

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0709**

Jesse Smith,
Appellant,

vs.

City of Crosby, et al.,
Respondents.

**Filed January 18, 2022
Affirmed
Segal, Chief Judge**

Crow Wing County District Court
File No. 18-CV-19-1566

Patrick T. Tierney, Collins, Buckley, Sauntry & Haugh, PLLP, St. Paul, Minnesota; and

Timothy W. Andrew, Andrew, Bransky & Poole, P.A., Duluth, Minnesota (for appellant)

William J. Everett, Anna L. Yunker, Everett Law, LLC, Buffalo, Minnesota (for respondents)

Considered and decided by Frisch, Presiding Judge; Segal, Chief Judge; and Cleary,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

This appeal arises out of the summary-judgment dismissal of a lawsuit brought by appellant Jesse Smith against the City of Crosby (the city), Kim Coughlin, and Kevin Randolph (collectively respondents). The suit asserts claims against respondents for defamation and against the city for violating the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. §§ 13.01-.90 (2020). Smith argues in this appeal that the district court erred by granting summary judgment on his defamation claim because there is a genuine issue of material fact whether the allegedly defamatory statements were made with actual malice. Smith also asserts that the district court erred by granting summary judgment on his claim for violating the MGDPA because he claims that the evidence shows (1) that he neither authorized the release of private data nor waived his privacy rights; and (2) that the city violated section 13.04, subdivision 4, of the MGDPA by failing to expunge records related to an employment termination that had been overturned in arbitration. We affirm.

FACTS

Smith was employed as a police officer with the Crosby Police Department.¹ In addition to his employment for the city, Smith also worked part-time as a police officer for

¹ Smith had been a sergeant with the department, but in 2012 he was demoted to the position of police officer and was terminated from his employment. The police union grieved the demotion and employment termination. An arbitrator upheld the demotion but overturned the employment termination and Smith was then reinstated as a police officer for the city.

the cities of Cuyuna and Deerwood. Smith was promoted to police chief for Cuyuna in December 2014. Smith received approval from the city for both part-time positions.

In March 2016, respondent Kevin Randolph, who was a lieutenant in the Crosby Police Department, discovered that Smith had used his login credentials from the Cuyuna Police Department while he was on duty for the city. Randolph reported this to respondent Kim Coughlin, the city's police chief. Randolph advised Coughlin that Smith may be doing work for the Cuyuna Police Department while Smith was on duty for the city and could be receiving double pay. In response, Coughlin arranged for a lieutenant with the Cass County Sheriff's Department (the lieutenant) to conduct a criminal investigation into the matter and placed Smith on administrative leave.

In April 2016, the lieutenant prepared a report summarizing the investigation to date. The lieutenant noted several discrepancies in Smith's time sheets. The lieutenant also reported that there were "numerous" times between 2014 through 2016 when Smith performed work for Cuyuna by creating Cuyuna incident case reports while on-the-clock for the city. But the lieutenant stated in the report that he could find "no evidence" that this was done for the purpose of getting double pay. The lieutenant concluded the report stating that "[t]his matter will remain under investigation." Following a meeting with the lieutenant, Coughlin determined that she would not pursue possible criminal charges and instead directed Randolph to conduct an internal-affairs investigation.

In September 2016, Randolph completed his internal-affairs investigation and prepared a 25-page report. The investigation showed that Smith was double-paid by the city and Cuyuna for five and one-half hours. The investigation also revealed that

approximately half of the incident case reports logged by Smith while on duty for the city during the relevant time frame were for Cuyuna, not the city. Smith indicated that he did this work while “on break” from his job with the city. But based on the times of the entries and Smith’s assignment at the time, Randolph concluded that the Cuyuna work did not coincide with Smith’s break times. Randolph believed that Smith’s conduct violated internal policy and union contract provisions. Following the conclusion of Randolph’s investigation, Coughlin sent a letter to the mayor and requested a special meeting of the council to address the matter. In October 2016, the city council met and terminated Smith’s employment.

The police union grieved Smith’s employment termination and the matter proceeded to arbitration. In May 2017, the arbitrator issued an award sustaining the grievance in full (the arbitration decision). The arbitrator determined that the city failed to establish by a preponderance of the evidence that there was just cause to terminate Smith’s employment. The arbitrator was highly critical of the investigation conducted by Randolph and stated that he believed Randolph’s report was “slanted,” “disingenuous[,] and possibly untruthful.” The arbitrator ordered the city to reinstate Smith as a police officer, with back pay. The arbitrator also opined that the city’s actions “did not result in a disciplinary action within the meaning of [the MGDPA],” and ordered the city, “to the extent permitted by law,” to expunge references to Smith’s termination from Smith’s personnel files.

Smith and the union released the full 52-page arbitration decision to the media, and Smith also provided copies to some family members and friends. There was widespread

attention in the local media related to Smith and the arbitration decision, including as many as 75 articles and letters to the editor in the three area newspapers.

In September 2017, Smith applied to become a full-time police officer with the City of Deerwood. As part of the application process, Smith was required to undergo a background check, which was conducted by a sergeant from another police department (the employment background investigator). Smith signed two data-release authorizations, one for the city and one for the Crosby Police Department, authorizing release of private data to the employment background investigator.

In November 2017, the employment background investigator met with Coughlin and Randolph. Randolph told the employment background investigator about the criminal investigation into Smith, the subsequent internal-affairs investigation, the termination of Smith's employment, and the arbitration award ordering Smith's reinstatement. Coughlin and Randolph also told the employment background investigator that they believed that Smith had not fulfilled his obligations as a police officer; he had tipped off a suspect that law enforcement would be executing a search warrant at the suspect's house and business; and Smith was either crooked or corrupt, causing the employment background investigator to write "criminal cop" in his notes from the meeting.² The City of Deerwood nevertheless hired Smith as a full-time police officer in January 2018 and promoted him to sergeant in 2020.

² The investigator, whose sworn statement was relied on by Smith, did not recall if they had used the word "crooked" or "corrupt."

Randolph retired in 2019. During his tenure as a lieutenant, Randolph made monthly appearances on a local radio talk show. In what would be his last appearance in March 2019, Randolph publicly announced his retirement and discussed, among other topics, current challenges faced by law enforcement. Randolph expressed his frustration with arbitration and cited examples from around the country and in Minnesota. He noted in particular a recent decision of the Minnesota Supreme Court where an arbitrator had reversed the employment termination of a police officer. The court affirmed the arbitration award reinstating the officer, noting the limited authority of the courts to reverse arbitration decisions.

The following are excerpts from comments Randolph made that relate to Smith's defamation claim:

Um, when you get into administration, you cannot get rid of your bad cops. I mean, we saw that here locally. We have, you know, we have these situations where these cops are actually committing crimes on duty. We try to fire them and arbitrators give them their jobs back. And now the State Supreme Court has said, "Hey, if that's the arbitrator's decision, then—then we have no reason to overturn it, no matter what the facts are" [O]ver and over these guys get their jobs back. And it—it's making . . . all the good cops get painted as bad because of this. And it's just so—so good cops are leaving.

Who wants to . . . I've seen it in—In every department I've worked in. You can have one bad guy and he just drags the whole group down with him. Uh, drags morale down. Drags performance. And it's—it, you know, it becomes very disheartening. And that's, you know, one of the things that it—it was in the Star Tribune this week. Um, there—you know, because of the [Minnesota] Supreme Court decision, there is now a big movement growing to get . . . the Legislature to start

passing laws to restrict the power of these arbitrators and these crazy decisions that they make.

But if [you are a police officer] paying your union dues to a union that is fighting to keep these bad cops on the job, you're destroying your own future. . . . And I'd be—you know, uh and I mean one of the—the ironies of this situation is—is, as I leave the City here at the end of the month um, I'm—you know, I—I give up a lot of the restrictions that I've had in talking about these cases. And fortunately for me, the one case here, they've uh—they've made very public all the information. So I don't need to worry about the privacy on that. But I intend to make, you know, uh make the case that I have been through and joined in with the other cases and start—start looking at this and saying “Enough is enough. This is ridiculous in—in how this State treats criminal cops.”

I mean, we have people who have committed just heinous crimes. The—you know, the uh, assaulting people on video. Theft. Stealing from the City. You can't—you can't be fired for that. You know, this is—how does this help police work? How does this help society?

Smith initiated his lawsuit in April 2019. The respondents moved for summary judgment, and Smith moved for partial summary judgment on his MGDPA claim. The district court granted respondents' motion and denied Smith's motion. The district court determined that Smith was a public official for First Amendment purposes and failed to bring forward evidence sufficient to create a genuine issue of material fact whether the alleged defamatory statements were made with actual malice. The district court also determined that several of the alleged defamatory statements were not actionable because they were protected by qualified privilege, constituted statements of opinion, not fact,³ or

³ We note that Smith did not appeal the dismissal of the statements that the district court found to be statements of opinion.

were too vague. On Smith’s claim for violating the MGDPA, the district court determined that none of the complained-of statements violated the MGDPA; Smith “waived his privacy rights under the MGDPA by making the 52-page arbitration decision available to the public”; and “the [c]ity properly retained the private personnel data of Smith,” despite the arbitrator’s order “that it be expunged ‘to the extent permitted by law.’” Smith now appeals.

DECISION

On appeal from the grant of summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013). “We view the evidence in the light most favorable to the party against whom summary judgment was granted.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). A genuine issue of material fact exists when there is sufficient evidence that could lead a rational trier of fact to find for the nonmoving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

Smith challenges both the dismissal of his defamation and MGDPA claims. We address each challenge below.

I. Defamation Claim

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), *rev. denied* (Minn. Oct. 16, 2001).

True statements are not defamatory. *McKee v. Laurion*, 825 N.W.2d 725, 730 (Minn. 2013) (explaining that “[t]he plaintiff has the burden of proving falsity in order to establish a successful defamation claim”). Statements that are “substantially true,” or “supportable interpretations of ambiguous underlying situations,” are also not defamatory. *Hunter v. Hartman*, 545 N.W.2d 699, 707 (Minn. App. 1996) (quotation omitted), *rev. denied* (Minn. June 19, 1996). And statements, even if untrue, may be protected by a qualified privilege if made upon a “proper occasion,” with “proper motive,” and are based on “reasonable or probable cause.” *Hunt v. Univ. of Minn.*, 465 N.W.2d 88, 92 (Minn. App. 1991). In such cases, to overcome the qualified privilege, the party seeking relief must show that an alleged defamatory statement was made with common-law malice. *Id.*

In his challenge to the dismissal of his claim for defamation, Smith argues that the district court erred in determining that there was no genuine issue of material fact whether the alleged defamatory statements were published with actual malice. When the alleged

defamatory statements concern a “public official,” as the district court determined was the case here, the First Amendment requires that the plaintiff prove, with “convincing clarity,” that the statements were made with “actual malice.”⁴ *Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 56 (Minn. App. 1995), *rev. denied* (Minn. July 27, 1995); *see also Connelly v. Nw. Publ’ns, Inc.*, 448 N.W.2d 901, 903 (Minn. App. 1989), *rev. denied* (Minn. Feb. 21, 1990). “Actual malice” for First Amendment purposes is defined as “knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not.” *Connelly*, 448 N.W.2d at 903 (quoting *New York Times*, 376 U.S. at 279-80). Mere “[e]rrors in judgment do not establish actual malice; nor does failure to investigate.” *Elstrom*, 533 N.W.2d at 56.

“[W]hen the factual question concerns actual malice the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.” *Connelly*, 448 N.W.2d at 903 (quotation omitted). “Whether the evidence can support a jury finding of actual malice is a question of law,” subject to de novo review. *Elstrom*, 533 N.W.2d at 56; *see also Ruiz*, 829 N.W.2d at 56.

Smith’s defamation claim is based on two sets of statements. The first set involves statements allegedly made in 2017 by Coughlin and Randolph to the employment

⁴ Smith uses the term “constitutional malice.” In Minnesota, the term “actual malice” is used to refer to the “constitutional malice” standard that was first articulated in *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). *See Jadwin v. Minneapolis Star & Trib. Co.*, 367 N.W.2d 476, 482 n.7 (Minn. 1985) (using “the term actual malice . . . to refer to the ‘constitutional malice’ standard developed in *New York Times*”).

background investigator. This set includes alleged defamatory statements that Smith (1) had not fulfilled his police officer responsibilities properly because he was doing work for the Cuyuna Police Department when he was on duty for the city; (2) had warned a criminal suspect that a search warrant was going to be issued; and (3) was either a “crooked” or “corrupt” cop. The second set includes statements made by Randolph in his final radio show appearance in March 2019 to the effect that “cops are actually committing crimes on duty” and that “[y]ou can have one bad guy and he just drags the whole group down with him.”

In granting summary judgment, the district court determined that Smith failed to provide evidence sufficient to create a genuine issue of material fact that the alleged statements were made with actual malice. The court also determined that the statements made to the employment background investigator were not actionable because they were protected by qualified privilege and that the March 2019 radio show comments were too general and “veiled” to make it clear that they referred to Smith.

Smith raises several arguments in an effort to show error by the district court. First, Smith argues that the findings in the arbitration decision provide sufficient evidence of actual malice to withstand summary judgment. Smith claims that the arbitration decision established that Smith engaged in no criminal conduct and that respondents are collaterally estopped from relitigating that question. The district court rejected Smith’s collateral estoppel argument, as do we.

The arbitrator’s findings and conclusions are not binding in this action. Collateral estoppel applies only when the issue is identical to an issue in a prior adjudication, there

was a final judgment on the merits, the estopped party was a party to the prior adjudication, and the estopped party was given a full and fair opportunity to be heard on the issue. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004). Here, the arbitration decision focused on whether just cause existed for discharge under the labor contract between the union and the city. No such issue is involved in this suit. In addition, neither Coughlin nor Randolph were parties to the arbitration proceeding. The district court thus correctly rejected the collateral-estoppel claim.

Smith next argues that he submitted evidence showing that Coughlin and Randolph knew the alleged defamatory statements were false and that this created a genuine issue of material fact on the issue of actual malice. Turning first to the allegation that Smith was performing work for two departments while being paid by the city, Smith claims that this “was fully investigated by [the lieutenant from] Cass County with a finding of no criminal activity.” He maintains that this provides evidence that Coughlin and Smith made the statements knowing they were false. We are not persuaded.

First, the lieutenant’s report did not state that there was “no criminal activity.” The report, in fact, stated that there were “numerous” instances of Smith performing work for Cuyuna—logging Cuyuna incident case reports—while being paid by the city. The report notes that the lieutenant could not find evidence based on the investigation to date that Smith had an intent to obtain double pay. But the report ends by stating that the matter will remain under investigation, with no conclusion about whether there was or was not “criminal activity.” In addition, Randolph’s investigation found that Smith was double paid for at least five and one-half hours, which was not disputed by Smith.

Respondents also provided undisputed evidence showing that half of the incident case reports entered by Smith during his Crosby shifts were for Cuyuna, not Crosby, and that Smith's logging of Cuyuna incident case reports did not coincide with Smith's break-times from his work for the city. Respondents thus had evidence showing that Smith was performing work for Cuyuna while being paid to perform work for the city.⁵ We thus conclude that Smith failed to present sufficient evidence regarding the dual-work statements to establish a genuine issue of material fact under the heightened "clear and convincing" standard of proof that applies to actual malice.

Turning to the alleged defamatory statement that Smith had warned a suspect about a search warrant, Smith asserts that "[t]here was no credible evidence to support Randolph's claim" and that "Randolph fabricated [the] story." The claim relates to a search warrant that was executed in early March 2017. Randolph stated that he met with city officers about two weeks earlier to discuss the search-warrant plan. When the search warrant was executed, the officers found an empty safe and found bank bags with cash in the suspect's car and on his dining room table. While the amount of cash found was about \$40,000, it was less than law enforcement expected to find. This created the suspicion that someone had tipped off the suspect about the search warrant.

⁵ We also note that, during the relevant time frame, Smith was working as the part-time police chief for Cuyuna. The incident case reports Smith logged into the Cuyuna database while on duty for the city were for calls that were responded to by law-enforcement agencies other than Cuyuna officers. Randolph stated that they believed Smith was doing this to inflate Cuyuna's statistics. Smith claimed he logged the incident case reports so that Cuyuna officers would be kept up-to-speed on what was happening in their jurisdiction. Regardless of motive, it remains that Smith admittedly performed work for the benefit of Cuyuna while being paid to do work for the city.

An internal-affairs investigation was started and phone records were collected. The phone records showed that, on the evening when Randolph held the search-warrant meeting with officers, the suspect called Smith (Smith was on duty for Deerwood at the time), Smith returned the call, and a few minutes later someone using a Deerwood police department phone called one of the officers who had attended Randolph's search-warrant meeting. The phone records also showed that the suspect and Smith spoke by phone three times the next evening and that none of the officers who attended the search-warrant meeting had any phone contact with the suspect between the date of the meeting and the execution of the search warrant.

Smith maintains that Randolph never held a meeting about the search warrant and that the phone records are thus meaningless. But Smith provided no admissible evidence in support of this assertion. Unsupported allegations are not sufficient to demonstrate the existence of a genuine issue of material fact. See *Harvet v. Unity Med. Ctr., Inc.*, 428 N.W.2d 574, 579 (Minn. App. 1988) (stating that claims "of malice . . . based on conjecture and speculation . . . are insufficient to create a jury question"). We therefore affirm the district court's conclusion that Smith failed to create a genuine issue of material fact that the statements about the "tip-off" were made by Coughlin and Randolph knowing their falsity.

We next address the alleged statement that Smith was a "crooked" or "corrupt" cop. This presents a closer question. But based on the evidence outlined above, we conclude that Smith has failed to satisfy his burden to demonstrate a genuine issue of material fact that Coughlin and Randolph made the statement knowing its falsity. As noted earlier, the

standard of proof for actual malice is not just a preponderance of the evidence, but proof by clear and convincing evidence. *Connelly*, 448 N.W.2d at 903.

Smith cites *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989), as support for reversal. *Harte-Hanks* is, however, distinguishable. The case involved a claim of libel based on a front-page newspaper article. The article contained quotes from a woman who asserted that the libel victim, Connaughton, “had used ‘dirty tricks’” and had offered “her and her sister jobs and a trip to Florida ‘in appreciation’ for their help” in bringing about an investigation of bribery involving a court administrator. *Harte-Hanks*, 491 U.S. at 660. Connaughton was a candidate for judge and his opponent was the incumbent judge who supervised the court administrator. *Id.*

A jury found for Connaughton and the newspaper appealed claiming there was not sufficient evidence of actual malice. *Id.* at 661. The newspaper asserted that they had recorded interviews with the woman, and had also interviewed Connaughton and five others who were present when the alleged statements were made to the woman and her sister by Connaughton. *Id.* at 670-72, 682-83. The Supreme Court, however, rejected the newspaper’s arguments and upheld the jury verdict based on the conclusion that the newspaper must have entertained serious doubts about the truth of the woman’s story. *Id.* at 689-93.

The Court found persuasive that, of the seven other people present when the alleged statements were made, the six who were interviewed by the newspaper steadfastly denied the woman’s account. *Id.* at 682-83. And the newspaper never even tried to interview the seventh person—the woman’s sister—who was also present when the alleged statements

were made and would be the most knowledgeable and logical source to corroborate or contradict the woman's claims. *Id.* The facts relied on by the Court in reaching its conclusion included that: (1) the newspaper failed to even try to interview the sister; (2) all other witnesses denied the woman's story; (3) the newspaper advised the woman that they would run the story when she first met with them, before any independent investigation by the paper; and (4) the newspaper endorsed the incumbent in the judicial election while the paper's main competitor endorsed Connaughton. *Id.* at 681-84.

Here, the evidence supporting Coughlin and Randolph's statements includes computer entry and payroll records of Smith and phone records for Smith and the officers who attended Randolph's meeting on the search warrant. While Smith contests the inferences drawn from those records, he does not dispute the accuracy of the records. Thus, there is a concrete distinction between the nature of the evidence supporting Coughlin and Randolph's statements and the evidence relied on by the newspaper in *Harte-Hanks*. We therefore affirm the district court's grant of summary judgment concerning the "tip-off" allegation.

We note that the district court also determined that the allegations were protected by qualified privilege. As noted above, qualified privilege applies to communications that are "made upon a proper occasion, from a proper motive, and . . . based upon reasonable or probable cause." *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 256-57 (Minn. 1980). We need not address this issue, however, having concluded that Smith has failed to show the existence of a genuine issue of material fact on the question of actual malice regarding the first set of allegations.

Turning to the second set of allegations, the statements made by Randolph in his final radio show appearance in March 2019, these statements are equally subject to summary judgment for lack of sufficient evidence to create a genuine issue of material fact under the heightened standard of proof required to demonstrate actual malice. The alleged defamatory statements in the second set of allegations include comments by Randolph such as: “these cops are actually committing crimes on duty”; and “I’ve seen it in . . . every department I’ve worked in. You can have one bad guy and he just drags the whole group down with him.” To the extent that the comments Randolph made in the radio show can even be said to relate to Smith, they are of the same nature as the comments in the first set and are subject to summary judgment based on the same reasoning.

Moreover, we agree with the district court that, in addition to the lack of evidence of actual malice, these statements are too general and too veiled to be actionable on a claim for defamation. In the 36 pages of the transcript of Randolph’s comments, Randolph covered several topics, including his frustration with the arbitration process because it allowed “bad cops” to remain in their jobs. The comments about the arbitration process were, however, focused on a recent state supreme court opinion that had been in the news where an arbitrator had reinstated a terminated officer: “the State Supreme Court has said, ‘Hey, if that’s the Arbitrator’s decision, then . . . we have no reason to overturn it.’” While Randolph referred in his comments to “the one case here,” Smith’s name was never mentioned, and no details were provided. By contrast, as noted by the district court, Randolph provided significant detail concerning cases that had occurred elsewhere. In

addition, the radio show appearance was also almost two years after the 2017 arbitration award, making any of the fleeting references to the “one case here,” less obvious.

We thus discern no error by the district court in granting summary judgment on Smith’s claim for defamation.

II. MGDPA Claim

Smith challenges the district court’s grant of summary judgment on his MGDPA claim, arguing that the district court erred in concluding that he had authorized the disclosure of data relating to the alleged grounds for his 2016 employment termination and had waived his privacy rights by releasing the arbitration decision to the media. He also contends that the city violated the MGDPA by failing to expunge personnel records related to his employment termination as ordered in the arbitration decision.

The MGDPA “regulates the collection, creation, storage, maintenance, dissemination, and access to government data in government entities.” Minn. Stat. § 13.01. Under the MGDPA, data about disciplinary action that is reversed through an arbitration process is private personnel data that may not be publicly released by the employer without permission of the subject of the data, a court order, or other statutory authorization. Minn. Stat. §§ 13.03, subd. 6, .04, subd. 3, .43, subd. 2(b).

Smith claims the city disclosed private data in violation of the MGDPA at least four times. These include statements Randolph made in his 2019 radio show, the disclosures by Coughlin and Randolph to the employment background investigator, and statements made in two letters to the editor in local newspapers. In one of the letters to the editor, an attorney for the city wrote that she had advised the city that it had to follow the MGDPA

and that the only way it could “respond to the false claims, character assassinations, or the lies being printed about them in the paper” would be for the “affected employee(s)” to sign a waiver of their privacy rights and that she “sincerely doubt[s] such a waiver would be forthcoming.” The second letter to the editor was from a city council member who similarly stated that the city could not respond unless the employee signed a waiver, and that respondents had “nothing to hide” and “did not lie.”

Addressing first the alleged disclosure of private data to the employment background investigator, the district court correctly concluded that Smith expressly authorized the release of private data to the investigator. Smith signed not just one, but two authorizations. The first, addressed to the city, states that Smith authorizes “to be released . . . private data, as defined by [the MGDPA], . . . collected by you as a result of my contacts and associations with you and/or your agents and representatives.” The authorization then states that it applies to a variety of data, including “any information pertinent to a position with the Deerwood Police Department.” The second authorization is addressed to the Crosby Police Department and again authorizes the release of private data as defined in the MGDPA, including “all data, which has been collected, created, received, retained or disseminated in whatever form, which in any way relates to my dealings with [the department].” The authorizations are clear and comprehensive and dispense with Smith’s MGDPA claims related to the disclosure of private data to the employment background investigator.

As for Randolph’s 2019 radio-show comments and the two letters to the editor, it is not clear that the alleged disclosures contained private data because of the veiled nature of

the comments. But even if they contained private data, Smith's claim was properly dismissed on summary judgment because he failed to bring forward adequate evidence of damages to withstand a motion for summary judgment. Proof of damages is a requisite element of a claim seeking compensatory relief for a violation of the MGDPA. Minn. Stat. § 13.08, subd. 1; *accord Adams v. Harpstead*, 947 N.W.2d 838, 842 (Minn. App. 2020), *rev. denied* (Minn. Sept. 29, 2020).

Smith argues that he satisfied this requirement because he claims the alleged disclosures caused him emotional harm, humiliation, and damaged his reputation. 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 Cnty. 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 enough to withstand a motion for summary judgment. Rather, to survive summary judgment, plaintiffs must present additional evidence to support their emotional distress claim. *Navarre*, 652 N.W.2d at 16-18, 30; *Adams*, 947 N.W.2d at 844-45.

Here, Smith's claim that he suffered emotional distress is supported by only conclusory allegations; he failed to present any corroborating evidence. And, despite Smith's claim that his reputation was harmed by the release of his private data, he was still

hired by the Deerwood Police Department. In addition, the circumstances surrounding the alleged violation include the fact that Smith himself released the 52-page arbitration decision to the media. Thus, the same information that Smith claims caused him emotional distress was already in the public sphere, by his own actions, and received wide media attention. While we agree with Smith that he did not waive his privacy rights under the MGDPA by releasing the arbitration decision, we conclude that his claim for unlawful disclosure is nevertheless subject to summary judgment because he failed to establish a genuine issue of material fact on damages.

Smith's final claim is that the city violated the MGDPA by failing to expunge all records related to his employment termination as ordered in the arbitration decision. Smith is correct that Minn. Stat. § 13.04, subd. 4, allows an individual to "contest the accuracy or completeness of public or private data" and that "[d]ata on individuals that have been successfully challenged by an individual must be completed, corrected, or destroyed by a government entity without regard to the requirements of section 138.17." But Smith did not contest the accuracy of the data under the requisite procedure set out in section 13.04, subdivision 4, of the MGDPA.

The procedure in Minn. Stat. § 13.04, subd. 4, among other steps, includes an administrative appeal to the state commissioner of administration. *See* Minn. R. 1205.1600 (2021); Minn. Stat. §§ 13.04, subd. 4, 14.62 (2020). If efforts to resolve the claim do not succeed at this stage, the next step is a contested-case hearing under the Minnesota Administrative Procedure Act. Minn. Stat. § 13.04, subd. 4. An adverse decision from that process can only be reviewed by a certiorari appeal in this court. Smith failed to follow

this procedure and, instead, pursued his claim under the MGDPA in district court. Because an accuracy-and-completeness challenge does not belong in district court, Smith's claim for violating Minn. Stat. §13.04 was properly dismissed on summary judgment.

Affirmed.