STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1342

David Berger,
Respondent,

vs.

Timothy Wynes, et al.,
Appellants.

Filed April 16, 2018
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge

Dakota County District Court
File No. 19HA-CV-16-1528

Sarah J. McEllistrem, Bryce M. Miller, Mark H. Gehan, Collins, Buckley, Sauntry & Haugh, P.L.L.P., St. Paul, Minnesota (for respondent)

Lori Swanson, Attorney General, Kathryn A. Fodness, Assistant Attorney General, St. Paul, Minnesota (for appellants Timothy Wynes, Inver Hills Community College, Minnesota State College and Universities, and Nicole Meulemans)

Considered and decided by Rodenberg, Presiding Judge; Bjorkman, Judge; and Smith, Tracy M., Judge.

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

RODENBERG, Judge

Appellants Timothy Wynes and Nicole Meulemans appeal from the district court's denial of their motions for summary judgment based on qualified and official immunity, respectively. We affirm in part, reverse in part, and remand.

FACTS

Respondent David Berger is a faculty member at Inver Hill Community College (IHCC). He is also a grievance representative for the faculty union at the college.

In late January 2016, the IHCC faculty union took a vote of no confidence in the IHCC president, appellant Timothy Wynes. Respondent was a part of the group that led the process for and promoted the vote of no confidence. Respondent contributes to the faculty union's website, Inver Hills United, and posted the results of the no-confidence vote on that webpage. Respondent personally funds the Inver Hills United website and pays for merchandise advertising the website, such as baseball caps, post-it notes, and pens.

Student 1[1] was in one of respondent's classes at IHCC and was a student employee at the college. Respondent gave Student 1 several Inver Hills United pens, which Student 1 distributed. At some point, Student 1 told Assistant Student Life Director N.B. that respondent had asked him to pass out the Inver Hills United pens. N.B. allowed Student 1 to do so as long as it was not on work time. Student 1 also told N.B. that he did not feel like he could talk to the Student Senate President because respondent would not like him

[1] For the reader's ease, and to preserve the student's anonymity, we refer to the student who is central to the facts of this case as "Student 1" and not by his name or initials.

if he did. This statement made N.B. concerned, and on February 10, 2016, N.B. emailed respondent, asking him if she could speak with him about a concern she had about a student. Respondent responded that she could have the student contact him directly. N.B. replied that she was concerned that the student would not do so. N.B. then went to talk to respondent in person, and respondent refused to speak with her.

After her February 10 communications with respondent, N.B. sent an email to appellant Nicole Meulemans, the Student Life Director at IHCC, including the chain of emails to and from respondent that complained about respondent's conduct toward N.B. Meulemans spoke with N.B., and also forwarded the emails to Suzanne Brusoe, then the Chief Human Resource (HR) Officer for IHCC. Meulemans told Brusoe that, when she spoke to N.B., N.B. sounded very upset and did not feel comfortable staying at work. N.B. complained that she had "never felt so completely disrespected in the workplace."

Brusoe forwarded this complaint to Mark Carlson, the Vice Chancellor of HR for the Minnesota State College and University System (MnSCU), who determined that the complaint should be investigated. Brusoe sent respondent a letter on February 12, 2016, informing him that he was being placed on paid leave while the college investigated his conduct. The letter explained that, during the leave period, respondent was not to be on the college campus or attend college functions, participate in any of his job duties, communicate with other college employees in a way that could interfere with the investigation, or communicate with students regarding the investigation or classes. The letter was signed by Brusoe and stated that she had been authorized by Wynes to place respondent on leave.

IHCC hired attorney Pamela VanderWiel to investigate respondent's claimed misconduct. N.B. helped VanderWiel by notifying persons who would be interviewed, including Student 1. N.B. informed VanderWiel that Student 1 was concerned and anxious about being interviewed. N.B. reported to VanderWiel that Student 1 had told her that respondent stopped Student 1 and told him to be careful of N.B., that N.B. interfered between respondent and a student, that N.B had lied, that respondent made N.B. cry, and that Student 1 should not trust N.B.

Student 1 did not respond to VanderWiel's requests for an interview. Meulemans felt that it was her job to facilitate the investigator's interview, so she approached Student 1 while he was working and asked him if he would meet with VanderWiel. According to Meulemans, she and Student 1 walked from Student 1's workplace to the office where VanderWiel was waiting. The walk took no more than two minutes and Meulemans claims that she did not tell Student 1 what to say, threaten his job, or tell him that respondent's conduct was unacceptable.

VanderWiel interviewed Student 1, but did not record the interview because she found him to be "an unusually uncomfortable witness" and believed that he would be more open and honest without a recording. VanderWiel later testified that she began Student 1's interview by explaining that he would not get in trouble for talking to her. Meulemans remained in the room for at least part of Student 1's interview.

In a deposition taken after this lawsuit was commenced, Student 1 testified that he did not respond to the interview requests because he did not want to be involved and wanted to focus on his education. Student 1 also testified that, when Meulemans took him to talk

to VanderWiel, Meulemans told him that what respondent had done was "unacceptable." Student 1 stated that he felt like he would lose his job if he said anything good about respondent in the interview. He agreed that Meulemans never directly threatened to fire him. Student 1 had previously signed an affidavit in which he said that he had been coached to say negative and untrue things about respondent and did so out of fear of losing his job. When asked about this at his deposition, Student 1 stated that Meulemans told him that respondent's actions were unacceptable, but did not tell him what to say. Student 1 recognized that Meulemans had expressed an opinion, but said that he felt some pressure that prevented him from saying anything good about respondent.

After VanderWiel completed her investigation, she submitted a report on May 23, 2016, concluding that respondent had violated MnSCU's Employee Code of Conduct and the State of Minnesota's Respectful Workplace Policy. Vice Chancellor Carlson then informed respondent that he could return to work.

Southwest Minnesota State University President Connie Gores was asked by the general counsel's office to review the investigation report as an independent decision-maker. She agreed to so act. On June 23, 2016, Gores sent respondent a letter informing him of her conclusion that respondent had violated the Employee Code of Conduct and the Respectful Workplace Policy. The letter also communicated Gores's tentative decision to suspend respondent for five days without pay, and offered respondent an opportunity to meet with Gores or send a written response for consideration before Gores made her final disciplinary decision.

Respondent provided additional written information to Gores, including two affidavits indicating that Meulemans pressured Student 1 to make false statements during the investigation. After receiving those affidavits, Gores requested a follow-up investigation, which revealed "no evidence that Meulemans threatened or coerced [Student 1] into making false statements."

After reviewing the affidavits and the follow-up investigation report, Gores sent respondent a letter on August 22, 2016, confirming her decision to suspend him for five days without pay.

Respondent sued Wynes, Meulemans, and MnSCU, claiming: (1) First Amendment retaliation by Wynes individually under 42 U.S.C. § 1983, (2) violation of the Minnesota Data Practices Act by all defendants individually and collectively, (3) defamation by Wynes individually, (4) First Amendment retaliation by Meulemans individually, and (5) tortious interference with contract by Meulemans individually. Respondent later dismissed the defamation claim against Wynes after reaching a settlement. After completing discovery, both parties moved for summary judgment. Appellants raised immunity defenses to the claims asserted against them individually. The district court dismissed the First Amendment retaliation claim against Meulemans, but denied summary judgment for appellants on the First Amendment retaliation claim against Wynes, the data-practices claim, and the tortious-interference-with-contract claim against Meulemans.

This appeal followed. By special-term order, we limited the scope of this appeal to the immunity questions relating to the First Amendment retaliation claim against Wynes

under 42 U.S.C. § 1983, and the tortious-interference-with-contract claim against Meulemans.

D E C I S I O N

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03. No genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)). We "view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *DLH, Inc.*, 566 N.W.2d at 70. As such, "a court deciding a summary-judgment motion must not make factual findings or credibility determinations or otherwise weigh evidence relevant to disputed facts." *Geist-Miller v. Mitchell*, 783 N.W.2d 197, 201 (Minn. App. 2010). "We review a district court's summary judgment decision de novo. In doing so, we 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) (citation omitted).

I. Qualified immunity bars appellant's First Amendment retaliation claim against Wynes under 42 U.S.C. § 1983.

Wynes challenges the district court's denial of his motion for summary judgment on the First Amendment retaliation claim and argues that qualified immunity renders him immune from suit.

Qualified immunity is intended to shield government officials from liability and the burdens of litigating a section 1983 claim for damages in some circumstances. *Robbins v. Becker*, 794 F.3d 988, 993 (8th Cir. 2015). "State officials are entitled to qualified immunity when 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Electric Fetus Co. v. City of Duluth*, 547 N.W.2d 448, 452 (Minn. App. 1996) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982)), *review denied* (Minn. Aug. 6, 1996). A right is clearly established when "existing precedent . . . ha[s] placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 2083 (2011). "The test for qualified immunity at the summary judgment stage is an objective one." *Electric Fetus*, 547 N.W.2d at 452 (quoting *Johnson v. Hay*, 931 F.2d 456, 460 (8th Cir. 1991)). We review the applicability of immunity de novo. *Kariniemi v. City of Rockford*, 882 N.W.2d 593, 599 (Minn. 2016).

The "allegations in a complaint *may* provide the basis for denying an immunity defense." *Gleason v. Metro. Council Transit Operations*, 563 N.W.2d 309, 318 (Minn. App. 1997) (emphasis in original), *aff'd in part*, 582 N.W.2d 216 (Minn. 1998). The court "need not consider the correctness of the plaintiff's version of the facts, nor even determine

whether the plaintiff's allegations actually state a claim. All it need determine is . . . whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 2816 (1985).

Here, the district court analyzed respondent's First Amendment rights at a high level, and determined that respondent's "support and promotion of the vote of no confidence taken against Defendant Wynes" was protected by the First Amendment. The district court considered respondent's allegations that Wynes authorized an adverse employment action against respondent because of his protected conduct. It then concluded that qualified immunity does not protect Wynes for actions taken against respondent for respondent's exercise of his First Amendment rights.

We first consider the specific actions alleged by respondent to have been taken by Wynes in violation of his clearly established constitutional rights. Respondent contends that Wynes, according to the February 12, 2016 letter of Chief HR Officer Brusoe, "authorized" a paid investigative leave for respondent while VanderWiel investigated respondent's conduct toward N.B. Respondent makes no other allegation concerning Wynes's involvement in the investigation or decision-making process. Respondent does not dispute that N.B. registered a complaint with administration concerning respondent's behavior during their interaction. There is no evidence or allegation that Wynes was responsible for or influenced the creation or reporting of this complaint.

The district court focused its analysis on whether respondent has a free-speech right and whether he claims that right to have been violated by Wynes's involvement in his

leave. To be sure, respondent has a right to speak freely, especially on matters of public concern, including the criticism of a public employer in his capacity as a public official. *Belk v. City of Eldon*, 228 F.3d 872, 878 (8th Cir. 2000). The First Amendment protects public employees from retaliation for exercising First Amendment rights. *Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 464-65, 99 S. Ct. 1826, 1828 (1979).

We think that a more precise focus on the complained-of conduct is needed to properly analyze Wynes's immunity defense. At most, Wynes authorized respondent's investigatory leave after N.B. complained about respondent's behavior. A person sued under 42 U.S.C. § 1983 is immune from suit unless the particular conduct in question violates a clearly established right. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015); *cf. Bryan v. McPherson*, 590 F.3d 767, 781 (9th Cir. 2009) (holding that there is no immunity for a police officer using a stun gun on an unarmed, stationary man wearing nothing but boxer shorts and facing away from the officer, despite the absence of "closely analogous case law" because the officer's conduct "so clearly offends . . . constitutional rights").

We are aware of no existing precedent or case law holding that a public employee's First Amendment rights are violated when the public employee is placed on paid investigative leave while a bona fide complaint against the employee is investigated. It matters not that the public employee previously engaged in First Amendment activities. Respondent did not have a clearly established right to not be placed on paid investigative leave in response to a bona fide complaint. Respondent identifies no controlling law establishing such a right, and we know of none. Therefore, and even if we assume it to be

true, as respondent claims, that Wynes explicitly authorized the paid leave, Wynes is entitled to qualified immunity.

We reverse and remand with instructions that the district court dismiss respondent's section 1983 claim against Wynes because Wynes is entitled to qualified immunity on these undisputed facts.

II. Official immunity does not protect Meulemans from respondent's tortious-interference-with-contract claim on this factual record.

Meulemans likewise challenges the district court's denial of her motion for summary judgment. She argues that she is entitled to official immunity on the claims against her for tortious interference with respondent's contract with IHCC.

The district court did not expressly analyze Meulemans's official-immunity argument, and instead focused on whether respondent had established a prima facie case of tortious interference with contract. It denied Meulemans's summary-judgment motion and implicitly concluded that Meulemans is not entitled to official immunity. We review questions of official immunity de novo. *Kariniemi*, 882 N.W.2d at 599.

Under the common law, official immunity prevents public officials charged by law with duties that "call for the exercise of [j]udgment or discretion from being held personally liable to an individual for damages," unless the official is guilty of a willful or malicious wrong. *Schroeder v. St. Louis Cty.*, 708 N.W.2d 497, 505 (Minn. 2006) (internal quotation omitted). "Official immunity enables public employees to perform their duties effectively, without fear of personal liability that might inhibit the exercise of their independent judgment." *Mumm v. Mornson*, 708 N.W.2d 475, 490 (Minn. 2006) (citation omitted).

Generally, official immunity "turns on: (1) the conduct at issue; (2) whether the conduct is discretionary or ministerial . . . ; and (3) if discretionary, whether the conduct was willful or malicious." *Kariniemi*, 882 N.W.2d at 600 (quotation omitted and alteration in original). Meulemans, as the party asserting immunity, bears the burden of establishing its applicability. *See Meier v. City of Columbia Heights*, 686 N.W.2d 858, 863 (Minn. App. 2004), *review denied* (Minn. Dec. 14, 2004).

Because only discretionary decisions are immune from suit, "[t]he starting point for analysis of an immunity question is the identification of the precise governmental conduct at issue." *Huttner v. State*, 637 N.W.2d 278, 284 (Minn. App. 2001) (quotation omitted), *review denied* (Minn. Nov. 13, 2001). Here, respondent is challenging Meulemans's involvement in the VanderWiel investigation, including bringing Student 1 to be interviewed, making comments to Student 1 about respondent, and being present during Student 1's interview.

Next, we determine whether the challenged conduct is ministerial or discretionary. *Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014). Respondent argues, for the first time on appeal, that Meulemans's actions were ministerial. Generally, a party may not raise an issue or argument for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). "The modern caselaw makes it abundantly clear that, as a general rule, if an appellant fails to preserve an argument or issue in district court proceedings, the issue or argument is forfeited and may not be asserted in an appellate court." *Doe 175 ex rel. Doe 175 v. Columbia Heights Sch. Dist., ISD No. 13*, 842 N.W.2d 38, 43 (Minn. App.

2014). Respondent forfeited the argument that Meulemans's conduct was ministerial by not raising it to the district court.

Moreover, and even if respondent did not forfeit this argument, Meulemans's conduct was clearly discretionary. "A discretionary act involves individual professional judgment, reflecting the professional goal and factors of a situation." *Huttner*, 637 N.W.2d at 284. By contrast, a ministerial act is "one that is absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts. A ministerial duty leaves nothing to discretion; it is a simple, definite duty arising under and because of stated conditions." *Mumm*, 708 N.W.2d at 490 (citations and quotations omitted). Respondent conceded at oral argument that there are no facts in the record showing that any policy explicitly guided or directed Meulemans's conduct. Nothing in the record indicates that she had an "absolute, certain and imperative" duty to bring Student 1 to the interview or otherwise involve herself in the VanderWiel investigation. To the contrary, it seems by all accounts that Meulemans had no duty to be involved in the investigation at all. She participated in the exercise of her discretion.

Because Meulemans's actions were discretionary, she is entitled to official immunity unless her conduct was willful or malicious. *See Majeski*, 842 N.W.2d at 462. "Discretionary conduct is . . . *not* protected if the official committed a willful or malicious wrong." *Elwood v. Rice Cty.*, 423 N.W.2d 671, 679 (Minn. 1988) (emphasis in original). "Malice means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991) (quotation omitted). "In the official immunity

context, wilful [sic] and malicious are synonymous." *Id*. "The exception to immunity for malicious acts allows liability 'only when an official intentionally commits an act that he or she then has reason to believe is prohibited.'" *Majeski*, 842 N.W.2d at 465 (quoting *Rico*, 472 N.W.2d at 107). The existence of malice is generally a fact question, *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 664 n.5 (Minn. 1999), but a reviewing court may resolve the question as a matter of law if there are no genuine issues of material fact, *see Frankson v. Design Space Int'l*, 394 N.W.2d 140, 144-45 (Minn. 1986).

There remains an unresolved and material fact question of whether Meulemans acted with malice.[2] There is record evidence that Meulemans brought Student 1 to the interview after he had previously stated that he did not want to participate, that she told Student 1 that respondent's conduct was "unacceptable," and that she remained in the room during Student 1's unrecorded interview (when all of the other interviews conducted during the investigation were recorded). On this record, a factfinder could determine that Meulemans acted with malice. Given the conflicting deposition testimony concerning what comments, if any, Meulemans made to Student 1 and the length of time Meulemans was present during Student 1's interview, a genuine issue of material fact remains. Accordingly, the record does not support Meulemans's official-immunity claim as a matter

[2] The district court determined that respondent "made a prima facie case for tortious interference." This determination is not challenged on appeal, and our special-term order limited the scope of this appeal to the immunity issues. Accordingly, Meulemans argues on appeal only that her conduct was discretionary and that there is no evidence to support a finding that she acted with malice.

of law. The district court did not err when it denied Meulemans's summary judgment motion.

In sum, we reverse the district court's denial of summary judgment to Wynes. Because respondent had no clearly established right to not be placed on paid investigatory leave while a bona fide complaint not made or influenced by Wynes was investigated, Wynes is immune as a matter of law from the 42 U.S.C. § 1983 claims against him. But we affirm the district court's denial of summary judgment concerning respondent's claims against Meulemans, and remand for further proceedings.

Affirmed in part, reversed in part, and remanded.