IN THE COURT OF APPEALS OF IOWA

No. 0-234 / 09-0600
Filed June 16, 2010

MICHELE DILLON,
Plaintiff-Appellant,

vs.

MELINDA RUPERTO and
AIMEE FOX,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Plaintiff, Michele Dillon, appeals from the district court ruling granting summary judgment in favor of the defendants. **AFFIRMED.**

Theodore F. Sporer of Sporer & Flanagan, P.C., Des Moines, for appellant.

Frank Harty and Debra L. Hulett of Nyemaster, Goode, West, Hansell & O'Brien Law Firm, Des Moines for appellee Melinda Ruperto.

Hugh J. Cain and Michelle R. Rodemyer of Hopkins & Huebner, P.C., for appellee Aimee Fox.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

SACKETT, C.J.

Plaintiff, Michele Dillon, appeals from the district court ruling granting summary judgment in favor of the defendants, Melinda Ruperto and Aimee Fox. She contends, (1) the court erred in denying her motion to extend the deadline for discovery, and (2) genuine issues of material fact preclude summary judgment on her claims of improper interference with a prospective contract and defamation. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS. Viewed in a light most favorable to the plaintiff, Dillon, the record reveals the following facts. Dillon was employed by MidAmerican Energy from June of 1983 until she was terminated on August 21, 2006. At the time of her termination, Dillon and the defendants, Ruperto and Fox, worked in the unregulated gas trading division. This division helps commercial and industrial customers purchase natural gas on a daily basis. Some customers receive volumes based on estimates made by MidAmerican Energy and some place actual orders for natural gas. The orders and estimates are updated on a spreadsheet and program. The division must keep the spreadsheet and program balanced. Dillon and Fox worked as schedulers and Ruperto was a supervisor.

On Friday, August 18, 2006, Dillon was scheduling orders for customers. She discovered that a co-worker had made an error that left the spreadsheet and program unbalanced. Dillon made adjustments to the spreadsheet and program to correct the problem. According to Dillon, other co-workers had corrected similar problems in the past in this fashion and she had not been trained how to

handle this specific error. Dillon's supervisor, defendant Ruperto, learned of the error and Dillon's correction purportedly through Fox. Dillon was called into Ruperto's office that afternoon for a performance review relating to the incident. Dillon explained what happened and Ruperto conducted an investigation.

The following Monday, on August 21, 2006, Dillon was called in to Ruperto's office. Ruperto and a human resources representative informed Dillon her employment with MidAmerican Energy was terminated. They read a letter to her which stated in part,

> This letter is to advise you that your employment with MidAmerican Company is terminated effective immediately due to your cover-up of a co-worker's error and your failure to be truthful during the investigation.
>
> On Friday, August 18, it was discovered that a co-worker did not enter a corrected gas nomination volume for Nestle Purina (Ralston) for gas day August 21st, which caused the customer to be short 29 MMBtu. Subsequently, you shorted the Interstate Power retail customer group 29 MMBtu for gas day August 21st to make up Ralston's short position and cover your co-worker's error. You also changed the trader's transaction to reduce the pass through to retail by 29 MMBtu. During the hearing on Friday, August 18, you explained that schedulers make the decision to short the MEC retail groups if additional gas was needed. However, it is the trader's responsibility to decide if we are going short (or long) in any of our gas groups. You performed work that you were not authorized to do in order to cover up a co-worker's error. In addition, your explanation during the hearing was false and misleading.

On October 22, 2007, Dillon filed a petition at law against Ruperto, alleging improper interference with an employment contract and defamation. On April, 30, 2008, Dillon filed a motion to amend her petition to include her co-worker, Fox, as a defendant. The motion was granted on June 27, 2008. On September 19, 2008, Dillon filed a motion to extend the deadline for service of

process upon Fox. The extension was granted and Fox was served on October 23, 2008. Fox filed a motion to dismiss on November 11, 2008. On December 23, 2008, Dillon filed a motion to extend the deadline for discovery and both Ruperto and Fox resisted the motion and filed motions for summary judgment. Dillon filed a motion to continue trial on January 23, 2009. The motions for summary judgment came on for hearing on February 11, 2009. At the hearing, the court denied the motion to extend the deadline for discovery. In a ruling filed February 17, 2009, the court granted the motions for summary judgment in favor of Ruperto and Fox. Dillon appeals contending, (1) the court abused its discretion in not extending the discovery deadline, and (2) genuine issues of material fact preclude summary judgment on her improper interference with a prospective contract and defamation claims. We affirm.

II. DISCOVERY DEADLINE. Upon a showing of good cause, a scheduling order setting a discovery deadline may be modified. Iowa R. Civ. P. 1.602(2)(*c*). A court has broad discretion in ruling on a motion to extend a discovery deadline. *See Olson v. Nieman's, Ltd.*, 579 N.W.2d 299, 305 (Iowa 1998); *Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 891 (Iowa 1981) ("Discovery matters are committed to the sound discretion of the trial court, and are reviewable only upon an abuse of that discretion."). If the court exercises its discretion on clearly untenable grounds or to an unreasonable extent, we will find an abuse of discretion. *Everly v. Knoxville Cmty. Sch. Dist.*, 774 N.W.2d 488, 492 (Iowa 2009); *Bindel v. Larrington*, 543 N.W.2d 912, 914 (Iowa Ct. App. 1995).

Pursuant to Iowa Rule of Civil Procedure 1.602(2), the court entered a scheduling order providing, among other things, a discovery deadline of December 9, 2008. Dillon's motion to extend this deadline, filed December 23, 2008, explained that an extension was needed because "Defendant Fox has not filed an Answer with the Court due to the pending Motion to Dismiss. As such, Plaintiff has not had the opportunity to conduct proper discovery on Defendant Fox prior to December 9, 2008." In her motion to continue trial, filed on January 23, 2009, Dillon stated that Fox had not filed an answer to the petition but Dillon did serve interrogatories and a request for production of documents on Fox on January 19, 2009, and Fox responded that she would not reply to discovery requests absent an order from the court. At the hearing on the motion for summary judgment, the court denied the request. It noted that Fox could have been added as a party and served sooner. It explained that Dillon was aware of Fox's involvement early on and Fox could have been deposed even before she was added as a defendant. Dillon contends Fox's immediate filing of the motion to dismiss effectively delayed discovery because if the motion was granted, Dillon's discovery efforts would be moot.

Ruperto and Fox argue Dillon has not preserved error on this issue. They contend that if Dillon required additional discovery to respond to the motions for summary judgment, she was required to file an affidavit requesting further discovery and a continuance under Iowa Rule of Civil Procedure 1.981(6). This rule provides that a court may order a continuance or additional discovery when

a party opposing a motion for summary judgment supplies an affidavit explaining why it cannot supply facts to resist the motion. *See* Iowa R. Civ. P. 1.981(6).

"After a summary judgment motion has been filed, it is important under our current rule that a rule [1.981(6)] affidavit be filed if additional discovery is required." *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 303 (Iowa 1996). A party resisting summary judgment should have the opportunity to conduct discovery prior to the hearing and ruling. *Id.* at 302. Nevertheless, failure to file an affidavit required by rule 1.981(6) provides the court sufficient grounds to reject a request for further discovery. *Id.*

We find no abuse of discretion in the court's decision to deny further discovery. Ruperto and Fox correctly point out that Dillon did not file an affidavit explaining why additional discovery was needed. Even if an affidavit was provided, denial of the request was still within the court's discretion. The events surrounding the issues transpired long before the summary judgment hearing and were adequately fleshed out in the filings prior to the hearing. Dillon did have an adequate opportunity to conduct discovery and the district court did not abuse its discretion in so finding. *See id.* at 302 (finding no abuse of discretion in denying a continuance to conduct further discovery in a defamation case based on events that occurred nearly three years before the petition was filed and there was a full opportunity to conduct discovery prior to the summary judgment hearing).

III. SUMMARY JUDGMENT SCOPE OF REVIEW. Our review of a ruling on a motion for summary judgment is for correction of errors at law. *Cemen*

Tech, Inc. v. Three D Indus., L.L.C., 753 N.W.2d 1, 5 (Iowa 2008). A court should grant the motion if the pleadings, discovery responses, admissions, and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). We review the evidence in a light favorable to the nonmoving party. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007). "'To obtain a grant of summary judgment on some issue in an action, the moving party must affirmatively establish the existence of undisputed facts entitling that party to a particular result under controlling law.'" *Hallett Const. Co. v. Meister*, 713 N.W.2d 225, 229 (Iowa 2006) (quoting *Interstate Power Co. v. Ins. Co. of N. Am.*, 603 N.W.2d 751, 756 (Iowa 1999)). The nonmoving party cannot rely on allegations or speculations to resist the motion but must assert specific facts showing a genuine issue of material fact. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95-96 (Iowa 2005).

A. IMPROPER INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS. Dillon's petitions alleged Ruperto and Fox were liable for interfering with her prospective employment contract with MidAmerican Energy. It is undisputed that Dillon's employment was terminable at will and not subject to a contract. It is therefore appropriate, as acknowledged by the district court, to analyze Dillon's claim as alleging improper interference with prospective business relations rather than interference with a contract. *See Compiano v. Hawkeye Bank & Trust of Des Moines*, 588 N.W.2d 462, 464 (Iowa 1999) ("We have previously held that contracts terminable at will are more properly protected

as a prospective business advantage rather than as a contract."). The tort can occur when a defendant induces a third party to not enter into a prospective business relationship or prevents the relationship from continuing. *Tredrea v. Anesthesia & Analgesia, P.C.*, 584 N.W.2d 276, 287 (Iowa 1998). Dillon contends Ruperto and Fox intentionally interfered to prevent her from continuing her employment relationship with MidAmerican Energy.

Tortious interference with prospective business relations consists of five elements:

> (1) The plaintiff had a prospective business relationship.
> (2) The defendants knew of the relationship.
> (3) The defendants intentionally and improperly interfered with the relationship.
> (4) As a result of the interference, the business relationship failed to materialize.
> (5) The amount of damages caused by the interference.

Iowa Coal Mining Co., Inc. v. Monroe County, 555 N.W.2d 418, 438 (Iowa 1996); *Willey v. Riley*, 541 N.W.2d 521, 527 (Iowa 1995); *Nesler v. Fisher & Co.*, 452 N.W.2d 191, 198-99 (Iowa 1990). The third element, "improper interference," requires proof that the defendant's sole motive was to financially injure or destroy the plaintiff. *Iowa Coal Mining Co., Inc.*, 555 N.W.2d at 438; *Fischer v. UNIPAC Serv. Corp.*, 519 N.W.2d 793, 800 (Iowa 1994); *Burke v. Hawkeye Nat'l Life Ins. Co.*, 474 N.W.2d 110, 114 (Iowa 1991). "Conduct is generally not considered improper if it is fair and reasonable under the circumstances and done for a legitimate business purpose." *Holdsworth v. Nissly*, 520 N.W.2d 332, 336 (Iowa Ct. App. 1994). In determining whether a person's conduct is improper, we consider a number of factors, including:

> (a) the nature of the actor's conduct,
> (b) the actor's motive,
> (c) the interests of the other with which the actor's conduct interferes,
> (d) the interests sought to be advanced by the actor,
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
> (f) the proximity or remoteness of the actor's conduct to the interference, and
> (g) the relations between the parties.

Hunter v. Bd. of Trustees, 481 N.W.2d 510, 518 (Iowa 1992) (citing Restatement (Second) of Torts § 767, at 26-27 (1979)).

The district court granted the motions for summary judgment finding that Dillon could not establish that Ruperto or Fox intentionally and improperly interfered with Dillon's prospective employment. It determined that Ruperto and Fox, as agents of MidAmerican Energy acting pursuant to company policy and within the scope of their employment, had a "qualified privilege" to interfere with Dillon's prospective employment. Since they had a legitimate business purpose for their conduct, their interference was not for the sole purpose of injuring or financially destroying Dillon, and was not improper.

Dillon argues that the interference was improper because Ruperto's and Fox's actions were malicious and wanton. She contends Ruperto, as supervisor, developed a policy where schedulers, such as Dillon and Fox, were to report their co-workers' errors. Dillon refused to follow the policy, believing it created negative working relationships and a "back-stabbing" work environment. She also argues that Ruperto wanted a "hand-picked" staff, and she was set up to fail because she was not "hand-picked" by Ruperto. She contends Fox conspired with Ruperto to implement this plan out of her own personal dislike for Dillon.

Dillon argues that when an agent's conduct is malicious and wanton, it exceeds the scope of qualified privilege and the agent can be liable for tortiously interfering with one's prospective employment. Agents of a corporation, due to their fiduciary relationship and financial interests, have a qualified privilege to interfere with business relations between the corporation and a third party. *Bossuyt v. Osage Farmers Nat'l Bank*, 360 N.W.2d 769, 778 (Iowa 1985).

> "Officers, directors, agents or employees who have an interest in the activities of a corporation or the duty to advise or direct such activities should be immune from liability for inducing the corporation to breach its contract, assuming their actions are in pursuit of such interests or duties. Public policy demands that so long as these parties act in good faith and for the best interests of their corporation, they should not be deterred by the danger of personal liability."

Id. at 779 (quoting Alfred Avins, *Liability For Inducing a Corporation to Breach its Contract* 43 Cornell L. Q. 55, 65 (1957)). The scope of this privilege can be exceeded when the agent interferes for personal gain or for another improper purpose. *See Grimm v. U.S. W. Commc'ns, Inc.*, 644 N.W.2d 8, 12-13 (Iowa 2002) (finding plaintiff's allegations that supervisor discriminated against her and sought to have her terminated due to plaintiff's sexual orientation were sufficient to survive a motion to dismiss on a claim of interference with an employment contract because the conduct, if true, exceeded the scope of the supervisor's qualified privilege); *Jones v. Lake Park Ctr., Inc.*, 569 N.W.2d 369, 376 (Iowa 1997) ("An officer or director may be held personally liable if the officer or director fails to act in good faith to protect the interests of the corporation."); *Hunter*, 481 N.W.2d at 518 (noting that under the circumstances, a jury could find a supervisor exceeded the scope of his qualified privilege when facts indicated

supervisor and employee were competitors, employee was terminated in violation of his employment contract, and the supervisor admitted to terminating the employee without considering the employee's work performance); *Bossuyt*, 360 N.W.2d at 779 (affirming a directed verdict in favor of the agent but noting it would be a different case if the agent had acted out of personal gain or not in his employer's interest).

We agree that *Grimm*, 644 N.W.2d at 13, *Jones*, 569 N.W.2d at 376, and *Hunter*, 481 N.W.2d at 518, recognize that a supervisor may be held liable for tortious interference with employment relations when their conduct exceeds the scope of the qualified privilege. However, in each of those cases, the supervisor's conduct was against public policy or did not comport with the employer's policy. *See Grimm*, 644 N.W.2d at 11-12 (finding that the plaintiff's allegations that the supervisor subjected her to a hostile work environment due to her sexual orientation, if true, would show that the supervisor was acting outside the scope of the supervisor's agency and the qualified privilege), *Jones*, 569 N.W.2d at 377 (noting that terminating an employee for refusing to do an illegal act is a violation of public policy); *Hunter*, 481 N.W.2d at 518 (stating that the supervisor's actions, some of which contravened company policy, were "sufficient to support a finding by the trier of fact that [the supervisor's] discharge of Hunter was not insulated from liability by the qualified privilege"). "If an officer or director intends to promote the best interests of the corporation, he or she acts in good faith and is protected from personal liability by the qualified privilege." *Jones*, 569 N.W.2d at 377.

The uncontroverted facts show that both Ruperto and Fox acted in accordance with an established policy of reporting and investigating scheduling errors. Ruperto's affidavit shows that she implemented this policy because inaccurate scheduling resulted in fines to the company. To save MidAmerican money, Ruperto instituted a system of quick reporting, investigating, and resolution of errors. Even if we assume that the policy produced inhospitable work relations, we cannot doubt that the system was designed to protect MidAmerican's financial interests. Even if Ruperto and Fox took pleasure in Dillon's termination, they still had a duty through their employment to report and investigate the incident, and Ruperto acted within her role as supervisor in recommending Dillon's termination.

When a defendant has a right or duty to act under the circumstances, we cannot deem the interference improper. *Fischer*, 519 N.W.2d at 800. In a claim of intentional interference with prospective contractual relations, a defendant does not act improperly when she provides truthful or honest information in response to a request for advice from the prospective contractor. *See* Restatement (Second) of Torts § 772, at 50 (1979). In such a situation, "it is immaterial that the actor also profits by the advice or that [s]he dislikes the third person and takes pleasure in the harm caused to h[er] by the advice." *Id.* at cmt. c, at 50-51. Here, a reporting policy was in place and Ruperto and Fox provided truthful information to MidAmerican according to the policy. Although Dillon dislikes how Ruperto and Fox characterize the facts, Dillon agrees with the underlying details of the incident and agrees she did not follow the policy.

We therefore find there is no genuine issue of material fact precluding summary judgment on Dillon's claim of intentional interference with prospective contractual relations. As a matter of law, Ruperto and Fox acted within the scope of their employment and were protected by qualified privilege. Their interference cannot be considered improper.

B. DEFAMATION. Dillon also contends there is a genuine issue of material fact precluding summary judgment on her claim of defamation against Ruperto and Fox. Defamation takes the form of libel or slander when untrue written or oral statements are published and injure a person's good name and reputation. *Barreca v. Nikolas*, 683 N.W.2d 111, 116 (Iowa 2004); *Kennedy v. Zimmermann*, 601 N.W.2d 61, 64 (Iowa 1999). Libel involves publication of written statements. *Delaney v. Int'l Union UAW Local No. 94 of John Deere Mfg. Co.*, 675 N.W.2d 832, 839 (Iowa 2004). "To establish a prima facie case of libel, the plaintiff must show the defendant '(1) published a statement that (2) was defamatory (3) of and concerning the plaintiff, and (4) resulted in injury to the plaintiff.'" *Kiesau v. Bantz*, 686 N.W.2d 164, 175 (Iowa 2004) (quoting *Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996)).

Dillon claimed the defamatory statements were made in her termination letter. The district court found Dillon's defamation claim failed because the statements in the letter were substantially true or pure opinion and therefore were protected. It also determined that Dillon could not prove the defamatory statements were published. To prevail on a defamation claim, a plaintiff must prove the statements were "published," or communicated to a third person or

persons. *Belcher v. Little*, 315 N.W.2d 734, 737 (Iowa 1982). The general rule is that publication does not include communication of the statement to the one defamed, unless the person defamed is strongly compelled to repeat the statements to others. *Id.* at 738. An employer has a limited privilege allowing it to publish statements when done within the scope of employment. *Theisen v. Covenant Med. Ctr., Inc.*, 636 N.W.2d 74, 83-84 (Iowa 2001).

> A communication is covered by a conditional or qualified privilege when it is made in good faith on any subject matter in which the [person communicating] has an interest, or with reference to which he or she has a duty to perform, and to another person having a corresponding interest or duty.

50 Am.Jur.2d *Libel and Slander* § 258, at 600 (2006); *Theisen*, 636 N.W.2d at 83-84. The privilege is lost when the statements are published excessively, repeated to persons with no legitimate interest in the matter, or if the speaker acts with malice. *Theisen*, 636 N.W.2d at 84.

Dillon claims she only informed her husband of the letter and does not claim she was strongly compelled to do so. She contends there is a fact question regarding whether Ruperto and Fox made the statements with actual malice. To defeat the qualified privilege and establish actual malice, "a plaintiff must prove the defendant acted with knowing or reckless disregard of the truth of the statement." *Barreca*, 683 N.W.2d at 121. If the statements were made in furtherance of the truth, it matters little if the statements were made with ill will or personal animus. *See id.* at 122-23.

We agree that Dillon's defamation claim fails because Ruperto and Fox were protected by a qualified privilege in publishing the statements. There is no

proof that Ruperto or Fox showed the letter to anyone other than the MidAmerican human resource representatives involved in the investigation and termination of Dillon. There is no evidence to dispute the truthfulness of the statements of the letter and the parties agree that an investigation was made prior to Dillon's termination. Dillon cannot establish that the statements were published with actual malice and accordingly we affirm on this issue.

IV. CONCLUSION. We affirm the district court ruling granting Ruperto and Fox's motions for summary judgment. The district court did not abuse its discretion in failing to grant Dillon an extension to conduct further discovery. As a matter of law, Dillon cannot establish her claims of interference with prospective business relations or defamation.

AFFIRMED.