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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

ODETTE MORADI, Plaintiff and Appellant, v. PIMENTEL PRIVATE SECURITY et al., Defendants and Respondents.	C037101 (Super. Ct. No. CV002078)

In *Bardin v. Lockheed Aeronautical Systems Co.* (1999) 70 Cal.App.4th 494 (*Bardin*), the Second District Court of Appeal held that an employer enjoys absolute immunity from civil liability for the disclosure of confidential information to a law enforcement agency during a background investigation. Plaintiff Odette Moradi, whose dream had been to become a correctional officer, was rejected by the Department of Corrections based on information supplied by her former employer, Pimentel Private Security (Pimentel). She claims *Bardin* is "bad law" and urges us to reject it.

We conclude that *Bardin* is not the culprit; Government Code section 1031.1, subdivision (b) is.[1] As *Bardin* acknowledges, subdivision (b) is internally inconsistent. (*Bardin*, *supra*, 70 Cal.App.4th at pp. 501-502.) We agree with the court in *Bardin* that, saddled with an irreconcilable conflict in the terms of the statute, we must rely on the broader context in which it appears and the intent of the Legislature in passing the statute. (*Id.* at p. 502.) We affirm the summary judgment granted the employer based on its absolute immunity for the various tort causes of action.

FACTS

The underlying facts, disputed or not, are irrelevant to the disposition of this appeal. Suffice it to say, Moradi worked as a private security guard for Pimentel for 16 months in 1993 and 1994. Before leaving Pimentel, she submitted an application to become a correctional officer with the Department of Corrections (Department). After conducting an extensive background investigation, including a review of her personnel file and interviews with her superiors at Pimentel, the Department rejected her application. Her tenure at Pimentel, though short, was marred with accusations of misconduct, tardiness, unreliability, emotional instability, inappropriate behavior, and failure to follow orders and company policies. Her employer contends she was terminated; she claims she

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[1] All further statutory references are to the Government Code unless otherwise indicated.

resigned following the breakup of her relationship with the owner's son.

DISCUSSION

In 1993 the Legislature enacted section 1031.1 to help law enforcement agencies obtain information about potential peace officers during background investigations. "It is the intent of the Legislature that law enforcement have access to pertinent information about peace officer applicants in order to ensure that qualified individuals with good moral character are selected." (Stats. 1993, ch. 135, § 2.) Based on law enforcement agencies' reports that it had become difficult, if not impossible, to obtain information from previous employers, the legislation provided employers immunity from civil liability.

Section 1031.1, subdivision (b), as finally enacted, provides: "In the absence of fraud or malice, no employer shall be subject to any civil liability for any relevant cause of action by virtue of releasing employment information required pursuant to this section. Nothing in this section is intended to, nor does in any way or manner, abrogate or lessen the existing common law or statutory privileges and immunities of an employer." We must consider the scope of the privilege granted the employer by subdivision (b). On appeal, we conduct de novo review of questions of statutory construction. (*Western/California, Ltd. v. Dry Creek Joint Elementary School Dist.* (1996) 50 Cal.App.4th 1461, 1479.)

We do not write on an empty slate. The Second Appellate District resolved the identical issue in *Bardin*, *supra*, 70 Cal.App.4th 494. In *Bardin*, the plaintiff's application to become a police officer was rejected based on information the Los Angeles Police Department received from her former employer, Lockheed Aeronautical Systems Company, as a part of its background investigation. In her complaint for breach of contract and various tort causes of action, the plaintiff alleged that Lockheed made false statements about her employment without a good faith belief in the truth of the information. The trial court granted Lockheed's motion for summary judgment, finding the employer had an absolute privilege under section 1031.1, subdivision (b). (*Bardin*, *supra*, 70 Cal.App.4th at pp. 498-499.)

The *Bardin* court aptly observed that the first sentence of subdivision (b) of section 1031.1, including the language "[i]n the absence of fraud or malice," provides employers with a qualified or conditional privilege. The second sentence, however, preserves the existing common law privileges and immunities of an employer. (*Bardin*, *supra*, 70 Cal.App.4th at pp. 501-502.) If, then, the existing privileges are absolute, the subdivision is inconsistent because the first sentence taketh away what the second sentence giveth. *Bardin* concluded that the common law immunity as explained in *O'Shea v. General Telephone Co.* (1987) 193 Cal.App.3d 1040 (*O'Shea*) did provide employers absolute immunity and, therefore, subdivision (b) is

ambiguous. (*Bardin*, *supra*, 70 Cal.App.4th at pp. 497-498.) We agree.

O'Shea is quite clear. Section 1031 demands that peace officers be of good moral character "as determined by a thorough background investigation." (*O'Shea*, *supra*, 193 Cal.App.3d at p. 1048, italics omitted.) The court held that employers who provide information during such an investigation have absolute immunity from civil liability. "The [California Highway Patrol], a governmental entity [citations], was conducting this thorough background investigation regarding appellant's fitness when the allegedly defamatory statements were obtained. Such inquiries and responses are protected by Civil Code section 47, [former] subdivision 2 [now subdivision (b)]. Even unsolicited communications from citizens to governmental agencies have been held protected by the absolute privilege of Civil Code section 47, subdivision 2. [Citations.] The rationale of those cases is obvious in the case before us; it is to encourage the utmost freedom of communication between citizens and public authorities. The Legislature has wisely required a thorough background investigation of the character of those who wish to be peace officers. It is essential that former employers of those considered for peace officer positions feel free to discuss in detail the characteristics of their former employees, now being considered for the extremely demanding tasks undertaken by the peace officers of this state." (*O'Shea*, *supra*, 193 Cal.App.3d at p. 1048.)

To resolve the ambiguity, the *Bardin* court attempted to decipher the legislative intent from available legislative history and from the findings of the Legislature. (*Bardin*, *supra*, 70 Cal.App.4th at pp. 500-501.) Our own research of the legislative history disclosed little more than what is obvious from the findings and the language of section 1031.1.

What is clear is that law enforcement agencies, even in the aftermath of *O'Shea*, continued to have difficulty obtaining sufficient information from former employers during background investigations. The statute includes the following legislative finding: "Law enforcement agencies have increasingly experienced refusals from employers to divulge information pertinent to peace officer applicants even with signed release waivers from applicants themselves, and this situation has seriously affected law enforcement's ability to conduct a thorough background investigation." (Stats. 1993, ch. 135, § 1.) Letters to the Assembly and Senate committees echoed the same sentiment.

As a consequence, the Legislature added section 1031.1, compelling an employer to provide information about a peace officer applicant in response to a request by a law enforcement agency provided the request is in writing, is accompanied by a notarized authorization by the applicant releasing the employer of liability, and is presented by an authorized representative of the agency. (§ 1031.1, subd. (a).) Both the initial bill and the first amended version provided an unambiguous absolute immunity to the employer. Subdivision (b) of section 1031.1

originally stated, "Any employer who discloses information in accordance with this section shall be exempt from civil liability." (Sen. Bill No. 1097 (1993-1994 Reg. Sess.) § 3.)

The ambiguity arose in a subsequent amendment. As the court in *Bardin* explained, the original language of section 1031.1, subdivision (b) was deleted and the version now before us mysteriously appeared. The court in *Bardin* did not account for the change, probably because the legislative history discloses few, if any, clues. In the April 12 amendment, employers enjoyed absolute immunity; two weeks later, the following language was substituted: "*In the absence of fraud or malice,* no employer shall be subject to any civil liability for any relevant cause of action by virtue of releasing employment information required pursuant to this section. Nothing in this section is intended to, nor does in any way or manner, abrogate or lessen the existing common law or statutory privileges and immunities of an employer." (Sen. Amend. to Sen. Bill No. 1097 (1993-1994 Reg. Sess.) § 3, Apr. 28, 1993 (italics added).)

It appears the language was cribbed from Insurance Code section 1873.2, which states: "In the absence of fraud or malice, no insurer, or any employee or agent authorized by an insurer to act on behalf of the insurer, and no authorized governmental agency or its respective employees, shall be subject to any civil liability for libel, slander, or any other relevant cause of action by virtue of releasing or receiving any information pursuant to Section 1873 or 1873.1. Nothing in this article is intended to, nor does in any way or manner, abrogate

or lessen the existing common law or statutory privileges and immunities of an insurer, or any employee or agent authorized by the insurer to act on behalf of the insurer, or of any authorized governmental agency or its respective employees."

Although there are no cases construing Insurance Code section 1873.2, the Senate Committee on the Judiciary referred to Insurance Code section 1873.2 and posed the question whether section 1031.1, subdivision (b) should be similarly refined. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1097 (1993-1994 Reg. Sess.) as amended Apr. 12, 1993.) Hence, while the ambiguity can be traced to Insurance Code section 1873.2, evidence of legislative intent in incorporating the same language into section 1031.1, particularly in light of *O'Shea*, is lacking.

We must, therefore, rely on the context in which the language appears and "'"'the wider historical circumstances of its enactment.'"'" (*Bardin*, *supra*, 70 Cal.App.4th at p. 502.) The purpose of the legislation is transparent. Law enforcement agencies were frustrated by their inability to obtain information about applicants from former employers. Construing the language to accord the broadest possible immunity for employers comports with the legislative purpose of facilitating the disclosure of information about applicants for peace officer positions to assure the candidates selected are of good moral character.

In *Bardin*, the court relied on *Fremont Comp. Ins. Co. v. Superior Court* (1996) 44 Cal.App.4th 867 (*Fremont*), a case

involving immunities accorded insurers who report fraud. Insurance Code section 1877.5, like section 1031.1, gives insurers a qualified privilege in the first sentence but adds a savings clause in the second sentence. The savings clause states: "Nothing in this chapter is intended to, nor does in any way or manner, abrogate or lessen the existing common law or statutory privileges and immunities of an insurer, agent authorized by that insurer to act on its behalf, or any authorized governmental agency or its employees." (Ins. Code, § 1877.5.) The court in *Fremont* concluded: "Plainly, *if* an insurer enjoyed a privilege to report workers' compensation insurance fraud (even in bad faith) prior to the enactment of Insurance Code section 1877.5, the language of the second sentence of section 1877.5 means that the insurer still had that privilege afterwards." (*Fremont*, *supra*, 44 Cal.App.4th at p. 873.)

The *Bardin* court reached the same conclusion: "The savings clause in the second sentence of section 1031.1, subdivision (b) preserves the existing common law and statutory privileges. These are subject to change, through judicial decision or legislative action. In the event an absolute privilege becomes unavailable in the future, either by a change in the common law or by amendment to Civil Code section 47, subdivision (b), the qualified privilege of section 1031.1 would still apply. Since we interpret section 1031.1, subdivision (b) to preserve common law and statutory privileges, respondents had an absolute

privilege under *O'Shea*." (*Bardin*, *supra*, 70 Cal.App.4th at p. 504.)

Moradi characterizes the *Bardin* analysis as nonsensical. She points to multiple references in the legislative history of Senate Bill 1097 to the language "in the absence of fraud or malice" and insists the Legislature plainly intended to provide employers with a qualified privilege. She suggests "[t]he second sentence of the resulting § 1031.1(b) can then be easily reconciled with the first by assuming that the Legislature intended that the existing body of common and statutory law addressing *qualified privileges*, if any, was to remain valid and controlling as to investigations by law enforcement agencies."

The statute is indeed problematic, but we are not at liberty to insert language in the statute in order to clarify it. The second sentence of subdivision (b) of section 1031.1 expressly states that subdivision (b) is not intended to abrogate or lessen the "existing common law or statutory privileges and immunities of an employer." It simply does not refer to existing "qualified" immunities. Moreover, as we discussed at some length above, absolute immunity is consistent with the purpose of the statute to obtain more information about prospective peace officers.

Moradi next contends that the statements by her former employer were not statements made in an "official proceeding" within the meaning of Civil Code section 47, subdivision (b). Subdivision (b) provides that a privileged publication or broadcast is one made "[i]n any (1) legislative proceeding,

(2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure . . . ." The courts in both *O'Shea* and *Bardin* held that communications from citizens to governmental agencies in the course of the latter's official investigation of an applicant's qualifications are protected by the absolute privilege of Civil Code section 47, subdivision (b). Both cases involved facts nearly identical to those before us. Former employers supplied information to law enforcement agencies about employees who had applied to become peace officers. Thus, pursuant to *O'Shea* and *Bardin*, Civil Code section 47 applies.

Moradi asks us to reject both *O'Shea* and *Bardin* and to adopt the reasoning of *Fenelon v. Superior Court* (1990) 223 Cal.App.3d 1476 (*Fenelon*). *Fenelon*, however, did not involve an employer's disclosure of background information about a former employee. The case, in fact, did not involve section 1031.1. We agree with Pimentel that the case is factually and legally dissimilar as it involved a false police report concocted for the express purpose of injuring the plaintiff. Whereas law enforcement agencies sought information from the employers in *O'Shea* and *Bardin*, the defendants in *Fenelon* went to the police with a fictional account of a crime.

Moreover, we find the more recent *Braun v. Bureau of State Audits* (1998) 67 Cal.App.4th 1382 (*Braun*) more apposite than

Fenelon. In *Braun*, the Bureau of State Audits investigated a training center at the University of California, San Francisco, where the plaintiff worked. In her complaint for civil damages, the plaintiff alleged the Bureau had defamed her in the audit report issued at the conclusion of the investigation. The trial court granted the Bureau's demurrer without leave to amend and the Court of Appeal affirmed. (*Id.* at pp. 1386-1388.)

The court rejected the same argument Moradi raises here that the term "'official proceeding'" in Civil Code section 47, subdivision (b) does not "'reach beyond proceedings which resemble judicial and legislative proceedings.'" (*Braun*, *supra*, 67 Cal.App.4th at p. 1389.) "Our holding that statements made in furtherance of Reporting Act audits are absolutely privileged under Civil Code section 47 is consistent with many other cases which have reached the same conclusion with respect to statements made in or about other types of governmental investigations. . . . [¶] . . . [¶] One policy underlying the absolute privilege for statements made in governmental investigations and reports of misconduct 'is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing.'" (67 Cal.App.4th at pp. 1389-1390.)

Citing a case we decided in 1966, *McMann v. Wadler* (1961) 189 Cal.App.2d 124 (*McMann*), Moradi contends that an official proceeding within the meaning of Civil Code section 47 applies only to judicial, legislative, or quasi-judicial proceedings. We rejected the argument raised in *McMann* that a board of

directors meeting of a private, nonprofit corporation is an "official proceeding," thereby providing directors absolute immunity for the statements made during board meetings. (*McMann*, *supra*, 189 Cal.App.2d at pp. 128-129.) Here, unlike *McMann*, a governmental agency fulfilling its statutory obligation to conduct a background investigation on an applicant (Gov. Code, § 1031, subd. (d)) solicited information from a former employer. The conclusion we rejected in *McMann* as to a private meeting simply has no application to the governmental action compelled by law here. *O'Shea*, not *McMann*, is the relevant authority.

Section 1031.1, subdivision (b) is ambiguous. While the first sentence provides employers a qualified privilege, the second preserves the absolute immunity provided by Civil Code section 47 and *O'Shea*. Because the purpose of the law is to encourage employers to disclose background information about peace officer applicants, we agree with *Bardin* that the context of the statute suggests that the privilege remains absolute in accordance with other existing privileges and immunities. Unable to redraft the language of the statute, we must await clarification by the Legislature. Until then, while the express terms of section 1031.1, subdivision (b) remain ambiguous, we must surmise what the Legislature intended from the broader context in which the subdivision was written.

DISPOSITION

The judgment is affirmed.

RAYE, Acting P.J.

We concur:

CALLAHAN, J.

KOLKEY, J.