

STATE OF MICHIGAN
COURT OF APPEALS

DEBRA AMARO,

Plaintiff-Appellant,

v

MERCY HOSPITAL,

Defendant-Appellee.

UNPUBLISHED

June 28, 2002

No. 229941

Wayne Circuit Court

LC No. 98-835739-CZ

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders granting summary disposition in favor of defendant regarding plaintiff's claims of defamation and wrongful discharge. We affirm.

I

Plaintiff began her employment with defendant in September 1991 as a registered nurse in the obstetrics unit. In 1993, plaintiff was transferred to the Family Care Clinic operated by defendant. Plaintiff was discharged in August 1998, allegedly for failing to follow defendant's follow-up policies on patients who had abnormal pap smear tests. Michele Rea, plaintiff's supervisor, investigated plaintiff's self-created policies and actual conduct in contacting patients and ultimately determined that plaintiff's conduct was "a clear situation of gross negligence." Plaintiff claims that this statement defamed her and that she was wrongfully discharged in violation of defendant's progressive discipline procedure. The trial court granted summary disposition in favor of defendant in two separate orders, and plaintiff appeals.

II

Plaintiff first argues that the trial court erred in dismissing her defamation claim. Defendant's motion for summary disposition was brought pursuant to both MCR 2.116(C)(8) and (10). At the conclusion of the motion hearing, the trial court specifically stated that it was granting the motion to dismiss the defamation claim pursuant to MCL 2.116(C)(8). The trial court's decision regarding a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 817 NW2d (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmoving party. *Id.* The motion may be granted

only where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.* Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Maiden, supra* at 119-120.

The elements of a claim of defamation are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statements irrespective of special harm, or the existence of special harm caused by the publication. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 325; 583 NW2d 725 (1998). These elements must be specifically pleaded, including the allegations with respect to the defamatory words, the connection between the plaintiff and the defamatory words, and the publication of the alleged defamatory words. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 77; 480 NW2d 297 (1991). An employer has a qualified privilege to defame an employee by making statements to other employees whose duties interest them in the subject matter. *Patillo v Equitable Life Assurance Society of the United States*, 199 Mich App 450, 454; 502 NW2d 696 (1993). A plaintiff may overcome this qualified privilege only by showing that the statement was made with actual malice, that is, with knowledge of its falsity or reckless disregard of the truth. *Gonyea, supra* at 79.

The trial court specifically ruled that plaintiff's amended complaint failed to sufficiently plead actual malice and that the statement was not actionable because it was a subjective statement of opinion. The specific allegations in plaintiff's amended complaint are:

10. In or about August, 1998, Plaintiff's supervisor Michele Rea, told Defendant's Employee Relations Specialist, Mary Twiggs, and Defendant's Administrator, Darlinda Van-Buren, that Plaintiff was grossly negligent in the performance of her duties as a Nurse.

11. Ms. Rea made the statement that Plaintiff was grossly negligent without first investigating facts which were readily available. Specifically, Ms. Rea failed to question Plaintiff's predecessor Jan Abbott to determine whether Plaintiff's job performance could reasonably be regarded as grossly negligent. Ms. Rea also failed to question Plaintiff's previous supervisors and the doctors with whom Plaintiff worked before stating that Plaintiff had been grossly negligent in the performance of her job duties. In this regard, Ms. Rea's statements that Plaintiff was grossly negligent were made in reckless disregard for the truth.

12. As a consequence of the statements made by Ms. Rea, Ms. Twiggs and Ms. Van Buren concurred in Ms. Rea's decision to suspend and then to terminate Plaintiff's employment.

13. Plaintiff repeated the statements that were made by Ms. Rea to the Doctors and Nurses with whom she had worked to obtain their advise and support in connection with a grievance that she planned to and did in fact file and it was foreseeable that Plaintiff would self publish the defamatory statements made by Ms. Rea.

14. The statements made by Ms. Rea which were published by Ms. Rea to Ms. Twiggs and Ms. Van-Buren and which were repeated by and Plaintiff were false and defamatory per se and those statements caused injury to Plaintiff's reputation as a Nurse. The statements made by Ms. Rea also caused Plaintiff to suffer emotional distress.

Plaintiff's paragraph 11 is not sufficient as a matter of law to allege actual malice. As the United States Supreme Court has held, the failure to investigate before publishing the allegedly defamatory statement, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. *Harte-Hanks, Inc v Connaughton*, 491 US 657, 688; 109 S Ct 2678; 105 L Ed 2d 562 (1989); see also, *Faxon v Michigan Republican State Central Comm*, 244 Mich App 468, 476; 624 NW2d 509 (2001). This is because actual malice requires proof that the defendant actually had a high degree of awareness of probable falsity or that the defendant entertained serious doubts regarding the truth of the publication. *Harte-Hanks, supra* at 667. Plaintiff has not alleged any facts showing that Rea had a high degree of awareness of probably falsity or that she entertained serious doubts regarding the truth of the statement.

Therefore, the trial court did not err in determining that plaintiff's amended complaint failed to sufficiently plead actual malice and summary disposition regarding plaintiff's defamation claim was proper.¹

III

Plaintiff next argues that the trial court erred in dismissing her wrongful discharge claim. She contends that the disciplinary policies and procedures in defendant's employee handbook instilled a legitimate expectation of just-cause employment. Specifically, plaintiff argues that the trial court erred in finding that a jury could not have reasonably found from the language of the handbook a just-cause employment relationship.

The trial court granted the motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint. *Maiden, supra* at 120. In deciding a motion under (C)(10), the court considers the pleadings, affidavits, admissions, depositions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* If the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

¹ Plaintiff dedicates a considerable portion of her appellate brief arguing that the trial court erred in finding that Rea's statement was a protected statement of opinion, pursuant to the decision in *Ireland v Edwards*, 230 Mich App 607; 584 NW2d 631 (1998). According to *Ireland*, where a statement, although factual and provable as false, could not be interpreted by a reasonable listener or reader as stating actual facts about the plaintiff, the statement is protected by the First Amendment. *Id.* at 617. Here, the statement that plaintiff was grossly negligent in her duties as a nurse may be interpreted as stating actual facts about plaintiff, and was, therefore, not protected by the First Amendment. In this regard, the trial court erred in finding that the statement was a statement of opinion. However, this issue is not dispositive, because plaintiff failed to sufficiently plead the requisite actual malice to overcome the qualified privilege that protected the statement from a claim of defamation.

Employment relationships are presumptively terminable at the will of either party. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 163; 579 NW2d 906 (1998).

However, the presumption of employment at will can be rebutted so that contractual obligations and limitations are imposed on an employer's right to terminate employment. . . . The presumption of employment at will is overcome with proof of either a contract provision for a definite term of employment, or one that forbids discharge absent just cause. . . . Courts have recognized the following three ways by which a plaintiff can prove such contractual terms: (1) proof of "a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause"; (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a contractual provision, implied at law, where an employer's policies and procedures instill a "legitimate expectation" of job security in the employee. [*Id.* at 164.]

In evaluating a legitimate-expectations claim, the first step is to decide what the employer has promised and the second step is to determine whether that promise is reasonably capable of instilling a legitimate expectation of just-cause employment. *Id.* at 165.

Plaintiff began her employment with defendant in September 1991 and signed an "Employee Handbook Acknowledgement Form" on October 7, 1991. When she applied for employment, the employment application specifically stated that her employment would be for no specific term and that it may be terminated by defendant or the employee at any time. The employment process section in the handbook specifically states that all employment with defendant is considered terminable by either the employee or defendant. Plaintiff contended in the trial court that the progressive discipline section created a legitimate expectation of just-cause employment. The progressive discipline section states that corrective discipline is intended to be constructive, with a focus on improvement; however, the option to discharge is reserved. Three steps of progressive discharge are listed: (1) oral warning; (2) written warning; and (3) suspension. Again, however, the handbook provides for discharge when an occurrence is serious enough to warrant it.

Plaintiff was discharged without progressive discipline for gross negligence. The handbook lists several items constituting examples of serious or major acts of misconduct that could result in suspension without pay or immediate discharge. "Any act of gross negligence" is listed as constituting serious misconduct. Consequently, the terms of the handbook provide that progressive discipline does not apply to gross negligence. There is simply nothing in the handbook that creates a legitimate expectation of just-cause employment on plaintiff's behalf. See *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 386-388; 563 NW2d 23 (1997).

Accordingly, the trial court did not err in granting summary disposition in favor of defendant under MCR 2.116(C)(10) regarding plaintiff's wrongful discharge claim for the reasons set forth by the trial court in its well-analyzed opinion of November 12, 1999.²

² We note at this juncture that defendant argues in its counter-statement of jurisdiction that this
(continued...)

IV

Lastly, plaintiff argues that the trial court abused its discretion when it sua sponte ordered plaintiff to compensate defendant for any additional discovery that may be undertaken as a result of the new allegations in plaintiff's first amended complaint. On appeal, plaintiff merely asserts that the trial court abused its discretion because such relief was not requested and the trial court did not set forth its reason for awarding such relief. Beyond this assertion, plaintiff does not analyze her claim or provide any facts or supporting law. Plaintiff may not merely announce her position and leave it to this Court to determine and rationalize the basis for her claim. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998). Moreover, contrary to plaintiff's claim, the trial court did state on the record that it believed that the amended complaint would cause additional expenses because the new claim would require deposing another witness. The trial court also noted MCR 2.118(A)(3), which permits the court to condition an order allowing the amendment of the complaint by ordering the amending party to reimburse the adverse party for the additional expense, including attorney fees.

The trial court did not abuse its discretion in granting the motion to amend the complaint with the condition that plaintiff pay all costs and attorney fees related to any additional discovery undertaken as result of the new allegations.

Affirmed.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly

(...continued)

Court lacks jurisdiction to consider plaintiff's appeal from any order other than the September 11, 2000, final order entered by the trial court that dismissed plaintiff's defamation claim. The wrongful discharge claim was dismissed in a prior order entered on November 12, 1999, and the order granting plaintiff's motion to file an amended complaint conditioned on the payment of costs and attorney fees was entered on June 21, 2000. Contrary to defendant's argument, we have jurisdiction to address the issues relating to any prior order in this case entered before the final order of September 11, 2000. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992) ("Where a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other orders in the case.").