Charles A. Spain
Justice

Panel consists of Justices Wise, Spain, and Hassan (Wise, J. concurring and dissenting).

[8] Because this is an interlocutory appeal of the trial-court's order denying Cai's motion to dismiss, only that order is before this court—not the entire trial-court case. We do not remand the case to the trial court because the case is not before us. *Chappell Hill Sausage Co. v. Durrenberger*, No. 14-19-00897-CV, 2021 WL 2656585, at *5 n.6 (Tex. App.—Houston [14th Dist.] June 29, 2021, no pet.) (mem. op.).