STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0659

Norwood Baybridge,
Appellant,

vs.

City of Ortonville, et al.,
Respondents.

Filed April 7, 2009
Affirmed
Crippen, Judge[*]

Big Stone County District Court
File No. 06-CV-07-36

Ronald R. Frauenshuh, Jr., 129 Northwest Second Street, Ortonville, MN 56278 (for appellant)

Julie Fleming-Wolfe, 1922 Grand Avenue, St. Paul, MN 55105 (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Crippen, Judge.

U N P U B L I S H E D O P I N I O N

CRIPPEN, Judge

The district court granted summary judgment dismissing appellant Norwood Baybridge's claims relating to his employment with the Ortonville Ambulance Service,

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

principally a whistleblower claim against his employer and defamation claims against individual defendants. Although the record shows appellant's reasons for believing that his actions have been variously criticized, we affirm because he has not shown that good reasons for the loss of his job were pretextual, and his defamation claims are defeated by immunity defenses.

FACTS

On July 6, 2006, a nurse on an ambulance transfer with appellant found him to be inattentive to his duties. Appellant, an emergency medical technician (EMT), failed to log the patient's vital signs, made personal phone calls, and, at one point, appeared to be taking a nap. The nurse, Carlin Keimig, reported the incident to superiors. Another EMT on the transfer, Rusty Dimberg, made a similar report to the director of the Ortonville Ambulance Service, Tom Scoblic. Scoblic discussed the incident with the ambulance board at its next meeting, and then asked Keimig to make a written report.

Ambulance board member James Hasslen was present at the board meeting. The board members all agreed that appellant's behavior constituted a gross violation of patient-care protocols. In the following months, additional complaints about appellant were documented. Dimberg documented several incidents, including one in which appellant did not act with sufficient diligence with a distressed patient. Another EMT described additional incidents, including one that prompted a patient's family member to inquire about appellant by asking, "Who was that jerk?" Scoblic wrote his own letter describing appellant's tendency to misuse the ambulance's siren to the point of irritating patients. The ambulance service's medical director wrote a letter articulating a fear that

the service might have difficulty staffing shifts because of the number of staff members who preferred not to work with appellant.

Scoblic also took other steps to follow up on the July 6 incident. He consulted with the city attorney, city council, and the city's consultant for human-resource issues. He sent a report to the Minnesota Emergency Medical Services Regulatory Board. With other members of the ambulance board, he sought to amend the EMT protocols to explicitly state that sleeping during a patient transfer is grounds for discipline.

Appellant, meanwhile, had been in Maryland from late July through early October on an unrelated job assignment. When he returned, Scoblic confronted him and offered him the opportunity to resign, but did not terminate his employment.[1] Appellant did not resign. In November 2006, the city council approved a discipline plan drafted by Scoblic, and Scoblic again met with appellant. Appellant refused to sign the plan or acknowledge the complaints about him. He did not sign up for any ambulance shifts in December for personal reasons and declined to sign up for any shifts in January 2007 for legal reasons.

Appellant filed the present suit in January 2007, alleging in part that actions taken by Scoblic were retaliation against appellant because of his dispute with a separate employer, The Eahtonka LLC. In July, appellant had done some start-up work for The Eahtonka, a private venture planning to operate a pontoon boat. Appellant disputed

[1] Steps taken by Scoblic and the board were the subject of a claim by appellant under the Veterans Preference Act. An administrative law judge concluded that appellant's employment was not terminated, constructively or otherwise; that decision was affirmed by this court. *Baybridge v. City of Ortonville*, No. A07-0574, 2008 WL 2573268 (Minn. App. July 1, 2008).

payment for some of his services—and raised questions about legal requirements for the boat—in a conversation with the mayor of Ortonville, an investor in the enterprise. Appellant terminated his relationship with The Eahtonka shortly thereafter, and at some point he communicated the alleged illegalities to the Department of Natural Resources and the Coast Guard.

After appellant had dissociated from The Eahtonka, he also had a tiff with another of its interested parties regarding her attempt to retrieve a password he had created for the boat's web site. That party was the mother of ambulance board member Hasslen, who was angered when he learned of the issue and wrote appellant an e-mail promising to dissociate with appellant both personally and professionally if appellant did not alter his behavior. Appellant ultimately surmised, based on the content of the e-mail, that the steps taken against him by Scoblic and the ambulance board had been incited by Hasslen, in retaliation for appellant having reported illegalities associated with the pontoon boat.

The instant action is based on allegations that the city wrongfully terminated appellant's employment because he reported problems with the pontoon boat and that Hasslen, Scoblic, and Keimig had libeled, slandered, and defamed him. The district court dismissed all claims on defendants' motion for summary judgment.

D E C I S I O N

On appeal from summary judgment, we review de novo for errors of law and for the existence of fact issues on which summary judgment should not have been granted. *STAR Ctrs., Inc. v. Faegre & Benson, LLP*, 644 N.W.2d 72, 76-77 (Minn. 2002). We

view the evidence in the light most favorable to the party against whom summary judgment was granted. *Id.*

Initially, in any sense that appellant's complaint sought relief under the Veteran's Preference Act, the district court correctly ruled that the act provides an administrative hearing and certiorari review as the exclusive source of relief, and that the district court did not have jurisdiction. *See Dietz v. Dodge County*, 487 N.W.2d 237, 239-40 (Minn. 1992) (holding that district court properly dismissed wrongful-termination claim based on plaintiff's failure to obtain certiorari review). Appellant pursued and exhausted that remedy. *Baybridge*, 2008 WL 2573268, at *2.

Thus, to the extent that appellant's claims or damages rely on constructive termination by the ambulance board, he is precluded from re-litigating this fact issue because it has already been determined in his administrative hearing under the Veteran's Preference Act. *See Graham v. Special Sch. Dist. No. 1*, 472 N.W.2d 114, 118-19 (Minn. 1991) (concluding, based on adequacy of school board's termination proceeding, that collateral estoppel applied to fact findings in subsequent defamation action). This outcome is not altered by appellant's right to a jury in the present action. *Id.*; *see also Abraham v. County of Hennepin*, 639 N.W.2d 342, 355 n.18 (Minn. 2002) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 335, 99 S. Ct. 645, 653 (1979), for proposition that re-litigation may be barred in subsequent actions despite presence of jury right).

Turning to appellant's claim under the Whistleblower Act, the district court correctly determined that appellant has not adduced proof sufficient to make out the

elements of his claim. A plaintiff establishes a whistleblower claim by showing "(1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two." *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983); *see also* Minn. Stat. § 181.932 (2008) (prohibiting retaliatory discharge). But the plaintiff's burden does not end there: if the employer rebuts the proof of these elements with a legitimate reason for the employment action, the burden falls again on the employee to show that the proffered reason was merely a pretext. *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001) (adopting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-07, 93 S. Ct. 1817, 1824-25, (1973)), *review denied* (Minn. May 15, 2001).

Evidence otherwise adequate to establish the employee's case may be insufficient to prove pretext. *Hubbard*, 330 N.W.2d at 445-46; *see also Logan v. Liberty Healthcare Corp.*, 416 F.3d 877, 881 (8th Cir. 2005) (noting that, upon rebuttal, plaintiff's prima facie evidence of pretext must be viewed in light of employer's justification). To survive summary judgment, the plaintiff must provide evidence sufficient for a fact-finder to conclude that the employer's reason was merely pretext for retaliation. *See Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 545-47 (Minn. 2001) (establishing, in the context of an employment discrimination claim, the employee's summary judgment burden at the pretext stage of *McDonnell Douglas*).

Assuming that steps taken by decision-makers in the ambulance service constituted adverse employment action, appellant needed to produce evidence that the stated reasons for those steps were mere pretext for the real reason, that is, retaliation for

appellant's reports about the pontoon boat. The record indicates that the only person in the ambulance service who knew about appellant's purported whistleblowing was Hasslen. Hasslen's e-mail to appellant says that he planned to dissociate with appellant, and it mentions the fact that appellant "slandered . . . Eahtonka." But the anger Hasslen expresses in the e-mail is not based on whistleblowing; it clearly stems from appellant's tiff with Hasslen's mother, an incident that had nothing to do with appellant's reports of illegalities.[2]

Even if the e-mail could raise a fact question on causal connection as an element of retaliation, the record shows legitimate, work-related reasons for disciplinary action against appellant as an EMT. Appellant has not provided any evidence that exposes these reasons as pretext. He provides nothing capable of establishing that complaints against him were solicited by Hasslen, or that any other members of the ambulance service even knew he had reported illegalities with the pontoon boat. At most, appellant avows that Scoblic told him Hasslen was the board member pushing to charge appellant with patient neglect, based on the July 6 incident. But even taking this as true, it does not detract from the legitimacy of the employer's action based on appellant's job performance.

Also, appellant's attempt to expose the board's discipline plan as pretext fails because he has not offered any evidence that the complaints against him were in any way false. *See Hoover*, 632 N.W.2d at 546 (explaining that judgment as matter of law is appropriate under *McDonnell Douglas* "if the plaintiff created only a weak issue of fact

[2] Appellant was at a loss to connect Hasslen's ire with appellant's reports about The Eahtonka, saying: "What he's referring to, you'll have to ask him."

as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no [retaliation] had occurred"). Appellant testified under oath at his deposition that he has no independent recollection of the July 6 transfer, where he was said to be neglecting the patient in various ways.[3] He has not offered any evidence that the other complaints about his performance are untrue. When asked what proof he has that Hasslen was soliciting complaints, appellant averred, circularly, that the mere existence of the complaints "shows as a fact that somebody, and I believe it to be James Hasslen, was saying things about me in order to have people write letters." Such assertions, on their own, do not justify giving the question of pretext to a jury.

Lastly, appellant's defamation and related claims are barred either by absolute immunity or a qualified privilege. Absolute immunity bars a defamation suit where doing so serves the public interest by allowing government officials freely to address matters pertinent to the performance of their assigned duties. *Carradine v. State*, 511 N.W.2d 733, 735-36 (Minn. 1994). In *Carradine*, the supreme court held that a state trooper's statements in an arrest report were immune because such statements are part of the trooper's job, provide useful information for his superiors and other officials, and play an important part in achieving a fair trial. *Id.* at 736. In addition, the court relied on the fact that allowing civil suits could deter officers from "fearlessly and vigorously

[3] As for the allegation of napping, appellant says it is false, contrived, malicious, or even "silly." He suggests that Keimig cannot prove that he napped. And he said that he "would never" do so. But he does not remember that day and has not said that he did not sleep.

preparing a detailed, accurate report." *Id.* With respect to Hasslen and Scoblic, all aspects of the *Carradine* rationale apply to protect statements they made as members of the ambulance service board. Discussing EMT performance is part of the board's job; it assists other decision-makers within the city; and it helps to serve the ultimate public end, which is effective emergency medical care. Most important, a board member might be deterred from raising patient-care issues if being sued was a possibility. As in *Carradine*, frankness and thoroughness better serve everyone's interests. Hasslen's and Scoblic's statements about appellant's performance are immune from his defamation, libel, and slander claims.

Keimig, meanwhile, who was not a member of the ambulance board, is protected by a qualified privilege. Such privilege applies if she can show she made the allegedly defamatory statements "in good faith . . . upon a proper occasion, with a proper motive, and . . . upon reasonable or probable cause." *Bol v. Cole*, 561 N.W.2d 143, 150 (Minn. 1997). The record shows that Keimig reported her observations only to relevant parties, and that she considered it part of her job to do so. She reported them promptly, and only reduced them to writing when asked to do so by relevant authorities. She directly observed the reported actions, and the reports were, therefore, supported by probable cause. And appellant has not offered evidence of malice sufficient to defeat Keimig's claim of privilege. *See Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 328 (Minn. 2000) (stating that plaintiff can defeat privilege by showing actual malice). His argumentative assertions that Keimig did not like him are not supported by competent

evidence in the record. Indeed, his own sworn testimony avows that they had always enjoyed a problem-free professional relationship.

Affirmed.