Circuit Court for Montgomery County
Case No. C-15-CV-22-001183

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0129

September Term, 2023

JANE DOE

v.

CHARLES E. SMITH JEWISH DAY SCHOOL OF GREATER WASHINGTON, INC.

Beachley,
Shaw,
Meredith, Timothy E.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Shaw, J.

Filed: March 7, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This matter arises from the grant of summary judgment in the Circuit Court for Montgomery County. Appellant, Jane Doe ("Teacher"), filed a complaint against, Appellee, Charles E. Smith Jewish Day School of Greater Washington, Inc. ("School"), alleging two counts of breach of the employment agreement and one count of defamation, stemming from the termination of her employment in December 2021. School filed a Motion for Summary Judgment, and following a hearing, the court issued an opinion granting School's motion. Teacher timely appealed and presents the following questions for our review:

1. That in terminating [Teacher's] employment during the term of her teaching contract allegedly for "just cause," the School did not act with objective reasonableness and in objective good faith from the perspective of a reasonable employer other than the School, based upon a reasoned conclusion supported by substantial evidence, as required for "just cause" to discharge [Teacher] during the term of her teaching contract, per *Towson Univ. v. Conte*, 384 Md. 68, 88, 91 (2004). *[COUNT I]*

2. That [Teacher's] termination was also improper as an unauthorized act, given that the School failed to follow provisions in the School's own Employee Policy Manual requiring a recommendation from the School's Executive Committee preceding the imposition of any employee discipline. *[COUNT II]*

3. That the Head of School's account that [Teacher] had been discharged because of "an egregious ethical violation that necessitated the decision" was untrue and deliberately disingenuous, and even if, arguendo, covered by a qualified privilege, nevertheless constituted an actionable defamation as an abuse of such privilege, per *Davidson v. Seneca Crossing*, 187 Md. App. 601, 645 (2009), holding that an asserted abuse of such a conditional privilege is a jury question. *[COUNT III]*

BACKGROUND

The Faculty Employment Agreement & Employee Policy Manual

Teacher was employed by School as a "contract teacher"[1] for grades seven through twelve. She taught art and ceramics and worked at School for approximately sixteen years. On April 2, 2021, Teacher and School entered into a written agreement ("employment agreement"), titled "Faculty Employment Agreement," for the academic year that spanned from August 23, 2021, to June 22, 2022. The parties do not dispute that a valid contractual agreement existed between Teacher and School. Teacher also signed an acknowledgment of the receipt of School's Employee Policy Manual ("employee manual") for the academic year.

Teacher's Tenure

In 2021, several encounters were brought to School's attention regarding Teacher's performance. On August 30, 2021, Dr. Lisa Vardi, the High School Principal, attempted to enter Teacher's classroom and found that it was locked. She noticed that the blinds on the classroom door's window were completely closed. Dr. Vardi unlocked the door and found Teacher and a male student sitting across from each other in two chairs leaning towards each other. The lighting in the classroom was low and there was music playing. Dr. Vardi left the classroom and emailed Teacher shortly after, reminding her of the social

[1] The Faculty Employment Agreement defines "Contract Teacher" as the following: "[a]ny teacher who has been continuously employed by the School for at least two full academic years, and is not tenured, shall be a 'Contract Teacher' unless the School designates the teacher as a Probationary Teacher."

distancing policy and that the door should remain open and unlocked when meeting with individual students. Dr. Vardi reported the incident to Dr. David Solomon, Teacher's immediate supervisor. She did not report the incident to Rabbi Mitchel Malkus, the Head of School.

In October of 2021, School received reports that a student attended multiple classes taught by Teacher throughout the school day, in place of the student's assigned classes. It was reported that the unenrolled student would discuss inappropriate topics with other students in Teacher's class, such as her boyfriends, intimacies with boys and alcohol consumption. On one occasion, while Teacher was supervising the class, an altercation occurred between the unenrolled student and a student enrolled in the class. The unenrolled student later made threatening posts on Snapchat about the enrolled student, that resulted in the unenrolled student's suspension. The incident was reported to the administration by another teacher and the students enrolled in the class, but it was not reported by Teacher. On October 29, 2021, Dr. Vardi had a conversation with Teacher regarding the incident, and Teacher stated that she "never thought [the incident] was that bad." Dr. Vardi asked Teacher whether she had conversations with the unenrolled student about her alcohol use and sexual relations, and Teacher stated, "I would rather not say."

Also, in October 2021, Dr. Vardi received an email notifying her that students were entering through the side entrance of the school to avoid signing in late. Teacher and students from her class opened the side entrance for the late students. Dr. Vardi had a conversation with Teacher regarding the security of the students, and requested that she

not allow students to leave her class to open the side entrance for their classmates, and to mark students late when they arrive after 8:00 a.m. Later that month, Dr. Vardi was notified by another teacher that students were in Teacher's classroom instead of their assigned classes. Rabbi Malkus was made aware of the multiple incidents involving Teacher during late October 2021.

On November 11, 2021, the School's Director of Human Resources informed Teacher that a decision had been made on behalf of School for good cause, to terminate her employment, effective as of December 11, 2021. School did not provide Teacher with its rationale for her termination. Rabbi Malkus emailed the parents of students in the arts and ceramics program that Teacher would not be continuing in her position. A member of the Board of Directors, who is also an alumnus and school parent inquired, and Rabbi Malkus responded: "While I can't relate the specific details, there was an egregious ethical violation that necessitated the decision. We needed to act for the wellbeing of our students and to protect the School."

The Lawsuit

In March of 2022, Teacher filed a lawsuit against School in the Circuit Court for Montgomery County, alleging two counts of breach of the employment agreement and one count of defamation. School filed a Motion for Summary Judgment, and the court held a hearing on School's motion.

School argued that it had just cause to terminate Teacher and that there were no factual disputes. School outlined the infractions that Teacher engaged in that led Rabbi

Malkus to conclude that Teacher was crossing boundaries and exercising unprofessional judgment in her interactions with students. School stated that Teacher admitted to the infractions, but she personally believed they were not "that bad." School argued that Teacher's second breach of contract claim failed because the employee manual was not a contract and that Teacher acknowledged that the manual was not a contract. Regarding the defamation claim, School argued that the email sent by Rabbi Malkus was not false and the statement was protected under the "qualified privilege." School asserted that to overcome the privilege, Teacher needed to show there was actual malice.

Teacher argued that the burden of proof was on School to show cause for her termination, that the case was fact-intensive and required a jury to decide whether School met its burden. She asserted that the infractions were in dispute, and that there was no evidence and only allegations. Teacher argued that the employee manual was incorporated into the contract, and that the school violated its grievance procedure outlined in the employee manual. Further, she argued the statement made by Rabbi Malkus was a defamatory statement because it implied that "some sort of sexual thing" was going on, and that qualified privilege did not apply.

After reviewing the evidence and hearing arguments from counsel, the court, in an opinion filed on March 22, 2023, found that there was no genuine dispute of material facts and granted Appellee's Motion for Summary Judgment on all three counts. The court held:

> *Count 1: Breach of Contract – Bad Faith Wrongful Termination of Employment*
>
> The dispute or difference between [Teacher's] perception of just cause versus the [School's] administrators' determination is not relevant. The undisputed facts support the finding that [School] acted with objective reasonableness. Accordingly, summary judgment is appropriate as to Count 1.
>
> *Count 2: Breach of Contract – Unauthorized Termination of Employment*
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> While [Teacher] argues that [School] did not follow its own procedure, [Teacher] ignores that [School] was not contractually bound to follow that process and that [School] could find just cause to terminate her employment within the bounds of the Employment Agreement alone. Accordingly, [School's] actions in terminating [Teacher] is not a material breach of the Employment Agreement.
>
> Further, even though [Teacher] undisputedly had a just cause contract with [School], distinguishing her case from case law focused on at-will contracts, the law is clear on when a policy manual rises to a contractual agreement, which is not present in this case. Hence, summary judgment is appropriate as to Count 2.
>
> *Count 3: Defamation – Libel and Slander*
>
> Finding that [Teacher] has failed to allege or prove facts to support a finding of breach of the common interest privilege, and without objection to the privilege applying, this Court finds that there is no dispute as to any material fact and that [School] is entitled to summary judgment as a matter of law on Count 3.

Teacher timely appealed.

STANDARD OF REVIEW

Summary judgment is proper when "there is no genuine dispute as to any material fact and the [moving] party is entitled to judgment as a matter of law." Rule 2-501(a). "Summary judgment is not foreclosed if a dispute exists as to a fact that is not material to

the outcome of the case." *Collins v. Li*, 176 Md. App. 502, 591 (2007). "We review the circuit court's grant of summary judgment *de novo*." *Gambrill v. Bd. of Educ. Of Dorchester Cnty.*, 481 Md. 274, 297 (2022). This Court "conduct[s] an independent review of the record to determine whether a genuine dispute of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Maryland Cas. Co. v. Blackstone Int'l Ltd.*, 442 Md. 685, 694 (2015). "We review the record in the light most favorable to the non-moving party and construe any reasonable inferences which may be drawn from the facts against the movant." *Id.* This Court "do[es] not endeavor to resolve factual disputes, but merely determine[s] whether they exist and are sufficiently material to be tried." *Gambrill*, 481 Md. at 297. "The requirement of a genuine issue of material fact is more than the existence of some alleged factual dispute and irrelevant factual disputes are not a genuine dispute of material fact." *Collins*, 176 Md. App. at 591.

DISCUSSION

I. The court did not err in finding that School had just cause to terminate Teacher.

Teacher argues School did not act in objective good faith in discharging her. She contends the testimony of the witnesses and documentary evidence used to establish the investigatory and decisional processes of School were "infected with bias" and "impulse." School argues the court correctly held that there was no genuine dispute of fact and that School acted in good faith in terminating Teacher. School asserts that its decision was based on information it had regarding Teacher's conduct which came from multiple credible sources.

In *Towson University v. Conte*, an employment case, the Supreme Court of Maryland examined the jury's role in reviewing employers' decisions to terminate employees for just cause. 384 Md. 68, 71 (2004). Dr. Conte was employed by Towson University, and after several events were brought to the University's attention, an internal investigation was conducted and following a brief hearing before the University President, he was terminated. *Id.* at 74. The reasons for his termination were "incompetence" and "willful neglect of duty," which were just causes enumerated in his employment contract. *Id.* at 73.

Dr. Conte filed a complaint in the Circuit Court for Baltimore County against the University alleging that it had wrongfully discharged him and breached his employment agreement. *Id.* at 74. The University countered that it had just cause to terminate his employment. *Id.* At the conclusion of a trial, the jury returned a verdict in favor of Dr. Conte, finding that the University did not prove by a preponderance of the evidence that just cause existed under the contract and he was awarded damages. *Id.* This Court affirmed the judgment and the University petitioned for certiorari, which was granted. *Id.* at 75.

The Maryland Supreme Court then considered "whether or to what extent a jury may examine or review the factual bases of an employer's decision to terminate an employee." *Id.* The Court determined that Dr. Conte's contract permitted termination only for cause and that the language of the contract was ambiguous as to whether the fact-finding prerogative lies with the University. *Id.* at 80. The Court ultimately held:

> In sum, we agree with the majority of jurisdictions that have considered this issue and hold that a jury's role in a wrongful discharge case does not include that of ultimate fact-finder. Instead, in the just cause employment context, a jury's role is to determine the *objective reasonableness* of the employer's decision to discharge, which means that the employer act in objective good faith and base its decision on a reasoned conclusion and facts reasonably believed to be true by the employer.

Id. at 91.

The Court reasoned that the practical considerations of running a business overwhelmingly favor a legal presumption that an employer retain the fact-finding prerogative underlying the decision to terminate employment, and that this case demonstrated why a jury should not be permitted to review the factual bases for termination in the employment context. *Id.* at 89. The Court remanded the case to the circuit court for a new trial. *Id.* at 97.

In *Himes Associates, Ltd. v. Anderson*, this Court examined whether the employer or the employee had the burden of proving "performance or cause" to terminate an employment contract, an issue that was not addressed in *Conte*. 178 Md. App. 504, 537 (2008). The appellee, Eric Anderson, sued his former employer, the appellant, Himes Associates, Ltd., in the Circuit Court for Anne Arundel County after he was terminated. *Id.* at 513. Mr. Anderson argued that he was not terminated for cause and was entitled to his severance pay under the agreement. *Id.* Himes argued that Mr. Anderson was terminated for cause and was not entitled to the severance pay. *Id.* at 513–14. The trial court ruled in favor of Mr. Anderson and determined that it was Himes' burden of proof to show that Mr. Anderson was terminated for cause. *Id.* at 536–37.

On review, we held that the employer does have the burden of proof to show cause for termination in an action for breach of a just cause employment contract. *Id.* at 539. We relied on our holding in *Tricat Indus., Inc. v. Harper*, 131 Md. App. 89 (2000), an employment contract case, where this Court concluded that "the proper assignment of the burden of proof to show cause for termination in an action for breach of a just cause employment contract, [] is on the employer." *Id.*

The *Himes* Court also reviewed whether the trial court applied the correct legal standard under *Conte* in evaluating Himes' decision to terminate Mr. Anderson for cause. *Id.* at 540. Himes argued that Mr. Anderson was terminated based upon four incidents which constituted cause under the employment agreement and that he was not entitled to severance pay. *Id.* at 514. Mr. Anderson argued that he was not terminated for cause and that he did not receive any warnings or complaints about his job performance or conduct. *Id.* This Court found that the trial judge applied the proper legal standard because he examined the motivations underlying the Himes' decision to terminate Mr. Anderson and assessed whether Himes indeed terminated Mr. Anderson for the reasons it cited as poor performance or cause consistent with the holding in *Conte*. *Id.* at 540–41. The trial judge decided, as a matter of fact, that the reasons cited by Himes for terminating Mr. Anderson were not the reasons for which he was terminated and ruled in favor of Mr. Anderson. *Id*. at 541. We affirmed the trial court's decision. *Id.* at 543.

In the present case, it is undisputed that the employment agreement between Teacher and School was a just cause contract. Paragraph seven of the employment agreement

states, "[t]he termination of employment and this Agreement is described in Attachment A." Attachment A of the employment agreement states the following, in pertinent part:

> A. Termination or Modification of Employment Agreement: The School may terminate this Agreement at any time during or before the start of the term hereof as set forth below.
>
> [. . . .]
>
> (ii) Contract or Tenured Teacher: In the case of a Contract Teacher or a Tenured Teacher, the School may terminate this Employment Agreement upon 30 days' written notice for any reason that the School determines in its sole and exclusive discretion constitutes Good Cause. At the sole discretion of the School, a Contract Teacher or Tenured Teacher may be relieved of his/her duties during the 30-day notice period. The parties acknowledge that it is impossible to anticipate in advance every possible circumstance that could warrant termination hereunder. All compensation and benefits will cease on the effective date of termination. The determination of what is considered Good Cause is the sole and exclusive decision of the School. The Contract and Tenured Teacher shall receive the compensation and benefits accrued but unpaid as of the effective date of termination.

Attachment A further provides examples of Good Cause:[2]

> (iii) The following are provided to serve as examples of Good Cause. Good Cause includes but is not limited to:
>
> (e) Teacher has failed to carry out assigned responsibilities or duties in a manner acceptable to the School.
>
> (f) Teacher has failed to adhere to guidelines and requirements of the job.
>
> (g) Teacher is repeatedly and/or excessively late to work.
>
> (h) Teacher has taken leave without proper approval or authorization.
>
> [. . . .]

[2] Only the relevant enumerated examples have been included for the purpose of brevity.

> (j) Teacher has failed to comply with any School policy, procedure, or practice, including but not limited to those set forth in the Employee Policy Manual.
>
> (k) Teacher has engaged in improper or unprofessional behavior.
>
> [. . . .]
>
> (p) Teacher has engaged in any other conduct that may harm the reputation of the School.

Based on the employee contract and in accordance with *Himes*, we hold that School had the burden of proving cause for termination of Teacher's employment contract. As *Conte* dictates, the employer, in this case, School, retained the fact-finding prerogative underlying the decision to terminate employment.

School presented the circuit court with numerous infractions committed by Teacher which included unapproved late arrivals, early departures, unsupervised classrooms, inappropriate interactions with students and missing staff meetings. School outlined the following incidents: Teacher was alone with a male student in her classroom with the door locked; Teacher permitted an unenrolled student in her classroom which led to an altercation with an enrolled student under her supervision; Teacher failed to report the incident to School's administration; Teacher permitted students to arrive late to school by entering the side door of the school; and Teacher permitted students to stay in her classroom when they should have been in their assigned advisory classes.

In her deposition, Teacher admitted that she was in a locked classroom alone with a student in August of 2021, and she agreed with Dr. Vardi's concerns that "other people

might see [her conduct] as inappropriate." She admitted that she "opened the door for students who were outside, but that she did not know the context of if the students were late or needed to go to the bathroom or needed to get water." She admitted that she let a student in her ceramics class stay in her classroom when she should have been in her assigned class and stated that "it probably wasn't the best form of judgment, but it was a ten-minute advisory, and she really wanted to stay." She admitted that she had conversations with her students about their personal lives and that she had discussions with one of her students about dating, friends, parties and alcohol.

Rabbi Malkus stated in his sworn declaration dated August 21, 2022, that he was responsible for the decision to terminate Teacher's employment. He said:

> Based on my more than two decades of experience as a Head of School, the [] incidents made me conclude that [Teacher] violated the School's policies and expectations, exercised poor judgment, and crossed over appropriate boundaries in her interactions and relationships with students. Accordingly, I believed it was appropriate, and in the best interest of the School and its students, to relieve her of teaching responsibilities and terminate her employment.

Based on our review of the record before the circuit court, we hold the court did not err in granting summary judgment. Teacher contends that there was a genuine dispute of material fact regarding what occurred in her classroom when she was found alone with a male student. However, regardless of the conduct that occurred inside the classroom, School found it inappropriate for a teacher at the school to be in a locked classroom with an individual student and Teacher conceded in her deposition that one could find that her conduct was inappropriate. Teacher failed to present any genuine dispute of material fact

that the School did not act "in objective good faith and in accordance with a reasonable employer under similar circumstances." *Conte*, 384 Md. at 85. As stated, "the existence of some alleged factual dispute and irrelevant factual disputes are not a genuine dispute of material fact" and do not preclude a determination that summary judgment as a matter of law is appropriate. *Collins*, 176 Md. App. at 591.

We note that School also determined that Teacher's termination was based on multiple incidents, and not the classroom incident alone. Further, the record does not reflect that School terminated Teacher for any reasons other than those set forth by School.

II. The court properly found that the employment agreement was not ambiguous and did not incorporate by reference the employee manual.

Teacher signed an employment agreement and an acknowledgement of receipt of the employee manual. The employment agreement stated that "School may terminate this Agreement at any time during or before the start of the term," and that "School may terminate this Employment Agreement upon 30 days' written notice for any reason that the School determines in its sole and exclusive discretion constitutes Good Cause." The preface of the employee manual states the following:

> The Manual is presented for information and reference only, and is not intended to, and does not create a term of employment or an employment contract, express or implied, between employees and the School. No changes to the policies or practices stated in this Manual can be made without approval from the Head of School. The policies and practices in this Manual are not contractual. However, employees are expected to abide by the policies set forth in this Manual. Policies, procedures, and benefits are reviewed on a regular basis. The School reserves the right to alter, suspend, interpret, or eliminate, in whole or in part, any portions of the Manual at any

> time, at its sole discretion. Every effort will be made to inform employees of the changes to the Manual in a timely manner.

The Employee Manual further provides under, "Employment Contracts": "For all employees who have been offered and have signed an employment agreement (i.e., contract), the terms of employment are governed by the employment agreement. In the event of any conflict between the terms of the employment contract and the policies of this Manual, the terms of the employment contract will prevail."

The provision at issue is under the heading "Other Legal or Ethical Violations," located in the employee manual. It states:

> In the case of a Reportable Event other than with respect to improper, irregular or questionable accounting and reporting, auditing, or internal control practices, if the Head or the President (or their respective designees) determines that the alleged facts in the report are credible and would, if true, constitute a material violation of the Standards of Behavior, s/he shall report the matter to the Executive Committee for its further consideration of the matter, provided, however, that if the Reportable Event alleges the failure of any member (or members) of the Executive Committee to adhere to the Standards of Behavior, that member (or members) shall recuse herself or himself (or themselves) from participating in the consideration of the matter.
>
> The Executive Committee shall record minutes of any deliberations concerning a Reportable Event and shall preserve any documentary materials received or created and any correspondence (including copies of emails) sent or received by the Executive Committee or any member thereof in connection with its consideration of the Reportable Event. Upon completion of its consideration of the Reportable Event, the Executive Committee shall submit to the Head (or the President, as the case may be), its recommendation as to what steps, if any, the School should take in response to the Reportable Event. The recommendation of the Executive Committee shall be strictly confidential. However, in the event that the School determines on the basis of the Executive Committee's report that some form of personnel discipline is warranted, the Head (or the President) shall obtain advice of counsel with

> respect to the obligation to maintain the confidentiality of the report and all supporting materials.

Teacher argues that her termination was an unauthorized act of School because School failed to follow its employee manual. She asserts that School was required to receive a recommendation from the Executive Committee of the School's Board of Directors before any employee discipline. Teacher argues the court erred when it reasoned that there was no binding contractual obligation on School's part to consult the Executive Committee prior to imposing discipline. School argues the employee manual is not a contract, and the manual was not incorporated by reference into the employment agreement.

Teacher cites to *Calomiris v. Woods*, 353 Md. 425 (1999). In *Calomiris*, the Maryland Supreme Court examined the appropriate test for determining whether contractual language is ambiguous, and whether the trial court erroneously admitted extrinsic evidence to interpret a provision in the parties' mortgage contract. *Id.* at 432–33. The Court stated that "the determination of ambiguity is one of law, not fact, and that determination is subject to *de novo* review by the appellate court." *Id.* at 434. The Court acknowledged that "[a]ll courts generally agree that parol evidence is admissible when the written words are sufficiently ambiguous." *Id.* at 433. The Court then explained that Maryland has long adhered to the law of the objective interpretation of contracts and under the objective view, "a written contract is ambiguous if, when read by a reasonably prudent person, it is susceptible of more than one meaning." *Id.* at 435–36. The Court noted, "[t]he

determination of whether language is susceptible of more than one meaning includes a consideration of 'the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution.'" *Id.* at 436. The Court further explained:

> Therefore, when interpreting a contract the court's task is to:
>
> > [D]etermine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed. In these circumstances, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. Consequently, the clear and unambiguous language of an agreement will not give away to what the parties thought that the agreement meant or intended it to mean.

Id. at 436 (citing *Gen. Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985)).

The Court held that the language in the parties' contract was unambiguous, and that even if the language were ambiguous, parol evidence would be admissible only to resolve the ambiguities and not to contradict unambiguous terms of the contract. *Id.* at 447. Additionally, the Court held that the trial court erred by "attempting to ascertain the contracting parties' intent with the use of parol evidence and by not applying the express terms of the partial release provision." *Id.*

In the case at bar, there was one contractual agreement between School and Teacher, the employment agreement, and its terms were not ambiguous. The employment agreement provided that "School may terminate this Agreement at any time during or before the start of the term . . . for any reason that the School determines in its sole and

exclusive discretion constitutes Good Cause." It is clear from the plain language of the termination provision that School was permitted to terminate the employment agreement with good cause and there is no other language in the employment agreement that offers any reasonable alternative to the language set forth in the termination provision. We decline to consider extrinsic evidence of the parties, because the language in the employment agreement is not "susceptible of more than one meaning." *Calomiris*, 353 Md. at 436.

In addition, we find that the employee manual did not constitute an additional contractual agreement between School and Teacher, nor was it incorporated by reference into the employment agreement. This Court has explained that "*not all* personnel policies and employee handbooks create enforceable contractual rights." *Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md. App. 470, 492–93 (1995). Moreover, we have affirmed a grant of summary judgment where an employee policy manual contained a disclaimer that the manual did not constitute an express or implied contract. *See Bagwell,* 106 Md. App. at 494; *see also Castiglione v. Johns Hopkins Hosp.*, 69 Md. App. 325, 341 (1986).

Here, the employee manual stated that "the terms of employment are governed by the employment agreement," and that "[t]he Manual is presented for information and reference only, and is not intended to, and does not create a term of employment or an employment contract, express or implied, between employees and the School." The manual also stated that, "School reserves the right to alter, suspend, interpret, or eliminate, in whole or in part, any portions of the Manual at any time, at its sole discretion." Teacher

signed the manual's "Acknowledgment of Receipt" which stated, "I understand that the Manual is provided to me for information and reference only and is not intended to and does not create a term of employment or an employment contract between myself and the School." Teacher agreed in her deposition that she received a copy of the manual and that she understood at the time of signing the acknowledgment of receipt that the manual was not intended to create a term of employment or an employment contract. Although School did not follow the procedures set forth in the employee manual regarding a "reportable event," it was not contractually obligated to do so. We affirm the circuit court's grant of summary judgment.

III. The court properly found that the common interest privilege shields School from liability.

Teacher argues the statement made by Rabbi Malkus in an email to an affiliate of the School, that Teacher engaged in an "egregious ethical violation" was a defamatory statement. School argues the statement was not defamatory and even if the statement was defamatory, it is protected by the common interest privilege.

A defamatory statement is one "which tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or associating with, that person." *Indep. Newspapers, Inc. v. Brodie*, 407 Md. 415, 441 (2009). To establish a prima facie case of defamation, a plaintiff must show: "(1) that the defendant made a defamatory statement to a third person, (2) that the statement was false, (3) that the defendant was legally at fault in making the statement, and (4) that

the plaintiff thereby suffered harm." *Id.* The plaintiff carries the burden to prove falsity. *Piscatelli v. Van Smith*, 424 Md. 294, 306 (2012). Whether a publication is defamatory, is a question of law for the court. *Id.* "Where a defendant asserts a privilege in a motion for summary judgment in a defamation action, we consider first whether the asserted privilege applies." *Id.* at 306–07 (citations omitted). "Thus, we assume that the plaintiff's allegations of defamation are true for purposes of evaluating whether the privilege exists." *Id.* at 307 (citations omitted).

"The common interest privilege shields a speaker against liability for defamation arising from statements 'publish[ed] to someone who shares a common interest or, relatedly, publish[ed] in defense of oneself or in the interest of others.'" *Shirley v. Heckman*, 214 Md. App. 34, 43 (2013) (citing Dan B. Dobbs, The Law of Torts, § 413, at 1158 (2000)). "The privilege recognizes the broader public value in 'promot[ing] free exchange of relevant information among those engaged in a common enterprise or activity and [permitting] them to make appropriate internal communications and share consultations without fear of suit.'" *Id.* (quoting Dobbs, § 414, at 1160–61). A common interest may be "found among members of identifiable groups in which members share similar goals or values or cooperate in a single endeavor . . ." *Id.* (quoting Dobbs, § 414, at 1160–61). This privilege exists "when the occasion shows that the communicating party and the recipient have a mutual interest in the subject matter, or some duty with respect thereto." *Davidson v. Seneca Crossing Section II Homeowner's Ass'n, Inc.*, 187 Md. App.

601, 645 (2009). Whether a privilege exists is a question of law for the court to decide. *Gohari v. Darvish,* 363 Md. 42, 73–74 (2001).

Once a qualified privilege has been found, the plaintiff may attempt to demonstrate that the privilege has been abused. *See Gohari*, 363 Md. at 74. Whether a privilege has been abused is a question of fact for the fact-finder to resolve, although that question may be decided by the court if the plaintiff fails to allege or prove facts that would support a finding of malice. *Piscatelli*, 424 Md. at 307. Malice is defined as "a person's actual knowledge that his [or her] statement is false, coupled with his [or her] intent to deceive another by means of that statement." *Id.* at 307–08. This Court has held "[t]here is no rigid definition of 'common interest,' but the principle that emerges from the cases in which the privilege has applied—i.e., that it covers speakers and recipients within a readily definable business or organizational relationship." *Heckman*, 214 Md. App. at 43.

In an email to a board member of the school, who is also a parent and alumnus, Rabbi Malkus, the Head of School, stated: "I will share with you that while I can't relate the specific details, there was an egregious ethical violation that necessitated this decision. We needed to act for the wellbeing of our students and protect the school." As we see it, Rabbi Malkus' statement was an internal communication that concerned the wellbeing of the school to another member of the school community who shares similar goals and values in the success of the school. The communication was limited to this common interest. As such, it falls squarely under the common interest privilege.

Additionally, we hold that Teacher failed to provide sufficient evidence to create a jury question regarding whether the common interest privilege had been abused. Teacher asserts that the statements made by Rabbi Malkus were not for the purpose of any societal interest, but instead were to deflect criticism of a misguided decision by the School and a desire to conceal a lack of good faith in her termination. However, Teacher failed to provide evidence to support a finding that Rabbi Malkus acted with malice and an intent to deceive. When Teacher was asked in her deposition whether she had any factual basis that the emails were false, malicious and/or misleading, she responded, "No, but I know them to be untrue." We agree with the trial court that Teacher's "show of even circumstantial evidence falls short." Teacher bore the burden of proof to establish abuse of privilege, and she failed to meet that burden. Because the common interest privilege applies, we need not address whether Rabbi Malkus' statement was defamatory. We hold that the circuit court properly granted School summary judgment.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0129s23cn.pdf