

*This opinion is nonprecedential except as provided by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
A21-1130**

Shanon Renee Harper, DNP, NP,
Appellant,

vs.

Dr. Jennifer Tessmer-Tuck, et al.,
Respondents.

**Filed May 2, 2022
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CV-19-21376

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Considered and decided by Ross, Presiding Judge; Worke, Judge; and Larkin,
Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges the district court's grant of summary judgment in favor of respondents, arguing that the district court erroneously dismissed her claims of (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) defamation,

(4) violation of the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C.A. §§ 11101-11152, and (5) vicarious liability. We affirm.

FACTS

Appellant Shanon Renee Harper, DNP, NP worked as a nurse practitioner for respondent North Memorial Health Care d/b/a North Memorial Health (North Memorial). Respondents Dr. Jennifer Tessmer-Tuck, Dr. Jonathan Gipson, and Melissa Thorson were also employees at North Memorial during Harper's employment. In March 2019, Harper informed North Memorial that she would be seeking employment elsewhere and submitted a notice of resignation, scheduled to begin on June 3, 2019.

On June 2, Harper participated as part of a care team in a procedure described as a "donation after circulatory death." A patient undergoing this procedure is "very near death," and "a good candidate for organ donation." During this procedure, the care team provides "comfort care," which includes "medication to manage symptoms of distress during the dying process."

Harper's role during the procedure was to "work in managing and dosing medications intended for comfort care." Harper placed the patient on a "continuous drip" which contained pain medication and a sedative.

During a shift change, a physician replaced Harper. Harper "performed a brief hand-off with the arriving physician" regarding the patient's care. The patient did not pass away and was returned to "full care[]" status. The patient was then transferred to another hospital.

North Memorial quickly learned of concerns regarding the procedure and initiated an investigation into whether Harper's actions conformed to the minimum standards of acceptable and prevailing practice in the management and dosing of medications.

On June 5, Tessmer-Tuck, Vice President of Medical Affairs at North Memorial, called Harper to conduct a peer review to evaluate the processes employed during the procedure. On June 7, a second telephone call took place among Harper, Tessmer-Tuck, and Thorson, North Memorial's Director of Patient Care, to review Harper's role during the procedure. On June 24, North Memorial notified Harper that an investigation into her role had been completed and that it had determined that her practice did not conform to the standards acceptable in the management and dosing of medications.

In July 2019, Tessmer-Tuck submitted a report to the Minnesota Board of Nursing (the board) stating that Harper failed to provide a thorough hand-off to the relieving physician, administered excessive medications, and failed to conform to standardized and accepted practice for the procedure and for comfort care. North Memorial submitted a similar report to the National Practitioner Data Bank (NPDB).¹

On July 9, 2020, the board informed Harper that it "decided disciplinary action by the [b]oard [was] not warranted in [the] matter." On February 4, 2021, the NPDB informed

¹ The NPDB is a federal repository of reports containing information on medical-malpractice payments and certain adverse actions related to health-care practitioners, providers, and suppliers.

Harper that North Memorial's report was voided "because it did not meet NPDB reporting requirements."

In January 2020, Harper initiated this lawsuit against respondents. Harper's second amended complaint claimed that the individual respondents breached their contract, including the covenant of good faith and fair dealing, made defamatory statements, and violated the HCQIA, and that North Memorial was vicariously liable. The parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of respondents. This appeal followed.

DECISION

Summary judgment

On appeal from summary judgment, appellate courts must determine "whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). We review both questions de novo, viewing "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).

Breach of contract

Harper argues that North Memorial breached their contract with her by failing to notify her of its investigation because she could not invoke any safeguards provided under the employment agreement and North Memorial's bylaws.

“A breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of the contract.” *Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014). A plaintiff’s breach-of-contract claim must show the following: “(1) formation of a contract, (2) performance by plaintiff of any conditions precedent to [her] right to demand performance by the defendant, and (3) breach of the contract by [the] defendant.” *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 833 (Minn. 2011). Whether statements made by an employer constitute a contract is a question of law to be reviewed de novo by the appellate courts. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 740 (Minn. 2000).

1. Employment agreement

The district court determined that Harper “has no contractual protections against the investigation,” nor did she have any “contractual protections against [North Memorial] reporting its findings.” Also, the district court determined that a valid contract existed between North Memorial and Harper, but that North Memorial did not breach the contract by investigating Harper’s role in the procedure or by its, the subsequent reporting of that investigation.

The parties agree that a contractual relationship existed between North Memorial and Harper. Harper argues that North Memorial breached their contract when it conducted an interview about her role in the procedure on June 5, 2019, and then subsequently submitted reports of its investigation.

In 2018, Harper signed an employment agreement which provided that “[i]n consideration, for signing an employment agreement with a non-compete clause, we agree

to pay you a two thousand dollar (\$2,000) signing bonus.” The employment agreement, amongst other provisions, detailed Harper’s terms of employment, duties and supervision, professional standards, and termination.

Harper failed to present evidence suggesting that North Memorial breached the employment agreement. Therefore, the district court did not err by dismissing Harper’s breach-of-contract claim based on her employment agreement.

2. Bylaws

Harper argues that North Memorial breached a contract by violating its bylaws, and that those bylaws include the following policies: (i) credentialing and discipline (credentialing policy), (ii) fair hearing, and (iii) peer review. North Memorial’s bylaws apply to each professional staff member, and subjects professional staff members to an inquiry or investigation following the report of concern involving that staff member’s conduct.

“[A]n employee handbook may constitute terms of an employment contract if (1) the terms are definite in form; (2) the terms are communicated to the employee; (3) the offer is accepted by the employee; and (4) consideration is given.” *Feges v. Perkins Rests., Inc.*, 483 N.W.2d 701, 707 (Minn. 1992). “[I]ndividual portions of an employee handbook may create contractual rights even if other portions of the handbook do not.” *Hall v. City of Plainview*, 954 N.W.2d 254, 261 (Minn. 2021). In *Campbell v. St. Mary’s Hosp.*, the supreme court implied that a hospital’s bylaws created contractual rights between a physician and the hospital. 252 N.W.2d 581, 587 (Minn. 1977) (stating that “under the

bylaws plaintiff was afforded a full measure of his contractual due process rights at every stage of the proceedings to revoke his surgical privileges”).

The district court determined that the credentialing policy and the fair-hearing policy were attachments to the bylaws, but the peer-review policy was not because it was incorporated into the employment agreement’s terms. We consider each individually.

(i) *Credentialing policy*

The credentialing policy was adopted by North Memorial’s medical staff “pursuant to the authority set forth in the [m]edical [s]taff [b]ylaws and is made a part of the [m]edical [s]taff [b]ylaws.” The credentialing policy applies to North Memorial’s “professional staff.” “Nurse practitioners” are considered “professional staff.”

A concern regarding a professional staff member’s clinical competence, care or treatment of patients, case management, ethical violations, adverse conduct affecting patient care that is believed to be “below professional standards of practice,” or detrimental to proper patient care could trigger an investigation. Here, North Memorial initiated an investigation into Harper’s care and treatment of a patient during the procedure because of reported concerns. The investigation did not violate the credentialing policy.

(ii) *Fair hearing*

Harper argues that the district court erred in determining that she was not entitled to a hearing under the fair-hearing policy. The district court determined that the “right to a [f]air [h]earing never attached.” The district court noted that “Harper never requested a fair hearing,” and that a right to a fair hearing did “not apply unless there has been a disciplinary action.”

Under North Memorial’s fair-hearing policy, employees are entitled to request a hearing after one of the following recommendations are made:

- (i) [d]enial of initial appointment to the [m]edical [s]taff;
- (ii) [d]enial of reappointment to the medical staff;
- (iii) [r]evocation of appointment to the medical staff;
- (iv) [d]enial of requested clinical privileges;
- (v) [r]evocation of clinical privileges;
- (vi) [s]uspension of clinical privileges for more than 30 days; or
- (vii) [m]andatory concurring consultation requirement (i.e., the consultant must approve the course of treatment in advance).

“No recommendations except those enumerated . . . shall entitle the individual to request a hearing.”

Here, the fair-hearing procedure was not triggered because none of the enumerated “recommendations” occurred; therefore, Harper was not entitled to request a hearing. The district court correctly concluded that Harper’s right to a fair hearing did not apply because no disciplinary action was taken. Thus, no breach of contract occurred.

(iii) Peer-review policy

North Memorial’s peer-review policy was created “to promote consistent monitoring and evaluation of the quality of care provided by the medical staff of North Memorial.” Any “review, and actions taken, by the Medical Executive Committee . . . shall take place as set forth in the . . . [b]ylaws and [c]redentialing . . . policy.” In the event a peer review results in discipline or corrective actions, North Memorial handles those actions in accordance with the bylaws, credentialing policy, and fair hearing policy.

The district court determined that Harper “failed to present a triable issue of breach.” The district court noted that North Memorial’s bylaws expressly state “that all professional staff members can be subject to investigation. Hence, [North Memorial]’s decision to investigate does not constitute breach.” We agree.

Good faith and fair dealing

Harper argues that the district court erred by determining that she had not presented a triable fact on the issue of bad faith or bad motive. Harper alleges that the reports submitted to the NPDB and the board were “false and nonreportable.” The record does not support these allegations.

A valid contract contains an implied covenant of good faith and fair dealing, which requires that “one party not unjustifiably hinder the other party’s performance of the contract.” *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995) (quotation omitted). But that covenant “does not extend to actions beyond the scope of the underlying contract.” *Id.* at 503.

We agree with the district court’s determination that the reports did not violate the implied covenant of good faith and fair dealing because Harper presented no evidence that the reports were submitted with “bad faith or bad motive.”

Turning next to the submission of the reports, we consider each individually.

1. The board

Under Minn. Stat. § 148.263, subd. 1 (2020), “[a] person who has knowledge of any conduct constituting grounds for discipline . . . may report the alleged violation to the board.” “Any person, health care facility, business, or organization is immune from civil

liability or criminal prosecution for submitting in good faith a report to the board”
Minn. Stat. § 148.264, subd. 1 (2020).

Here, Tessmer-Tuck submitted a report to the board regarding the investigation conducted into Harper’s role during the procedure. Tessmer-Tuck’s report informed the board that based on its investigation, North Memorial “concluded that . . . Harper failed to conform to the minimum standards of acceptable and prevailing practice in management and dosing of medications intended for comfort care for a patient.” Tessmer-Tuck informed the board that North Memorial’s conclusions were based on its findings that during the procedure Harper failed to provide a thorough hand-off to the relieving physician and that Harper administered and managed excessive doses of medications. North Memorial’s investigation included an evaluation of similarly situated North Memorial patients and the medications administered during those procedures. Based on the type and amount of medication administered, North Memorial concluded that Harper failed to conform to standardized and accepted practice for the procedure.

Tessmer-Tuck had knowledge of Harper’s conduct following the investigation and there is no evidence showing that her report was not submitted in good faith. Thus, Tessmer-Tuck did not breach the covenant of good faith and fair dealing by submitting her report to board.

2. NPDB

North Memorial submitted a report to the NPDB that was similar to Tessmer-Tuck’s report to the board. Both reports included the conclusions following the investigation. There is no evidence that these reports were submitted in bad faith.

Harper has not presented evidence to support her argument that North Memorial's submission of its report was in bad faith or with bad motive. Thus, North Memorial did not breach its covenant of good faith and fair dealing.

Defamation

Harper argues that no qualified privilege protects North Memorial from the imposition of liability for defamatory statements. To prove defamation, a plaintiff must establish four elements:

(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.

McKee v. Laurion, 825 N.W.2d 725, 729-30 (Minn. 2013) (quotations omitted).

Harper argues that the reports that were submitted to the board and to the NPDB included defamatory statements against her. The district court noted that Harper had "at least established a fact issue as to the defamatory implication of these reports," but determined that a qualified privilege attached to the reports.

A statement is protected by qualified privilege if it was made in good faith, "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) (citation omitted). To overcome the existence of a qualified privilege in relation to a defamation claim, Harper has the burden to prove that the statements were made with malice. *See Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920 (Minn. 2009). "Actual malice requires a

showing that the defamatory statements are made . . . from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff.” *Id.* (quotations omitted). The statement itself or its alleged falsity cannot establish malice; rather, malice may be shown by “extrinsic evidence of personal spite, as well as by intrinsic evidence such as the exaggerated language . . . , the character of the language used, [and] the mode and extent of publication” *Bol v. Cole*, 561 N.W.2d 143, 150 (Minn. 1997). Summary judgment is appropriate when a qualified privilege applies and a defamation plaintiff fails to present evidence that raises a genuine issue of material fact as to the existence of malice. *Id.*

Here, nothing in the record suggests that the reports were submitted for an improper motive. The record shows that the reports were based on a legitimate concern for the care provided during the procedure and a legitimate belief in their duty to report. The submissions constitute a proper occasion for investigating Harper’s role in the procedure. Thus, the district court did not err in concluding that a qualified privilege attached to the reports.

HCQIA

Harper argues that the district court erred by determining that the HCQIA does not provide a private cause of action.

The HCQIA requires hospitals to comply with its standards for protections from liability in relation to peer-reviewed actions. *See* 42 U.S.C.A. § 11101. Under HCQIA, an entity is immune if the review body meets all of the necessary standards. 42 U.S.C.A. § 11111(a). Those standards include: “the reasonable belief that the action was in

furtherance of quality health care,” the action is implemented “after a reasonable effort to obtain the facts of the matter,” the action is taken “after adequate notice and hearing procedures,” and there is a reasonable belief that the action is warranted based on the facts. 42 U.S.C.A. § 11112(a). The HCQIA expressly states that immunity is lost if and only if the reporter knew that the information was false. There is no evidence that respondents knew that the submitted reports are false. *See* 42 U.S.C.A. § 11137(c) (“No person or entity . . . shall be held liable in any civil action with respect to any report made under this subchapter . . . without knowledge of the falsity of the information contained in the report.”).

Information reported to the NPDB is accessible to state licensing boards and to any hospital where the nurse practitioner is employed or affiliated. *See* 42 U.S.C.A. § 11137(a). A hospital is required to request information from the NPDB whenever a physician applies for a position on its medical staff or for clinical privileges, and also every two years to check the status of each nurse practitioner who is on its medical staff or has clinical privileges. *See* 42 U.S.C.A. § 11135(a).

Under the HCQIA, a hospital is required to have accepted the surrender of clinical privileges of a nurse practitioner while that individual is under an investigation by the entity in relation to possible incompetence or improper professional conduct to report the surrender to the state board of medical examiners. *See* 42 U.S.C.A. § 11133(a)(1)(B). The state board of medical examiners must then forward information related to this surrender to the Secretary of Health and Human Services by submitting a report to the NPDB. *See* 42 U.S.C.A. §§ 11133(b), 11134.

The district court also analyzed the factors set forth in *Wayne v. Genesis Med. Ctr.*, and determined that the HCQIA does not support a private cause of action. *See* 140 F.3d 1145 (8th Cir. 1998). In *Wayne*, the Eighth Circuit identified four factors that must be considered to determine whether a private cause of action exists under the HCQIA:

(1) whether [appellant] is a member of the class for whose especial benefit the HCQIA was passed, (2) whether there was a legislative intent to create or deny a private remedy, (3) whether an implied remedy is consistent with the underlying purposes of the legislative scheme, and (4) whether the cause of action is one basically relegated to the states so that it would be inappropriate to infer a federal cause of action.

Id. at 1147-48 The Eighth Circuit concluded that “the HCQIA does not explicitly or implicitly afford aggrieved physicians a cause of action when a hospital fails to follow the HCQIA’s prescribed peer review procedure.” *Id.* at 1148.

We are persuaded by *Wayne* and agree that there is no private action for failure to follow standards under the HCQIA. Thus, the district court did not err in concluding that Harper has no cause of action under the HCQIA.

Harper argues that even if no private cause of action exists under the HCQIA, she is entitled to injunctive relief. “Granting equitable relief is within the sound discretion of the [district] court. Only a clear abuse of that discretion will result in reversal.” *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979).

In *Murphy v. Goss*, the court determined that the HCQIA’s immunity protections for civil suits extended to suits seeking injunctive relief. 103 F. Supp. 3d 1234, 1239 (D. Or. 2015), *aff’d*, 693 F. App’x 636 (9th Cir. 2017). Also, immunity under section

11137(c) can be lost only if it can be shown that the report was submitted with knowledge that it was false. *See id.*

The district court did not err by determining that Harper has no private cause of action under the HCQIA, nor did it abuse its discretion by concluding that injunctive relief was not available.

Statutory immunity

Harper also challenges the district court's determinations that respondents are immune from liability under the HCQIA and Minnesota statutes.

1. 42 U.S.C.A. § 11112

Harper argues that North Memorial did not conduct a professional review that complied with the requirements under 42 U.S.C.A. § 11112, and therefore, North Memorial could not receive immunity protections.

When a medical entity determines that a professional review action is necessary, the procedural requirements dictate that the professional review action be conducted:

- (1) in the reasonable belief that the action was in the furtherance of quality health care,
- (2) after a reasonable effort to obtain the facts of the matter,
- (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures are fair to the physician under the circumstances, and
- (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

42 U.S.C.A. § 11112(a).

The district court noted that the notice and hearing right do not attach where there has been no adverse professional review action taken. *See* 42 U.S.C.A. § 11112(c). Here, North Memorial took no disciplinary actions against Harper. The district court determined that it “will not base its immunity decision on this section of the HCQIA.” Harper’s argument that the submission of the reports constituted an adverse professional review action are unsupported by caselaw, therefore, the district court did not err in declining to rely on this section of the HCQIA.

2. *Minn. Stat. § 148.264*

Harper also argues that the reports are not protected by statutory immunity. Hospitals and licensed medical professionals have a duty to report licensed nurses who engage in conduct that could constitute grounds for disciplinary action by the nursing board. *See* Minn. Stat. § 148.264.

Under Minn. Stat. §148.264, subd. 1, individuals and organizations are “immune from civil liability or criminal prosecution for submitting in good faith a report to the board [under the mandatory reporting provision] . . . for otherwise reporting in good faith to the board violations or alleged violations of [the Minnesota Nurse Practice Act].”

The district court determined that Harper “failed to present evidence to create a triable issue of good faith [or not] sufficient to defeat the immunity available under Minn. Stat. § 148.264.” The record supports this determination.

3. *Minn. Stat. §§ 145.61-.67 (2020)*

Harper argues that the statutory provisions governing health-care review organizations do not provide immunity from liability because the reports were submitted

maliciously. She also argues that immunity does not apply because the investigation was not conducted by a review organization as envisioned by section 145.61.

Under Minn. Stat. § 145.61, subd. 5, a “review organization” is defined as “a committee whose membership is limited to professionals, administrative staff, and consumer directors . . . which is established by one or more of the following: a hospital, a clinic, a nursing home, [or] an ambulance . . . or first responder service.” The investigation into Harper’s role was conducted by a committee of North Memorial staff comprised of medical professionals, administrative staff, and directors. Therefore, Harper’s claim that the investigation was not conducted by a review organization fails. *See id.*

Under Minn. Stat. § 145.62, “[n]o person, firm, or corporation providing information to a review organization shall be subject to any action for damages . . . unless such information is false and the person providing such information knew, or had reason to believe, such information was false.” Further, under Minn. Stat. § 145.63, subd. 1:

No review organization and no person who is a member or employee . . . who acts in an advisory capacity to . . . a review organization shall be liable for damages or other relief in any action brought by a person or persons whose activities have been or are being scrutinized or reviewed by a review organization . . . unless the performance of such duty, function or activity was motivated by malice toward the person affected thereby.

The district court concluded that “immunity is lost only if [Harper] presents admissible evidence that [North Memorial and Tessmer-Tuck] were ‘motivated by malice,’ or failed to act in the reasonable belief that their actions were warranted after reasonable

efforts to ascertain the relevant facts.” As stated above, there is no evidence of actual malice. Therefore, North Memorial and Tessmer-Tuck cannot be held liable for damages.

Vicarious liability

Harper argues that the individual respondents are vicariously liable for (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, and (3) defamation. She contends that respondents “engaged in conduct that deprived [Harper] of her due process rights, set forth in [North Memorial’s] [m]edical [s]taff [b]ylaws and related policies and procedures.”

“Under the doctrine of respondeat superior, an employer is vicariously liable for the torts of an employee committed within the course and scope of employment.” *Popovich v. Allina Health Sys.*, 946 N.W.2d 885, 890 (Minn. 2020) (quotation omitted). “[R]espondeat superior applies to hospitals to impose vicarious liability on hospitals for the negligence of employees, including physicians and other medical personnel.” *Id.* at 891.

The district court determined that Tessmer-Tuck’s report was related to her duties as the vice president of medical affairs for North Memorial, and that submitting this report was within the scope of her employment. The district court determined that North Memorial “would be vicariously liable for any tortious acts of its employees [individual respondents].” However, because the district court dismissed Harper’s claims, “all claims for vicarious liability are likewise dismissed.” The district court noted that the contractual relationship here was only between Harper and North Memorial; therefore, there was “no basis in fact or law” for Harper to bring a breach-of-contract claim against the individual respondents, and the district court dismissed the claims accordingly.

In sum, the district court appropriately dismissed Harper's claims and granted summary judgment in favor of respondents.

Affirmed.