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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0794**

Brian Madison,
Appellant,

vs.

Todd County, et al.,
Respondents,

Morrison County, et al.,
Respondents.

**Filed April 12, 2021
Affirmed
Bjorkman, Judge**

Morrison County District Court
File No. 49-CV-19-309

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Considered and decided by Bjorkman, Presiding Judge; Bratvold, Judge; and Bryan,
Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges summary judgment dismissing his defamation and data-practices claims relating to statements made in connection with an employment background investigation. He also contests the denial of his motion to amend his complaint to seek punitive and exemplary damages. Because we conclude that (1) the alleged defamatory statements are true, express opinions rather than facts, or are protected by conditional privilege, and (2) appellant did not produce evidence of damage caused by the claimed data-practices violations, we affirm.

FACTS

Appellant Brian Madison was the Chief of Police for the City of Motley from 2007 through 2015. In 2014, Madison applied for a position with respondent Morrison County Sheriff's Office. He was selected for an interview, which he attended while wearing his Motley police uniform. Morrison County did not hire him. In 2015, Madison resigned from the Motley police department and went to work as campground manager for the City of Elbow Lake.

After resigning from Elbow Lake in 2016, Madison sought to rejoin the law-enforcement community. By September, he had been offered a position as a deputy in respondent Todd County Sheriff's Office conditioned on successfully passing a background investigation. Todd County assigned respondent Sheriff's Deputy Scott Dirkes to conduct the investigation.

During his investigation, Deputy Dirkes spoke to a number of individuals employed by Motley, Elbow Lake, and Morrison County. His September 23, 2016 report (report) was unfavorable toward Madison and included the following statements:

- Madison “was employed with the city of Motley, Minnesota as the Police Chief internship.”
- Members of the Morrison County Sheriff’s Office told Deputy Dirkes that Madison “lacked the inability to follow through with misdemeanor, gross misdemeanor, and felony cases within the city of Motley and would hand them off at a moments notice to the county to follow up on.”
- Madison attended his 2014 interview with Morrison County “in a city of Motley uniform and upon investigation . . . he was on the clock employed by the city of Motley for that interview.”
- Madison was “on the clock” during the Morrison County interview “indicating unethical use to this backgrounder of this candidate’s use of time.”

Todd County ultimately declined to hire Madison because of how he left his employment with Elbow Lake—resigning via text message with no notice before a busy weekend at the campground.

The next year, Madison applied for a law-enforcement position with Crow Wing County. A Crow Wing County background investigator contacted respondent Morrison County Sheriff Shawn Larsen. Madison did not get the position, later learning he failed the background investigation, which included Deputy Dirkes’s report. Madison requested a copy of the report from Todd County, and scheduled a meeting with Sheriff Larsen. Madison later discovered that Deputy Dirkes emailed the report to Sheriff Larsen on the morning of the meeting.

Madison commenced this action alleging the above statements defamed him¹ and that Todd County and Deputy Dirkes violated the Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01-.99 (2020), by sending the report to Morrison County staff without Madison's permission, and by failing to provide the report to him within ten days of his request. The complaint also asserts negligence and emotional-distress claims. Respondents moved for summary judgment as to all claims. Todd County and Deputy Dirkes argued that conditional privilege applies to all the challenged statements, and in the alternative, the statements are true or express opinions. Morrison County and Sheriff Larsen argued that the statements are non-actionable opinion or are true, and that Madison was not entitled to presumed damages because he could not prove actual malice. Madison moved for leave to amend his complaint to assert claims for punitive and exemplary damages.

Following a hearing, the district court granted respondents' motions. The court concluded that the challenged statements are either true, non-actionable opinion, or subject to a conditional privilege that Madison did not overcome with evidence of common-law malice. The district court also concluded the data-practices claims fail as a matter of law because Madison did not provide evidence that he suffered his claimed emotional damages. And the district court denied Madison's motion to amend the complaint to add punitive and exemplary damages claims. Madison appeals.²

¹ Madison sued Deputy Dirkes and Sheriff Larsen individually for defamation, and included Todd County and Morrison County under a theory of vicarious liability.

² Madison does not challenge the dismissal of his negligence and emotional-distress claims.

DECISION

Summary judgment is appropriate where “there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.01. We review de novo whether—when viewing the evidence in the light most favorable to the nonmoving party—there are genuine issues of material fact and whether the district court erred in its application of the law. *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 874 (Minn. 2019).

Madison challenges the dismissal of his defamation and data-practices claims and the denial of his motion to assert claims for punitive and exemplary damages. We turn first to his defamation claim.

I. Madison’s defamation claim fails as a matter of law because the challenged statements are true, express an opinion, or are conditionally privileged.

To prevail on a defamation claim, a party must establish that

(1) the defamatory statement was communicated to someone other than the plaintiff; (2) the statement is false; (3) the statement tends to harm the plaintiff’s reputation and to lower the plaintiff in the estimation of the community; and (4) the recipient of the false statement reasonably understands it to refer to a specific individual.

Larson v. Gannett Co., 940 N.W.2d 120, 130 (Minn. 2020) (quotation omitted). When such a statement concerns “a person’s business, trade, or professional conduct,” it is defamation per se, which does not require proof of actual damages. *Becker v. Alloy Hardfacing & Eng’g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). But a plaintiff alleging defamation per se must prove the remaining elements to succeed on his defamation claim.

Bebo v. Delander, 632 N.W.2d 732, 739 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001).

We begin our analysis by considering fundamental principles of defamation law. True statements are not defamatory. *McKee v. Laurion*, 825 N.W.2d 725, 730 (Minn. 2013). Statements that reflect opinions rather than verifiable facts are not defamatory. *See Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986) (“Expressions of opinion, rhetoric, and figurative language are generally not actionable if, in context, the audience would understand the statement is not a representation of fact.”). Neither are statements incapable of conveying a defamatory meaning. *McKee*, 825 N.W.2d at 732. “[W]hether a statement’s language reasonably conveys a defamatory meaning” is a question of law. *Id.* at 731. And even untrue statements of fact are not defamatory if they are made upon a “proper occasion,” with “proper motive,” and based on “reasonable or probable cause.” *Hunt v. Univ. of Minn.*, 465 N.W.2d 88, 92 (Minn. App. 1991). In such cases, the statements are conditionally privileged, and actionable only if the party seeking relief demonstrates common-law malice. *Id.*

Madison argues that the four challenged statements³ support a defamation claim he is entitled to present to a jury. We consider each statement in turn.

³ We consider defamation claims based on the statements identified in the complaint. *See Benson v. Nw. Airlines, Inc.*, 561 N.W.2d 530, 538 (Minn. App. 1997) (concluding statements not contained in the complaint were “beyond the scope” of the defamation claim), *review denied* (Minn. June 11, 1997). Madison agrees that certain statements he referenced in opposing summary judgment, but did not include in his complaint, are not before us on appeal.

A. “Chief internship”

The report states that Madison “was employed with the city of Motley, Minnesota as the Police Chief internship.” Madison contends that this statement is defamatory because he was, in fact, the Chief of Police for Motley—not an intern. We are not persuaded for two reasons.

First, when viewed in the context of the entire report, it is clear that the reference to an “internship” is a clerical error incapable of conveying a defamatory meaning. See *Jadwin*, 390 N.W.2d at 443 (“The defamatory character of any particular statement must be construed in the context of the . . . whole.”). The words “Police Chief internship” appear at the end of the “Employment” section of the report. The very next section is titled “Internship.” That section states “No internship was asked about or indicated in the background packet.” And the remainder of the report repeatedly refers to Madison’s position as “police chief” or “chief of police.” In context, the isolated reference to Madison being an intern is a mistake that does not undermine the overall accuracy of the report’s description of his employment.

Second, we are not convinced that the word “internship” carries a defamatory meaning. Madison cites no legal authority for the proposition that being an intern harms a person’s reputation in the community. And we are not aware of such authority. See *McKee*, 825 N.W.2d at 732 (stating a jury question exists only if “the words are capable of conveying a defamatory meaning”). The internship reference is not defamatory.

B. “Hand [cases] off at a moments notice”

The report states that Madison would “hand [cases] off at a moments notice” to Morrison County while he was the Motley police chief. Madison contends this is defamatory because he did not “hand off” cases to the county. We are not persuaded this statement is anything other than a non-actionable statement of opinion.

When determining whether a statement expresses a fact or an opinion, we consider “(1) a statement’s precision and specificity; (2) a statement’s verifiability; (3) the social and literary context in which the statement was made; and (4) a statement’s public context.” *Fine v. Bernstein*, 726 N.W.2d 137, 144 (Minn. App. 2007), *review denied* (Minn. Apr. 17 2007).

The reference to handing off criminal cases is contained in the portion of the report where Deputy Dirkes describes his conversations with Morrison County employees who said Madison “lacked the inability to follow through”⁴ with criminal cases and “would hand them off at a moments notice to the county to follow up on.” These statements are not precise or capable of “being proven true or false.” *Hunt*, 465 N.W.2d at 94. First, they do not identify the name, nature, or number of criminal cases Madison “handed off” to the county. Second, whether Madison possessed or lacked the ability to “follow through” on these unspecified criminal cases is vague and cannot be proven wholly true or false. Third, the assertion that he would transfer cases “at a moments notice” is figurative language that expresses an opinion rather than verifiable fact. Moreover, in the overall context of the

⁴ The parties agree, and we assume for purposes of summary judgment, that the phrase “lacked the inability” is meant to and does convey the same meaning as “lacked the ability.”

report, these statements clearly reflect that Morrison County employees felt Madison was too quick to turn over cases to the county's jurisdiction. Because these statements are imprecise and reflect opinion, they are not defamatory.

C. “On the clock”—Sheriff Larsen and Morrison County

The report states that Madison attended the 2014 Morrison County interview “in a city of Motley uniform,” and that “upon investigation by the Sheriff’s Office he was on the clock employed by the city of Motley for that interview.” In his deposition, Deputy Dirkes attributes this statement to Sheriff Larsen. Madison contends this statement is false because his timesheet from that day demonstrates he was not working for the city at the time of his interview. We agree with Madison that this statement is a verifiable statement of fact which can be proven true or false. But we are not persuaded that Sheriff Larsen’s statement supports a defamation claim.⁵

Statements that are otherwise defamatory are not actionable if they are “conditionally privileged and the privilege was not abused.” *Hunt*, 465 N.W.2d at 92. Statements made in connection with employment background investigations are generally subject to conditional privilege. *Id.* This is so “because the public interest is best served by encouraging accurate assessments of an employee’s performance.” *Id.* Accordingly,

⁵ Madison argues that Morrison County and Sheriff Larsen forfeited any conditional privilege because they did not raise the argument in the district court or on appeal. But they asserted the privilege in their answer and the district court concluded that the statements attributed to them are conditionally privileged. Moreover, this court may “affirm a grant of summary judgment if it can be sustained on any grounds.” *Doe v. Archdiocese of St. Paul & Minneapolis*, 817 N.W.2d 150, 163 (Minn. 2012).

we consider whether Sheriff Larsen made his statement “upon a proper occasion, from a proper motive, and based upon reasonable or probable cause.” *Id.*

It is undisputed that Sheriff Larsen made the statement in response to Deputy Dirkes’s request for an employment reference; this is a well-recognized proper occasion. *Id.*; see also *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980) (“In the context of employment recommendations, the courts generally recognize a qualified privilege . . .”). Sheriff Larsen had a proper motive—he was relating what he knew based on his office’s interactions with Madison. And because it is undisputed that Madison was wearing his Motley police uniform during his interview with Morrison County, it was reasonable to conclude that Madison was in the city’s employ. Sheriff Larsen’s “on the clock” statement is thus subject to conditional privilege.

Because the challenged statement is conditionally privileged, Madison must establish that Sheriff Larsen made the statement with malice as defined by the common law. *Hunt*, 465 N.W.2d at 92. Common-law malice means “actual ill will, or intent to causelessly and wantonly injure the plaintiff.” *Id.* (quotation omitted). “Malice may be shown by extrinsic evidence of personal ill will . . .” *Id.* Isolated conduct, such as canceling a meeting or other personal slights do not demonstrate the “personal animosity” required to show ill will. *Id.* at 90-92. And extrinsic evidence of ill will does not exist when the plaintiff does not allege personal animosity. *Id.* at 92; accord *Karnes v. Milo Beauty & Barber Supply Co.*, 441 N.W.2d 565, 568 (Minn. App. 1989) (deciding no extrinsic evidence supported the jury’s finding of actual malice where the plaintiff “did not allege any personal animosity”), review denied (Minn. Aug. 15, 1989). Madison does not

allege that Sheriff Larsen harbored personal animosity toward him. Thus, there is no extrinsic evidence of common-law malice.

Common-law malice may also be shown by “intrinsic evidence,” such as the use of “exaggerated language” within the statement or the extent of the statement’s publication. *Hunt*, 465 N.W.2d at 93. Madison does not point us to any such evidence. While Sheriff Larsen admitted that he did not personally conduct the referenced investigation, failing to investigate an allegation does not conclusively establish malice. See *Chafoulias v. Peterson*, 668 N.W.2d 642, 655 (Minn. 2003) (concluding a “mere failure to investigate” does not establish malice in the context of actual malice and public figures); see also *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 381 (Minn. 1990) (concluding a company’s “failure to investigate” before firing an employee for theft does not “ris[e] to the level of willful indifference” consistent with common-law malice). Sheriff Larsen made a reasonable assumption that a person wearing a full on-duty uniform to an interview was indeed on-duty at the time. He merely relayed this reasonable assumption to Deputy Dirkes as part of an employment investigation. In short, Madison presented no evidence of actual ill will or intent to injure Madison.

But even if Madison established disputed material facts as to malice, his defamation claim fails as a matter of law because he has not demonstrated actual damages. As noted above, parties seeking recovery based on statements that defame their business or profession generally do not need to prove actual damages. *Becker*, 401 N.W.2d at 661. But they must do so if the challenged statements relate to matters of public concern. *Maethner*, 929 N.W.2d at 878-79. Whether a statement is a matter of public concern

depends on the “totality of the circumstances,” including “the content, form, and context of the speech” as well as “what was said, where it was said, and how it was said.” *Id.* at 881 (quotation omitted). Sheriff Larsen is a public employee. He made the “on the clock” statement in that capacity in response to a reference check by another public entity. The challenged statement directly relates to Madison’s prior conduct as a public employee, specifically whether he acted ethically during his Morrison County interview. These undisputed facts convince us that Sheriff Larsen’s statement related to a matter of public concern.

Madison contends that there are genuine fact issues as to his actual damages. He first contends Todd County did not hire him because of the defamatory statement. But Todd County employees testified by deposition that Todd County did not hire Madison because he abruptly ended his employment with Elbow Lake by text on the eve of a busy camping weekend.⁶ And although Crow Wing County did not hire Madison after receiving the report from Deputy Dirkes, Madison did not produce evidence that Sheriff Larsen’s “on the clock” statement contributed to the decision.⁷ And Madison presents no evidence that his ongoing struggle to find employment in the law-enforcement field is in any way

⁶ Madison does not allege that this part of the report is defamatory.

⁷ We acknowledge that Madison presented an affidavit from a Crow Wing County employee to support his claim of actual damages. The district court did not consider the affidavit because Madison submitted it after the summary judgment and other motions had been fully briefed. Accordingly, it is not within the scope of this court’s review. And, to the extent that Madison challenges the district court’s decision not to consider the affidavit, we discern no abuse of discretion on this record. See *Underdahl v. Comm’r of Pub. Safety (In re Comm’r of Pub. Safety)*, 735 N.W.2d 706, 711 (Minn. 2007) (stating we do not disturb a district court’s discovery orders absent a clear abuse of discretion).

directly tied to Sheriff Larsen's alleged statements. In sum, Madison's claim against Sheriff Larsen and Morrison County based on the "on the clock" statement fails as a matter of law because the statement is conditionally privileged, made without common-law malice, and did not cause actual damages.

D. "On the clock" and "unethical use of time"—Deputy Dirkes and Todd County

The final challenged statement is the portion of the report in which Deputy Dirkes quotes Sheriff Larsen and opines that Madison's actions indicated "unethical use to this backgrounder of this candidate's use of time." Madison contends this is defamatory because he did not act unethically during the interview. Todd County and Deputy Dirkes argue that conditional privilege protects both parts of this statement. We agree and further conclude that the reference to "unethical use of time" is a protected opinion.

As we have discussed, to be conditionally privileged, the statement "must be made upon a proper occasion, from a proper motive, and based upon reasonable or probable cause." *Hunt*, 465 N.W.2d at 92. Deputy Dirkes was assigned to investigate and report on Madison's employment background to evaluate his candidacy for a deputy sheriff's position in Todd County. Thus, Deputy Dirkes made his statement on a proper occasion. He testified at his deposition that he prepares his background reports with an eye to relating what he was told by the people he interviewed in light of factors he believes are relevant to the candidate's fitness for the job. This motive for including the "on the clock" statement is proper. And the statement was based upon reasonable cause; Deputy Dirkes reported

what he was told by Sheriff Larsen about Madison’s conduct during his Morrison County interview. As such, the statement is conditionally privileged.⁸

Because the “on the clock” statement attributed to Deputy Dirkes is subject to conditional privilege, Madison must show common-law malice—actual ill will or intent to causelessly and wantonly injure Madison. *See id.* Madison concedes there was no personal animosity between him and Deputy Dirkes, so there is no extrinsic evidence of ill will. Madison instead contends that failure to investigate the statement and exaggerated language in the report constitute intrinsic evidence of common-law malice. But the failure to investigate an allegation is not dispositive on the issue of malice. *Chafoulias*, 668 N.W.2d at 655; *Wirig*, 461 N.W.2d at 381. And when reporting the “on the clock” statement itself, Deputy Dirkes does not use exaggerated language; he merely recites the fact that Madison attended the interview wearing the Motley uniform, and reports that “upon investigation by the Sheriff’s Office” Madison was “on the clock” during the interview. The rote recitation of facts from another source without embellishments or exaggerations does not constitute intrinsic evidence of common-law malice. Absent such evidence, conditional privilege applies to Deputy Dirkes’s “on the clock” statement.

And the second part of Deputy Dirke’s challenged statement—that Madison’s attendance at the interview while on the City of Motley’s payroll constitutes “unethical use

⁸ Madison argues that the report is not protected by conditional privilege because Deputy Dirkes was later disciplined in connection with the report. But the criticism and discipline were based only on Deputy Dirkes’s failure to identify the persons he interviewed in the report. The fact Deputy Dirkes did not follow the internal policy on identifying sources in a background report does not mean he acted with common-law malice when he spoke to the persons he did and reported what they had to say.

to this backgrounder of [Madison's] use of time"—expresses an opinion rather than verifiable fact. A statement is only verifiable if it is capable of "being proven true or false." *Hunt*, 465 N.W.2d at 94. Madison does not explain how "unethical use" of his time can be proven true or false. The statement does not identify any policies, rules, or statutes that define the ethical use of time or demonstrate Madison did not meet such a standard. And by qualifying the assessment "to this backgrounder," Deputy Dirkes clearly signaled that he was expressing his personal opinion that Madison's conduct was unethical. This expression does not support a defamation claim.

II. Madison's claims under the Minnesota Government Data Practices Act fail as a matter of law because he did not produce evidence sufficient to support recovery of emotional damages.

Madison alleges two violations of the Minnesota Government Data Practices Act: (1) Todd County's failure to provide him with the background report within ten days after his request as required by Minn. Stat. § 13.04, subd. 3; and (2) Deputy Dirkes emailing the report to Sheriff Larsen without Madison's authorization as required by Minn. Stat. § 13.05, subd. 4(d). Assuming without deciding that these actions violate the act, Madison is only entitled to relief if he proves damages. Minn. Stat. § 13.08, subd. 1; *accord Adams v. Harpstead*, 947 N.W.2d 838, 842 (Minn. App. 2020), *review denied* (Minn. Oct. 1, 2020).

Madison alleges he has suffered emotional distress as a result of these violations. A person may recover damages for emotional harm arising from data-practices violations, but only if he demonstrates "that emotional injury occurred under circumstances tending to guarantee its genuineness." *Navarre v. S. Washington Cty. Schs.*, 652 N.W.2d 9, 30

(Minn. 2002) (quotation omitted). This heightened standard is based on our supreme court’s historical reluctance “to expand the availability of emotional-distress damages because of concerns regarding liability and the potential for abuse.” *Adams*, 947 N.W.2d at 843 (citing *Navarre*, 652 N.W.2d at 30). For this reason, a plaintiff’s conclusory allegations of emotional distress are not sufficient. Rather, courts look for corroborative evidence such as medical treatment and physical symptoms, or the particular circumstances of the alleged violation. *Navarre*, 652 N.W.2d at 16-18, 30; *Adams*, 947 N.W.2d at 844-45.

The circumstances here are materially different from those in *Navarre*, where the supreme court determined the plaintiff’s allegations of emotional harm were supported by circumstances that guaranteed their genuineness even in the absence of medical evidence. *Navarre*, 652 N.W.2d at 16-18, 30. In *Navarre*, the plaintiff school teacher claimed emotional distress after her private personnel data—namely, complaints made about her job performance from “teachers, students, and parents”—was widely disseminated to parents (via letters) and various media outlets. *Id.* The supreme court determined evidence of this widespread disclosure “was sufficient to allow” the plaintiff’s claim for emotional damages “to be submitted to the jury,” because it reasonably indicated the disclosure did in fact make the plaintiff “extremely upset” and “caused her to be afraid to go out in public.” *Id.* at 30. The record here contains no such corroborative evidence. Madison did not seek treatment for his claimed emotional distress and does not allege physical symptoms, such as loss of sleep. And, unlike in *Navarre*, the two data-practices violations did not involve widespread disclosure to the general public from which resulting emotional distress is reasonably expected. See *Adams*, 947 N.W.2d at 844-45 (contrasting *Navarre*

with limited disclosure “involving only county personnel and the misdelivery of mail to a single fellow client-patient”).

On this record, Madison’s emotional-distress claim does not clear the heightened evidentiary burden set forth in *Navarre* and *Adams*. And because Madison does not claim or present evidence of other damages caused by the data-practices violations, his data-practices claims fail as a matter of law.⁹

Affirmed.

⁹ Because Madison’s underlying defamation claim and data-practices claims fail as a matter of law, we need not consider Madison’s motion to seek punitive or exemplary damages.