SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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DR. DEIRDRE CHIARAMONTE,

Plaintiff, Index No. 156644/2017

-against-

DECISION/ORDER

KATHRYN COYNE,

Defendant. Motion Seq. No. 001

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HON. DAVID B. COHEN, J.:

The following e-filed documents, listed by NYSCEF document numbers 8-109, 111-114, 118-161were read on this motion for dismissal.

This is an action for defamation and tortious interference with prospective business relationships, brought by a veterinarian against the chief executive officer of the animal clinic that formerly employed her. Defendant Kathryn Coyne now moves for summary judgment (CPLR 3212) dismissing the complaint.

BACKGROUND/PROCEDURAL HISTORY

The following facts are undisputed unless otherwise indicated. The non-party Animal Medical Center (AMC) is a non-profit veterinary hospital with a Board of Trustees of approximately 25 members. Non-party Robert Liberman has been a Board member since 1997 and its Chair since 2008. Non-party Elaine Langone has been on the Board since approximately 2000 and the Vice Chair since about 2009 or 2010. The Board is composed of several committees including the Executive Committee, of which both Liberman and Langone are members, as well as non-parties Nancy Kissinger and Tina Flaherty.

Plaintiff Deirdre Chiaramonte is a Doctor of Veterinary Medicine who worked at AMC from 2002 as an at-will employee until she was involuntarily terminated on July 24, 2012. She started her relationship with AMC in 1998 with an internship in small animal medicine and surgery. At the conclusion of her residency in July 2002, AMC hired her as an associate staff veterinarian. In 2004, after becoming board-certified by the American College of Veterinary Internal Medicine, AMC changed her status to staff veterinary internist.

In or about 2002, AMC began to institute a program to provide VIP treatment for the pets of the hospital's most valued donors and Board members. Plaintiff was initially asked to treat some of their pets, and the program was ultimately formalized as the "President's Council" (PC). In approximately 2004, running the PC became plaintiff's primary responsibility. Also in 2004, plaintiff helped establish the Tina Santi Flaherty Rehabilitation and Fitness Service (the "Rehab Center"), largely funded by Flaherty, with whom plaintiff had a close relationship. Plaintiff served as Co-Director of the Rehab Center until 2008, and as its sole director thereafter. She was on maternity leave from August to October 2010 and worked part-time from October 2010 to January 2011.

Coyne became CEO of AMC in March 2010. In June 2010, her sister, Margaret Barron, came to work at AMC on a temporary basis to replace Deena Wolfson, a 40-year employee who was then serving as the PC's coordinator and plaintiff's assistant. Plaintiff, Langone and others expressed concerns about Barron, including her qualifications, trustworthiness and the conflict of interest arising from nepotism, but ultimately acquiesced to

her hiring. Barron began working on a permanent basis in the fall of 2010, when plaintiff was on maternity leave.

In November 2011, Dr. Richard Goldstein joined AMC as its Chief of Medicine, reporting to its Chief Medical Officer, Dr. Bill Muir. Goldstein became plaintiff's supervisor. In February 2012, plaintiff met with defendant, Goldstein, Liberman, and Flaherty to discuss the future of the Rehab Center. Flaherty wanted the center to be evaluated by consultants, and plaintiff helped select two nationally known veterinarians, Dr. James Gaynor and Dr. Laurie McCauley, for that task. Gaynor issued a report (the Gaynor Report) that criticized and complimented some aspects of the center's management, while McCauley's report (the McCauley Report) was more negative and recommended that plaintiff not continue as its director.

Sometime before July 2012, defendant asked Goldstein to prepare a report (the Goldstein Report) assessing plaintiff's patient care. His report was highly critical of plaintiff's performance, stating that she lacked the specialized skills of an internist, demonstrated a lack of commitment and occasionally exhibited poor client communication. He also faulted her for committing frequent medical errors and omissions, providing three examples in which he concluded that she had not provided proper veterinary care.

On July 24, 2012, AMC terminated plaintiff's employment. Although she had the authority to fire plaintiff without the Board's approval, defendant held meetings with Executive Committee members Liberman, Langone, Kissinger and Flaherty the day before to advise them

of her decision. In preparation for the meeting, defendant prepared two substantially identical memoranda for Langone and Kissinger outlining the reasons for plaintiff's termination. Because, as discussed below, plaintiff's defamation claim is based largely upon the statements contained in the version of the memorandum addressed to Kissinger (the Termination Memorandum), the court reproduces the body of it here in full for the purpose of analysis:

> SUMMARY
> After repeated, patterned and witnessed episodes of unprofessional behavior, substandard medical care and a poor work ethic at The Animal Medical Center, Management has lost all confidence in its employee Dr. Deirdre Chiaramonte.
>
> Due to her unique position as the veterinarian assigned to The AMC's President's Council, she had been loosely supervised by the former President's Council Coordinator and the Chief Medical Officer. She had no relationship - reporting or otherwise to the former CEO.
>
> Her annual performance reviews completed by the Chief Medical Officer (CMO), Dr. Muir did NOT address any issues other than productivity.
>
> Dr. Richard Goldstein, Chief of Medicine has had day-to-day interactions with her for the past 8 months. He has provided (EXHIBIT I) and analysis of Dr. Chiaramonte's practice pattern, assessment of her clinical skills, review of several cases that did not meet the standard of care and her ability to function as the Director of Rehabilitation Services as well as an AMC team member.
>
> EXHIBIT II
> While there are many examples of Dr. Chiaramonte's unprofessional behavior, lack of judgment, and remarks made publically about AMC Staff Doctors, Board Members, Donors and Clients these examples are significant.
>
> Items # 1- 2
>
> Sexual harassment of a senior male staff member in front of staff Dr. Chiaramonte insinuated that he had asked her for a "blow job". Clearly the employee did not solicit this request and was humiliated and embarrassed as was the staff.
>
> Crude rude remarks about AMC staff members.

Item #3

Inappropriate discussions with clients / donors soliciting help in placing her son in private schools then denigrating Board members for not assisting her with that endeavor.

Item #4

At the Boathouse Dinner (combined staff & Board), she made public rude and crude comments about the size of a Board members penis adding, "he needed Stem Cell Therapy to increase the size."

Item #5

Communication from Dr. Chiaramonte to her Rehab Staff regarding a client she disliked --- "I won't budge on what I do for them." Then sharing confidential information about the client with staff stating that the client "is an enemy of one of our Board members", and then speculating on the client's wealth.

Item #6

Consultant's Report regarding the Tina Santi Flaherty Rehabilitation Center.

Pages 4, 5, 12

Dr. McCauley expressed grave concerns regarding Dr. Chiaramonte's undermining Dr. Leilani Alvarez's position in the Rehab Center, the total lack of medical oversight by Dr. Chiaramonte, referring to Dr. Chiaramonte as "poison" to the culture, and her utter shock at overhearing Dr. Chiaramonte refer to Dr. Alvarez as a "bitch" to the staff.

In addition to the above, there have been numerous racial remarks made about other AMC employees.

EXHIBIT III

Work Ethic / Productivity Issues

The President's Council (PC) hours of operation are Monday - Friday / 9:00 AM - 5:00 PM. While Dr. Chiaramonte has enjoyed setting her own "flexible" schedule, she is expected to work 8 hrs. per day.

In reviewing the 2011 and 2012 Payroll Records (EXHIBIT III-1 and EXHIBIT 111-2), Dr. Chiaramonte has worked far less than the required hours yet fully paid.

Of greater concern is Dr. Chiaramonte's deliberate abuse of the payroll system, that is,

punching in, leaving for personal time, then punching out at end of day – reflecting a full day's work when she was not on AMC business but on AMC time.

(Dates: 1/30/12, 3/29/12, 3/30/12, 4/11/12, 4/16/12, 6/6/12)

While Dr. Chiaramonte is on "Blackberry Call" 24/7, she rarely, if ever, returns to The (sic) AMC after-hours for President's Council clients admitted through ES or other service. To her credit, she does (as do others) respond to client questions / concerns when off duty by Blackberry/email.

Workload / Productivity

There are approximately 78 clients that see Dr. Chiaramonte as their primary care veterinarian (EXHIBIT IV) but these clients also see other specialists at AMC.

Dr. Chiararnonte's Workload

2010 = 322 Client Visits	Avg 1.40 visits / day
2011 = 467 Client Visits	Avg 2.03 visits /day
*2012 = 133 Client Visits	Avg 1.11 visits / day

As noted in Dr. Goldstein's report (EXHIBIT 1), the caseload is far below what is expected of any other full-time veterinarian at The AMC. In assessing her skill level, he is not comfortable in assigning her to Community Practice or Internal Medicine.

While also the Director of the Rehab Unit at The AMC, it is clear that she has little or no involvement in the day-to-day operation. In fact, she has stated that it is a "technician run" program. Work scheduling of the techs, employee evaluations, and other day-to-day operations are offloaded to a Nurse Manager. There has been no significant or otherwise, research, expansion of the program, educational advancement for the technicians, training or integration with the rest of AMC and the rehab center. Recently, directed by the donor, a comprehensive review by outside consultants of the status of the Rehab Program has been conducted (EXHIBIT IV), which is the full report of Dr. Laurie McCauley.

In addition to disputing some of the representations in the Memorandum, plaintiff asserts that the day after her termination, defendant falsely stated to AMC's African-American Human Resources Director, Linda Faison, that plaintiff had referred to Faison as "Blackie."

On July 23, 2013, plaintiff commenced a civil action against AMC and Coyne in the United States District Court for the Southern District of New York (*Chiaramonte v The Animal*

Medical Center, et al, 13 Civ. 5117 [KPF]). In addition to the defamation and tortious interference claims pursued in this action, plaintiff sought recovery under the federal Equal Pay Act and its state law analogue under Labor Law § 194. By order dated January 7, 2016, the court granted defendants' motion for summary judgment to the extent of dismissing the Equal Pay Act and Labor Law claims, without prejudice to plaintiff's right to refile the defamation and tortious interference claims in state court (*Chiaramonte v AMC*, 2016 WL 299026,*15 [SD NY 2016]). The Second Circuit Court of Appeals affirmed that determination by order dated January 26 2017 (*Chiaramonte v AMC*, 677 F App'x 689 [2d Cir 2017]).

Plaintiff commenced this action on July 24, 2017, re-asserting her claims for defamation and tortious interference against Coyne alone. By stipulation dated September 18, 2018, the parties agreed to use the discovery material from the federal action as if produced in this action. This motion for summary judgment followed.

DISCUSSION

For the following reasons, defendant's motion for summary judgment is granted in its entirety. All of the allegedly defamatory statements, to the extent they are not mere opinion, are protected by the common interest privilege, and the tortious interference claim is duplicative of the defamation claim.

Defamation Claim

Defamation is "a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014] [internal quotation marks and citation omitted]). "To prove a claim for defamation, a plaintiff must show: (1) a false

statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]). Among the categories of statements constituting per se defamation for which a showing of harm is presumed are those which may "arguably impugn plaintiff's reputation in its trade, business or profession" (*Meer Enterprises, LLC v Kocak*, 173 AD3d 629, 631 [1st Dept 2019], *citing Liberman v Gelstein*, 80 NY2d 429, 435 [1992]).

In order for the court to conduct its review, the plaintiff must set forth the exact words of the offending statements (*Offor v Mercy Med. Ctr.*, 171 AD3d 502, 502 [1st Dept 2019]; *Rubin v Napoli Bern Ripka Shkolnik, LLP*, 151 AD3d 603, 604 [1st Dept 2017]; CPLR 3016[a]). Failure to allege the offending words in *haec verba*, or the use of paraphrasing, requires dismissal (*BCRE 230 Riverside LLC v Fuchs*, 59 AD3d 282, 283 [1st Dept 2009]). Moreover, "[a]ny qualification in the pleading thereof by use of the words 'to the effect', 'substantially', or words of similar import generally renders the complaint defective" *(Gardner v Alexander Rent-A-Car, Inc.*, 28 AD2d 667, 667 [1st Dept 1967]). The plaintiff is further required to provide the "time, place and manner of the purported defamation" (*Offor*, 171 AD3d 502, 503, *quoting Buxbaum v Castro*, 104 AD3d 895, 895 [2d Dept 2013]). However, on a motion for summary judgment, the court may consider evidentiary materials including affidavits, deposition transcripts, and documents to assess the adequacy of the pleadings *(Bulow v Women in Need, Inc.*, 89 AD3d 525, 526 [1st Dept 2011]).

"'Since falsity is a sine qua non of a libel claim and since only assertions of fact are

capable of being proven false . . . a libel action cannot be maintained unless it is premised on published assertions of fact,' rather than on assertions of opinion" (*Sandals Resorts Int'l Ltd. v Google, Inc.*, 86 AD3d 32, 38, [1st Dept 2011], *quoting Brian v Richardson*, 87 NY2d 46, 51 [1995]). "Distinguishing between fact and opinion is a question of law for the courts, to be decided based on what the average person hearing or reading the communication would take it to mean" (*Davis v Boeheim*, 24 NY3d 262, 269 [2014]).

New York applies three factors to determine whether a reasonable reader would consider a statement fact or opinion: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact" (*Davis*, 24 NY3d 262, 270) [citations and quotations omitted]). Furthermore, as the Court of Appeals has explained:

> A "pure opinion" is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be a "pure opinion" if it does not imply that it is based upon undisclosed facts. When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a "mixed opinion" and is actionable. The actionable element of a "mixed opinion" is not the false statement itself-it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking.

Steinhilber v Alphons, 68 NY2d 283, 289-90 (1986] [citations and quotations omitted]. Applying a holistic approach, a court should not "sift[] through a communication for the purpose of isolating and identifying assertions of fact" but "should look to the over-all context in which the

assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the . . . plaintiff" (*Davis*, 24 NY3d 262, 270 [citations and quotations omitted]).

The right to recover for defamation, even if proven, is not absolute. "Courts have long recognized that the public interest is served by shielding certain communications, though possibly defamatory, from litigation, rather than risk stifling them altogether" (*Liberman v Gelstein*, 80 NY2d 429, 437 [1992]). To further that interest, they have recognized that "a conditional, or qualified, privilege extends to 'communications made by one person to another upon a subject in which both have an interest'" (*id.*, *quoting Stillman v Ford*, 22 NY2d 48, 53 [1968]; *see Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 445 [2002]).

The common interest privilege applies to communications between employees of an organization (*Liberman*, 80 NY2d 429, 437; *Loughry v Lincoln First Bank*, 67 NY2d 369, 376 [1986]). In this connection, "[t]he applicability of the privilege to statements made by an employer/supervisor reviewing or evaluating the performance of an employee is well established" (*Kasachkoff v City of New York*, 107 AD2d 130, 134 [1st Dept 1985], *aff'd*, 68 NY2d 654 [1986]; s*ee Presler v Domestic & Foreign Missionary Soc'y of Protestant Episcopal Church in US*, 113 AD3d 409, 410 [1st Dept 2014]; *Ashby v ALM Media, LLC*, 110 AD3d 459, 459 [1st Dept 2013]; *Dillon v City of New York*, 261 AD2d 34, 38, [1st Dept 1999]; *Murganti v Weber,* 248 AD2d 208, 209 [1st Dept 1998]; *McNaughton v City of New York*, 234 AD2d 83, 84 [1st Dept 1996]). This is so because "an employer has the right, without judicial interference, to

assess an employee's performance on the job" (*Williams v Varig Brazilian Airlines*, 169 AD2d 434, 343 [1st Dept 1991]). As relevant here, the privilege has been held to apply specifically to statements regarding an employee's performance contained in a termination memorandum (*Priovolos v St. Barnabas Hosp.*, 1 AD3d 126, 127 [1st Dept 2003] and a memorandum circulated by directors to a corporate board criticizing the company's executives and recommending their termination (*Foster v Churchill*, 87 NY2d 744, 748, 751 [1996]).

Once the general applicability of the privilege has been established, the burden shifts to the plaintiff to prove that the defendant's communications were motivated by malice (*Stega v New York Downtown Hosp.*, 31 NY3d 661, 670 [2018]; *Toker v Pollak*, 44 NY2d 211, 219 [1978]). Malice may be established in one of two forms: common law malice, meaning that the statements are made with spite or ill will, or constitutional malice, meaning that the statements are made with a reckless disregard for the truth (*Liberman*, 80 NY2d 429, 437-38; *Metrosearch Recoveries, LLC v City of New York*, 169 AD3d 512, 512 (1st Dept), *leave denied*, 33 NY3d 910 [2019]). In the context of common law malice, "spite or ill will refers not to defendant's general feelings about plaintiff, but to the speaker's motivation for making the defamatory statements" (*Liberman*, 80 NY2d 429, 439). Therefore, "[i]f the defendant's statements were made to further the interest protected by the privilege, it matters not that defendant also despised plaintiff" (*id.*). "Suspicion, surmise and accusation are not enough . . . [and] [t]he existence of earlier disputes between the parties is not evidence of malice" (*Shapiro v Health Ins. Plan of Greater New York*, 7 NY2d 56, 64 [1959]). Furthermore, under the common law standard, "a triable issue is raised only if a jury could reasonably conclude that 'malice was the one and only cause for the

publication'" (*Liberman*, 80 NY2d 429, 439, *quoting Stukuls v State of New York*, 42 NY2d 272, 282 [1977]).

To demonstrate the reckless disregard required under the constitutional standard for malice, the plaintiff must prove that the "statements [were] made with [a] high degree of awareness of their probable falsity" (*Liberman*, 80 NY2d 429, 438, *quoting Garrison v Louisiana,* 379 US 64 [1964]; *Sweeney v Prisoners' Legal Servs. of New York, Inc.*, 84 NY2d 786, 793 [1995]). In this regard, "there is a critical difference between not knowing whether something is true and being highly aware that it is probably false . . . [o]nly the latter establishes reckless disregard in a defamation action" (id.). Accordingly, "[t]he plaintiff must set forth evidence to support the conclusion that defendants entertained serious doubts as to the truth of the statement" (*Present v Avon Prod., Inc.*, 253 AD2d 183, 188 [1st Dept], *leave dismissed* 93 NY2d 1032 [1999]).

The Alleged Defamatory Statements

In opposing dismissal of the defamation claim, plaintiff purports to rely on a number of alleged communications between the defendant, members of AMC's Board, and an AMC employee, at around the time of her termination. However, except for the one comment made to Faison, plaintiff has not precisely identified the exact words of the challenged statements. While the complaint contains a number of alleged quotations, neither plaintiff's affidavit nor her memorandum of law quote from, or make any reference whatsoever to, the complaint.[1]

[1] Plaintiff purports to describe the defamatory communications in paragraphs 63 through 80 of the complaint. However, only paragraphs 63, 68(a)-(f), 69 and 75 provide actual quotations, most

Accordingly, the court must exclude that pleading from its analysis.

Plaintiff appears to rely primarily on upon the Memoranda and the Gaynor, McCauley and Goldstein Reports, as well as a private folder maintained by defendant containing notes and emails regarding plaintiff. However, defendant has proffered undisputed testimony that the three reports were neither attached to the Memoranda nor distributed to members of the Board (Vogel Aff. ¶ 6; Coyne Dep. Tr. 286:15-19, 308:20-309:8; Liberman Dep. Tr. 150:22 -151:16; Langone Dep. Tr. 58:10-17). Furthermore, while defendant brought the Memoranda with her to the meetings with the Executive Committee members, she did not provide them to Kissinger, Langone or Liberman (Coyne Tr. 284:24-285:8; Langone Tr. 53:22-24; Liberman 136:6-14). The Termination Memorandum was provided to Flaherty during a short meeting, but she may not have read past the first page of it (Coyne 312:21-313:8). And although a number of the alleged incidents recounted in the private folder appear in that Memorandum, plaintiff does not assert that the folder was ever shown to anyone (see Pls. Mem. at 9-11).

Accordingly, the court will restrict its review to the statements contained in the Termination Memorandum, under the assumption that Flaherty read the entire document, and to the statement made to Faison. However, the court notes that plaintiff has failed to identity the precise statements in the Memorandum to which she finds defamatory, for the most part paraphrasing the actual language or offering subjective characterizations of its contents. While the court has endeavored to determine the basis of her objections, it has limited its analysis to

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of them taken from the Memoranda.

those statements which are most clearly alluded to, or cited to, in plaintiff's brief.

Common Interest Privilege

Plaintiff does not dispute the general application of the common interest privilege with respect to the statements in the Termination Memorandum. However, with respect to attribution of the racial slur to her, plaintiff argues that the privilege is inapplicable because it was communicated to Faison after plaintiff had already been terminated. She also contends that defendant forfeited the privilege as to all of the statements by acting with both common law and constitutional malice.

The court agrees with defendant that all of the statements are protected by the common interest privilege. With respect to the report of the racial slur to Faison, it pertained to job-related conduct in which defendant and Faison had a common interest, whether plaintiff was employed or had been recently terminated. In any event, the privilege applies to post-termination communications regarding an employee (*see, e.g., De Sapio v Kohlmeyer*, 52 AD2d 780, 780–81 [1st Dept 1976]). Furthermore, on this record, plaintiff has not met her burden of establishing either form of malice with respect to any of the allegedly defamatory statements.

Common Law Malice

In support of her claim of common law malice, plaintiff contends that defendant defamed her to protect defendant's sister, Barron, with whom defendant was very close. Plaintiff asserts that after she opposed Barron's hiring, defendant kept the secret file on plaintiff and communicated with Barron about plaintiff's interactions behind her back. She further contends

that defendant took an excessive interest in plaintiff's employee evaluations of Barron, and reacted strongly to any of plaintiff's criticisms of Barron's performance.

Plaintiff's evidence does demonstrates there was a certain degree of animosity between her and defendant stemming from a combination of office politics and nepotism. However, it does not show that their hostile relationship or the protection of Barron's employment was the *sole* motivation for drafting the Termination Memorandum. Rather, there is substantial evidence that defendant acted at least in part to further the interests of AMC. Although plaintiff dismissed concerns expressed about her relatively low caseload, the issue had been raised in three separate evaluations of her performance over the years. The Gaynor and McCauley reports were procured at Flaherty's request, not defendant's, and they expressed a number of policy recommendations regarding the future of the Rehab Center that were at odds with plaintiff's vision – including plaintiff's dismissal as its director. Furthermore, plaintiff effectively conceded that she could not meet her burden at her deposition:

> Q: But it's your testimony that the furtherance of [plaintiff's] own personal agenda was to fire you in order to continue to employee Margaret [Barron].
>
> A: Yes.
>
> Q: What proof do you have that [Ms. Coyne] fired you to further that personal agenda?
>
> A: No proof.

(Chiaramonte Tr. at 299:16-24). Furthermore, considering the record as whole, it is clear that whatever defendant stood to gain personally by plaintiff's departure, she also harbored a sincere

belief that the termination would also benefit AMC (*see, e.g., Brook v Peconic Bay Med. Ctr.*, 152 AD3d 436, 438–39, 59 NYS.3d 310, 313 [1st Dept 2017] ["the allegation that defendants conspired to eliminate Dr. Brook as a competitor demonstrate[s] that actual malice was not their sole motive for making the statements"]).

Constitutional Malice

In urging that defendant acted with constitutional malice, plaintiff first focuses on the allegedly inappropriate comments attributed to plaintiff under the heading "Exhibit II" in the Termination Memorandum. She argues that defendant could not have been honestly mistaken about whether plaintiff made the comment about the size of a trustee's penis at an AMC dinner ("Item # 4"), because defendant claimed to have personally heard it. However, in her deposition, plaintiff did not affirmatively deny making the comment. Rather, she merely said that she did not remember, conceded she had been drinking and agreed that it was "maybe" possible that she said it and forgot (Chiaramonte Tr. 373:24-375:4). Defendant, on the other hand, sent an email to herself about the incident shortly after it occurred, and eighteen months before plaintiff was terminated (Clark Aff., Ex. 16).

With respect to certain comments that defendant claims were reported to her by others -- the racial slur, and the sexually harassing comment ("Item # 1),[2] plaintiff argues that a jury would be entitled to disbelieve that they were reported at all, or find that she entertained serious

[2] Plaintiff cites to a third comment attributed to plaintiff, her directive to "bag and tag that things and get it out of here, it stinks" with respect to a client's euthanized dog. However, this statement does not appear in the Termination Memorandum and plaintiff does not indicate to whom, if anyone, it was communicated.

doubts about them. Apart from this speculation, however, plaintiff has not raised an issue regarding defendant's good faith. Plaintiff admitted saying "No, I won't blow you for a dollar" to AMC'S Chief Financial Officer (Chiaramonte Tr. at 324:15-326:16) and the parties merely disagree over whether this was a well-received or offensive joke. As to the racial slur, defendant has submitted an affidavit from her assistant, Gregg Vogel, in which Vogel avers that after defendant informed Vogel that plaintiff was being terminated, Vogel told defendant that plaintiff had made numerous unkind remarks about AMC employees, including the reference to Faison with a racial slur. Although plaintiff denies making that reference, she cannot raise a question of fact as to defendant's good faith reliance on Vogel by merely calling Vogel a liar (*Present*, 253 AD2d 183, 188). Nor does evidence that defendant failed to investigate the truth of the accusation, or conducted a negligent investigation, "create an inference that a defendant suspected the falsity of the information and purposefully avoided seeking out facts that would confirm its falsity" (*id.*); *see Sweeney*, 84 NY2d 786, 793 ("A qualified privilege may be sustained if the speaker is genuinely unaware that a statement is false because the failure to investigate its truth, standing alone, is not enough to prove actual malice even if a prudent person would have investigated before publishing the statement").

For the same reason, defendant was entitled to rely on the Goldstein and McCauley reports with regard to plaintiff's performance. Additionally, plaintiff has supplied no authority for the proposition that defendant was required to disclose and explain the strengths and weaknesses of both the McCauley and Gaynor Reports, or effectively promote plaintiff's view of their relative merits.

Furthermore, plaintiff has not demonstrated that defendant acted with reckless disregard to the truth in connection with the Termination Memorandum's representations regarding plaintiff's workload and productivity. Although plaintiff claims that defendant provided numbers lower than those reflected by AMC's records, plaintiff does not explain what the difference was, what the accurate numbers were, and how they were in any way significant. Instead, plaintiff has merely cited to a number of internal documents that were not attached to the Memorandum or otherwise presented to the Board. Nor does plaintiff state what her actual numbers were. Although plaintiff contends that she often worked more than the required 35 hours per week, she does not address the claim that she took off for personal time between punching in and out, other than asserting that AMC had a fingerprint swipe in system that was not always used (Chiaramonte Aff. ¶ 71).

Finally, as she did in connection with her testimony relevant to common law malice, plaintiff effectively conceded that she could not meet her burden with respect to constitutional malice:

> Q. Do you have any reason to believe that [defendant] Coyne may have been honestly mistaken about anything that wasn't true that she said about you?
>
> A. No.
>
> Q. Why not?
>
> A. Why do I think she was not mistaken?
>
> Q. What information do you have that –
>
> A. Oh.

Q. -- to prove that she was not –

A. I don't have any information.

Q. -- that she was not - that she could not have honestly been mistaken about anything that wasn't true.

A. I don't have any information.

Accordingly, the court holds that the application of the qualified common interest privilege, standing alone, requires dismissal of plaintiff's defamation claim.

Non-Actionable Opinion

For the sake of completeness, the court will also address defendant's contention that many of the allegedly defamatory statements constitute non-actionable opinion. As plaintiff concedes, the New York courts have held as general rule that internal employee evaluations constitute opinion rather than fact (*see Dillon*, 261 AD2d 34, 38; *Panghat v New York Downtown Hosp.*, 85 AD3d 473, 474 [1st Dept 2011]; *Ott v Automatic Connector, Inc.*, 193 AD2d 657, 658 [2d Dept 1993]). Thus, dismissal has been found to be warranted where the president of a hospital's professional staff stated that the chairman of pediatrics was "immoral", "unethical" and had "mismanaged cases" (*Hollander v Cayton*, 145 AD2d 605, 606, [2d Dept 1988]); and where an interoffice memorandum accused the plaintiff attorney of being "uncooperative, abrasive and dilatory in fulfilling his responsibilities in interacting with our customer [sic], client's attorney, client and participating brokers" (*Goldberg v Coldwell Banker, Inc.*, 159 AD2d 684, 684–85 [2d Dept 1990]).

Once again, plaintiff has not identified with any precision what representations in the

Termination Memorandum she deems to be statements of fact, rather than opinion. However, she relies upon a federal case in which a doctor was accused "of compromising the welfare of patients by substituting radioactive sources without telling the doctor who was administrating them to a patient about it, being dishonest with respect to a specific set of statements that he made in an effort to cover up his safety violations, disobeying orders from his superiors with respect to safety, and ignoring established safety procedures" (*Albert v Loksen*, 239 F.3d 256, 267 [2d Cir 2001]). Nothing in the Memorandum at bar is as fact-specific as that. Rather, it merely opines that plaintiff at times failed to meet the standard of care in several cases, and correctly summarizes the conclusions of the Goldstein Report. Plaintiff's contention that defendant mislead the Board as to the "independence and comprehensiveness" of the reports also implicates questions of mere opinion, as do her claims that defendant "lied about [plaintiff's] role and contributions to the [Rehab] Center" and "and misrepresented the importance of productivity in the President's Council." And contrary to plaintiff's assertion, defendant did not accuse her of "forging her time records", but rather of abusing the payroll system by conducting personal business after punching in to work.

Tortious Interference

The claim for tortious interference must be dismissed as duplicative of the defamation claim, as it is based on the allegation that defendant "made false and defamatory statements about plaintiff, with malice, in order to terminate plaintiff's business interest with AMC" (Compl. ¶ 85). Thus, it alleges "no new facts and seek no distinct damages from the defamation claim" (*Perez v Violence Intervention Program*, 116 AD3d 601, 602 [1st Dept 2014], *leave denied* 25

NY3d 915 [2015]). Furthermore, as defendant correctly argues, a "plaintiff cannot be allowed to evade the employment-at-will rule by recasting her cause of action in the garb of tortious interference with her employment" (*Marino v Vunk*, 39 AD3d 339, 340 [1st Dept 2007], *citing Ingle v Glamore Motor Sales*, 73 NY2d 183, 189 [1989]). Rather, a claim for tortious interference with an at-will relationship must allege conduct which is "criminal or independently tortious", or undertaken for the sole purpose of intentionally harming the plaintiff (*Carvel Corp. v Noonan*, 3 NY3d 182, 190, [2004]), and here, plaintiff has merely relied upon the conduct underlying her failed defamation claim. Finally, defendant was not a third party to plaintiff's employment relationship, but was a co-employee acting within the scope of her authority (*see Presler*, 113 AD3d 409, 409–10 (1st Dept 2014); *Marino*, 39 AD3d 339, 340).

Accordingly, it is hereby

ORDERED, that the motion to dismiss is granted, and the complaint is dismissed, with costs and disbursements to defendant as taxed by the Clerk of the Court, upon submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

Dated: January 28, 2020

DAVID B. COHEN, J.S.C.

HON. DAVID B. COHEN
J.S.C.