

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 15 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MYRNA DE JESUS,

Plaintiff - Appellant,

v.

DIGNITY HEALTH, DBA St. Joseph's
Hospital and Medical Center,

Defendant - Appellee.

No. 23-15189

D.C. No. 2:21-cv-00926-DWL
U.S. District Court for Arizona,
Phoenix

MANDATE

The judgment of this Court, entered September 20, 2024, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

APPENDIX B

WARNING: AT LEAST ONE DOCUMENT COULD NOT BE INCLUDED!**You were not billed for these documents.****Please see below.****Selected docket entries for case 23-15189**

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Filed	Document Description	Page	Docket Text
09/20/2024	<u>29</u>		FILED MEMORANDUM DISPOSITION (MARK J. BENNETT, BRIDGET S. BADE and DANIEL P. COLLINS) De Jesus's motions for judicial notice (Dkt. Nos. 25, 26, 27), which seek to supplement the record with documents not presented to the district court, are denied.
	29 Memorandum	2	AFFIRMED. FILED AND ENTERED JUDGMENT. [12907772] (CPA)
	29 Post Judgment Form DOCUMENT COULD NOT BE RETRIEVED!		

NOT FOR PUBLICATION**FILED**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEP 20 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MYRNA DE JESUS,

No. 23-15189

Plaintiff-Appellant,

D.C. No. 2:21-cv-00926-DWL

v.

DIGNITY HEALTH CORPORATION,

MEMORANDUM*

Defendant-Appellee.

Appeal from the United States District Court
for the District of Arizona
Dominic Lanza, District Judge, Presiding

Submitted September 20, 2024**

Before: BENNETT, BADE, and COLLINS, Circuit Judges.

Plaintiff Myrna De Jesus, proceeding pro se, appeals the district court's summary judgment against her in her defamation lawsuit against Defendant Dignity Health Corporation ("Dignity Health"). De Jesus performed work at St. Joseph's Hospital and Medical Center ("St. Joseph's"), although her actual employer was a third-party vendor, Optum360 Services, Inc. ("Optum"). De Jesus was terminated by Optum after Dignity Health personnel told her Optum

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes that this case is suitable for decision without oral argument. *See* FED. R. APP. P. 34(a)(2)(C).

supervisor about several instances of alleged misbehavior on her part. De Jesus sued, alleging defamation under Arizona law, and Dignity Health removed the case to federal court based on diversity. We have jurisdiction over De Jesus's timely appeal of the district court's summary judgment. *See* 28 U.S.C. § 1291. Reviewing de novo, *Donell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008), we affirm.

1. We agree with the district court's conclusion that, as a matter of law, Dignity Health is entitled to the "common interest" privilege, which shields it from liability for defamation. Under Arizona law, an otherwise defamatory statement will be found to be "conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know." RESTATEMENT (SECOND) OF TORTS § 596 (AM. L. INST. 1977) ("RESTATEMENT"); *see Green Acres Tr. v. London*, 688 P.2d 617, 625 (Ariz. 1984) (following RESTATEMENT § 596). This privilege applies, for example, to communications between persons or entities "associated together in professional activities." RESTATEMENT § 596, cmt. d. The communications in this case plainly fall within this privilege. Dignity Health and Optum are associated together in the provision of patient care at St. Joseph's and share a common interest in De Jesus's job performance and professionalism, including her interactions with others

working at St. Joseph's. *See Miller v. Servicemaster by Rees*, 851 P.2d 143, 144–46 (Ariz. Ct. App. 1992) (finding that the common interest privilege protected against defamation liability for an allegation of sexual harassment made against an employee of a company by a janitor employed by a third-party vendor).

However, common interest, like other “qualified” privileges, cannot shield a defendant from liability if it is “abused.” *Green Acres*, 688 P.2d at 624. De Jesus contends that Dignity Health abused the privilege by acting with actual malice. The district court correctly concluded that De Jesus had failed to present sufficient evidence to create a triable issue as to actual malice. Actual malice arises “when the defendant makes a statement knowing its falsity or actually entertaining doubts about its truth.” *Id.* (citation omitted). There is no evidence from which a reasonable jury could conclude that the persons at Dignity Health who were responsible for contacting Optum and who relayed the disputed allegations concerning De Jesus’s conduct knew that those allegations were false or actually entertained doubts about their truth.

De Jesus insists that the allegations against her were false, but her “mere denial” of the allegations does not suffice to permit a jury finding of actual malice. *See Sewell v. Brookbank*, 581 P.2d 267, 271 (Ariz. Ct. App. 1978). De Jesus also points to evidence that the Dignity Health personnel involved in this case treated her in what she considers to have been a mean-spirited and “spiteful” manner. But

under applicable Arizona law, “actual malice” refers to the knowing or reckless distribution of false information, not to personal civility. *See Green Acres*, 688 P.2d at 616. De Jesus also contends that Dignity Health changed its story about the events leading to her termination and that this supports an inference of knowledge of falsity. But the minor differences that De Jesus notes do not alter the gravamen of the alleged charge of misconduct against her, and they do not support an inference that Dignity Health acted with actual malice when it relayed the allegations to De Jesus’s supervisor.

The common interest privilege may also be abused through “excessive publication . . . to an unprivileged recipient not reasonably necessary to protect the interest upon which the privilege is grounded.” *Green Acres*, 688 P.2d at 616 (citation omitted). But De Jesus concedes in her opening brief that “Dignity Health only publicized its defamatory falsehoods to Hernandez,” her Optum supervisor. Although De Jesus asserts that Optum then retransmitted those defamatory allegations to others (and that she herself did so), that cannot suffice to show excessive publication by Dignity Health.

2. De Jesus attempts to raise on appeal several additional claims, but they are not properly before us. The only claim fairly raised in De Jesus’s complaint against Dignity Health, even generously construed, was for defamation. And in the parties’ joint report under Federal Rule of Civil Procedure 26(f), which required

De Jesus to state “each” of her “claim[s],” she stated only that she was bringing “a claim for defamation/slander against Dignity Health Corporation.” De Jesus insists that she developed additional claims in her briefing at summary judgment, but the district court at summary judgment was not obligated to consider new claims not raised in the complaint, and it therefore properly declined to do so. *Earth Island Inst. v. U.S. Forest Serv.*, 87 F.4th 1054, 1072–73 (9th Cir. 2023).¹

AFFIRMED.

¹ De Jesus’s motions for judicial notice (Dkt. Nos. 25, 26, 27), which seek to supplement the record with documents not presented to the district court, are denied.

APPENDIX C

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Myrna de Jesus, No. CV-21-00926-PHX-DWL
10 Plaintiff,
11 v. ORDER
12 Dignity Health Corporation, et al.,
13 Defendants.
14

15 Plaintiff Myrna de Jesus (“Plaintiff”), who is proceeding *pro se*, worked as a patient
16 care coordinator for non-party Optum360 Services, Inc. (“Optum360”). Although Plaintiff
17 was employed by Optum360, she physically worked inside St. Joseph’s Hospital and
18 Medical Center, which is a facility owned by Defendant Dignity Health Corporation
19 (“Dignity Health”). Plaintiff’s job responsibilities included registering patients’ insurance
20 during the hospital admissions process.

21 In March 2021, following an incident in which Plaintiff allegedly called a Dignity
22 Health nurse a “fucking bitch” in front of a Dignity Health patient, Dignity Health
23 representatives spoke with (and then emailed) Plaintiff’s Optum360 manager to raise
24 concerns about this and other incidents. The next day, Optum360 fired Plaintiff.

25 In this action, Plaintiff asserts a defamation claim against Dignity Health and seeks
26 \$10 million in damages. Now pending before the Court are the parties’ cross-motions for
27 summary judgment. (Docs. 69, 70.) For the following reasons, Dignity Health’s motion
28 is granted, Plaintiff’s motion is denied, and this action is terminated.

BACKGROUND

I. Facts

The following facts are derived from the parties' summary judgment submissions and other materials in the record and are uncontested unless otherwise noted.

A. The Alleged Incidents

6 “Plaintiff worked as a Patient Care Coordinator for Optum360. . . . Although
7 employed by Optum360, Plaintiff physically worked at St. Joseph’s Hospital and Medical
8 Center, a Dignity Health facility.” (Doc. 69 at 2 ¶ 1; Doc. 1-3 at 7.)¹ In this role, Plaintiff
9 “assisted hospital admissions by registering patients’ insurance and worked from a mobile
10 workstation, or ‘Work on Wheels.’” (Doc. 69 at 2 ¶ 2; Doc. 78 at 4 ¶ 2 [undisputed].)

11 On September 16, 2020, Plaintiff received a documented “coaching” from
12 Optum360 related to an incident that occurred the previous day. (Doc. 69 at 2 ¶ 4; Doc. 78
13 at 4 ¶ 4[undisputed]; Doc. 69-1 at 45-46 [“The purpose of this coaching session is to define
14 areas of concern in your work performance or behavior and allow you the opportunity to
15 demonstrate improvement.”].) “The Coaching required Plaintiff to ‘focus on treating all
16 patients, coworkers, [and] leaders’ with ‘respect, humility,’ ‘compassion, and integrity,’
17 and noted ‘significant and immediate improvement’ was necessary to avoid additional
18 disciplinary action, ‘up to and including termination.’” (Doc. 69 at 2 ¶ 7; Doc. 69-1 at 45-
19 46.)²

20 As for the specifics of the underlying incident, Optum360’s “Coaching Summary”
21 form states that on September 15, 2020, a nurse, “Jackie,” “had concerns with [Plaintiff].”
22 (Doc. 69-1 at 45.) Jackie informed Plaintiff that the “patient was not oriented and
23 appropriate to answer admission questions” but Plaintiff said, “I am going to ask him
24 anyways.” (*Id.*) After Plaintiff obtained the patient’s signature on the intake forms, as well
25 as other information (such as the patient’s date of birth and social security number),

¹ Plaintiff generally agrees but clarifies that she was later promoted to a “Compliance” position. (Doc. 78 at 4 ¶ 1; Doc 69-1 at 50.)

² Plaintiff agrees the Coaching included these requirements but characterizes it as "just a counselling not a write up." (Doc. 78 at 5 ¶ 7.)

1 Plaintiff insisted to Jackie that the patient “wasn’t confused and could answer questions
 2 and sign paperwork because ‘I have a Masters in Psychology.’” (*Id.*) Plaintiff disputes
 3 certain aspects of Optum360’s account of the incident. (Doc. 78 at 5 ¶¶ 5-7.)

4 Separately, on March 1, 2021, “a Dignity Health nurse, Lois Dracobly, verbally
 5 reprimanded Plaintiff for not wearing her mask while standing in a hallway outside the
 6 intensive care unit.” (Doc. 69 at 3 ¶ 8; Doc. 69-2 at 7 [email from Dracobly describing the
 7 incident].)³ “Plaintiff was not wearing her mask because she was eating.” (Doc. 69 at 3
 8 ¶ 9; Doc. 78 at 6 ¶ 9 [undisputed].) Plaintiff ignored Dracobly’s request to wear a mask
 9 while she was eating, so Dracobly called security, “who asked Plaintiff to eat in the
 10 cafeteria.” (Doc. 69 at 3 ¶¶ 11-12; Doc. 78 at 6 ¶ 11-12 [undisputed].)

11 Dracobly also contends that, a “few weeks” before the masking incident, she and
 12 Plaintiff had another unpleasant interaction. (Doc. 69-2 at 7.) There, Plaintiff tried to get
 13 insurance and registration information from a family that was in the process of grieving
 14 their loved one. (Doc. 69 at 3 ¶¶ 13-14; Doc. 69-2 at 7.) Plaintiff generally disputes
 15 Dracobly’s version of this incident. (Doc. 78 at 6 ¶¶ 13-14.)⁴

16 Finally, on March 1, 2021, there was a separate incident at an elevator. (Doc. 69 at
 17 3 ¶¶ 15-22; Doc. 78 at 6 ¶¶ 15-22 [generally agreeing there was an incident]; Doc. 69-1 at
 18 12 [Plaintiff’s deposition testimony describing the elevator incident].) The exact events
 19 are contested, but generally, Plaintiff was in the elevator with her mobile unit, which took
 20 up considerable space. (Doc. 69-1 at 13 [“I was measuring the WOW machine, kind of
 21 taking up this space, and then me standing, the bed of the patient is so long, I said, “We’re
 22

23
 24 ³ Although Dignity Health’s motion identifies the date of this incident as March 1,
 25 2020, this appears to be a typo, as the underlying email is dated March 1, 2021 and states
 26 that the mask-warning incident occurred “[t]his morning.” (Doc. 69-2 at 7.) As for the
 27 substance of the incident, Plaintiff “partially agrees” with Dignity Health’s description but
 28 maintains that she was “eating oatmeal” (not yogurt) and was “allowed . . . to eat
 anywhere” and “Defendant cannot provide any evidence that it obliged all personnel to eat
 at the cafeteria only, and that all must wear their masks while eating.” (Doc. 78 at 5-6 ¶ 8.)

⁴ Plaintiff also argues that Dracobly “did not have a professional interaction with
 Plaintiff” and in fact “pushed Plaintiff on the chest.” (Doc. 78 at 6 ¶ 13.) Plaintiff claims
 to have a police report from the interaction, but it was not attached as an exhibit. (*Id.*)

1 not going to fit.”].) Upon arriving at the seventh floor, Plaintiff encountered three⁵ nurses
 2 transporting a patient in a bed. (*Id.* at 12-13.) Plaintiff, knowing they would not all fit
 3 inside the elevator, asked the nurses and patient to wait for the next one. (*Id.* at 13-14 [“So
 4 I suggested, “Do you think you guys can just wait for the other elevator to open?”].) The
 5 nurses explained they could not wait because they were running late for surgery and asked
 6 Plaintiff if they could use the elevator. (*Id.* [“She said, “No. We’re running late. We’re
 7 running late for the patient’s surgery.”].)

8 In Plaintiff’s version of this incident, Plaintiff exited the elevator while muttering
 9 “dealing with idiots.” (*Id.* at 14 [“When I got off, they moved back in. In my mind, I was
 10 more to myself, because I said, ‘They are not thinking.’ In my mind, I said, ‘Dealing with
 11 idiots,’ so I said that.”].) The nurses have a different recollection—two of the nurses,
 12 Danyelle Dodd and Daniela Lopez, recalled that Plaintiff called Dodd a “fucking bitch.”
 13 (Doc. 69 at 4 ¶ 23.)⁶

14 **B. Dignity Health Representatives Report The Alleged Incidents To
 15 Plaintiff’s Optum360 Supervisor**

16 Dodd immediately referred the incident to her Dignity Health manager, Maureen
 17 Juilfs. (Doc. 69 at 4 ¶ 24; Doc. 78 at 8 ¶ 24 [not disagreeing in relevant part]; Doc. 69-2 at
 18 5 [email from Juilfs]; Doc. 69-2 at 10-11 [Juilfs declaration].) After speaking with Plaintiff,
 19 Juilfs expressed a desire to speak with Plaintiff’s Optum360 supervisor, Sarah Hernandez.
 20 (Doc. 69 at 4 ¶¶ 25-27; Doc. 78 at 8 ¶¶ 25-27 [undisputed in relevant part]; Doc. 69-2 at 11
 21 ¶ 7 [Juilfs declaration].)

22 The group then traveled to Hernandez’s office. (Doc. 69 at 4 ¶ 28; Doc. 78 at 8 ¶ 28
 23 [undisputed].) Juilfs first spoke to Hernandez alone. (Doc. 69 at 5 ¶ 29; Doc. 78 at 8 ¶ 29
 24 [undisputed].) Juilfs generally relayed the allegation by Dodd and Lopez—*i.e.*, that
 25 Plaintiff had called Dodd a “fucking bitch” in front of a patient. (Doc. 69 at 5 ¶ 30; Doc.
 26

27 ⁵ Dignity Health contends there were only two nurses. (Doc. 69 at 3 ¶ 15.)

28 ⁶ Plaintiff agrees the allegation by Dodd was that she used the words “fucking bitch”
 but maintains this allegation was “fabricated.” (Doc. 78 at 7 ¶ 23.) Plaintiff also notes
 there were cameras in the area that no one has produced.

1 69-2 at 11 ¶ 7 [Juilfs declaration: “The three of us walked to Ms. Hernandez’s office. I
 2 told Ms. Hernandez what Ms. Dodd had shared with me.”].)⁷

3 Afterward, Dodd spoke to Hernandez for approximately 30 minutes. (Doc. 69 at 5
 4 ¶ 31; Doc. 78 at 8 ¶ 31 [undisputed]; Doc. 69-1 at 21 [Plaintiff’s deposition testimony].)
 5 After Hernandez finished speaking with Dodd, “Plaintiff was reprimanded and sent home
 6 by . . . Hernandez.” (Doc. 71 at 6 ¶ 2; Doc. 83 at 5 ¶ 2 [undisputed that Plaintiff was
 7 reprimanded and sent home].)

8 That same day, Juilfs emailed Hernandez to summarize her understanding of the
 9 meeting and the general allegations. (Doc. 69 at 5 ¶ 33; Doc. 69-2 at 5 [email]).)⁸ Dodd
 10 reviewed the email for accuracy before Juilfs sent it. (Doc. 69-2 at 11 ¶ 8.)

11 Dracobly sent a separate email to Hernandez about 20 minutes after Juilfs sent her
 12 email. (*Id.* at 7.) Dracobly relayed the allegations concerning Plaintiff’s interactions with
 13 the grieving family and Plaintiff’s unmasked eating in the ICU. (*Id.*)

14 Plaintiff has now identified the following 17 statements within the two March 1,
 15 2021 emails that form the basis of her defamation claim against Dignity Health:

- 16 (a) “they asked her to please step out and allow them to take the patient down,
 17 she replied I was here first,”
- 18 (b) “proceeded to call Danyelle a F___ing Bitch,”
- 19 (c) “she pushed the down button which caused the elevator to open the door
 again and seem to acknowledge non-verbally that yes that is what she said,”
- 20 (d) “she was extremely aggressive,”
- 21 (e) “started arguing with my employee,”
- 22 (f) “she was told by me that this was not the time or the place for this
 23 discussion she continued to state her case loudly to which was sternly asked
 not to have this discussion in the hall which is when she stopped,”
- 24 (g) “she has gray, shoulder-length hair and is normally wearing an orange
 25 jacket,”

26
 27 ⁷ Although Plaintiff maintains that Dodd’s account of the incident is inaccurate, she
 does not dispute the Juilfs relayed this account to Hernandez. (Doc. 78 at 8 ¶ 30.)

28 ⁸ Plaintiff maintains the allegations are false but agrees the email was sent. (Doc. 78
 at 9 ¶ 33.)

- 1 (h) "the patient's two daughters,"
- 2 (i) "I asked if I could help her and she said she needed to get insurance
- 3 information and register the patient,"
- 4 (j) "I told her the patient had been here for a couple weeks and this was
- 5 definitely not the time to approach family,"
- 6 (k) "she was very pushy and immediately got defensive with me,"
- 7 (l) "I asked her a few more times to please leave the family as they were
- 8 grieving and it was inappropriate to approach them,"
- 9 (m) "Finally, I told her I needed her to completely leave the unit or I'd call
- 10 security as she was resistant to leaving,"
- 11 (n) "I reminded her to please keep her mask on in the hospital unless she was
- 12 in a breakroom, etc. where she could have it off while eating,"
- 13 (o) "She mumbled something, rolled her eyes, and put the mask over her
- 14 mouth but not nose,"
- 15 (p) "She was eating a yogurt. I, again, reminded her that in public areas of
- 16 the hospital we all needed to wear our masks. She said something along the
- 17 lines of 'do you expect me not to eat' in which I told her that she was
- 18 welcome to use our breakroom or any other to eat but if she was in the public
- 19 areas of the hospital her mask needed to be on," and
- 20 (q) "that employees response to them was also disrespectful and
- 21 unprofessional."
- 22 (Doc. 69-2 at 16-18 [Plaintiff's response to Interrogatory No. 1, "Identify each and every
- 23 statement and/or communication which you allege constituted defamation and/or libel
- 24 towards you by any employee of Dignity Health"].)

25 **C. Subsequent Developments**

26 The following day, March 2, 2021, Optum360 terminated Plaintiff's employment.

27 (Doc. 69 at 5 ¶ 34.)⁹

28 On May 12, 2021, Optum360 rejected Plaintiff's appeal of the termination decision.

29 (Doc. 69 at 5 ¶ 36; Doc. 78 at 9 ¶ 36 [undisputed in relevant part]; Doc. 69-2 at 13

30 [Optum360 letter explaining basis for denial of appeal].) Optum360's Internal Dispute

27 ⁹ Plaintiff agrees she was terminated by Optum360 on March 2, 2021 but contends

28 this was because Dignity Health requested her termination. (Doc. 78 at 10 ¶ 34.) To

support this assertion, Plaintiff cites a subsequent letter from Optum360 explaining why

her appeal of the termination decision had been denied. (*Id.*)

1 Resolution (“IDR”) team concluded that “several witness [sic] were able to collaborate
2 [sic] you called another employee a ‘fucking bitch’ while exiting the elevator. Your
3 behavior violated UnitedHealth Group’s Values and therefore [we] found your termination
4 to be warranted.” (Doc. 69-2 at 13.)

5 Dignity Health asserts that “Plaintiff does not have any evidence that Dignity Health
6 repeated the alleged defamatory statements to anyone but Ms. Hernandez.” (Doc. 69 at 6
7 ¶ 43.) In support of this assertion, Dignity Health points to the following passage during
8 Plaintiff’s deposition:

9 Q. And the claim is that these two women told Sarah Hernandez that you
10 had said things that you didn’t say, correct?

11 A. Correct.

12 Q. Who else did these two women tell, besides Sarah Hernandez, to your
13 knowledge?

14 A. I don’t know. Everybody talks to everybody there. All I know, they
15 made the false allegation to Sarah.

16 (Doc. 69-1 at 23.) Notwithstanding this, Plaintiff now disputes whether the dissemination
17 of the alleged defamatory statements was limited to Hernandez, arguing that her “inability
18 to find a job after submitting several applications to third parties, including but not limited
19 to, prospective employers and the Arizona Department of Economic Security (denial of
20 unemployment benefits), [is] evidence that Dignity Health’s false and defamatory
21 statements were publicized to these third parties.” (Doc. 78 at 10 ¶ 34.)

22 II. Procedural History

23 On April 16, 2021, Plaintiff filed this action in Maricopa County Superior Court.
24 (Doc. 1-3 at 5-14 [complaint].)

25 On May 26, 2021, Dignity Health timely removed this action to federal court based
26 on diversity jurisdiction. (Doc. 1 at 2.)

27 On June 3, 2021, Plaintiff filed a motion to remand (Doc. 8), which the Court denied
28 (Doc. 11).

On March 31, 2022, Dignity Health filed its motion for summary judgment. (Doc.

1 69.) That same day, Plaintiff filed her motion for summary judgment. (Docs. 70, 71.) At
 2 Plaintiff's request (Doc. 72), the Court later permitted Plaintiff to file additional exhibits
 3 in support of her motion (Doc. 75). The parties' cross-motions are now fully briefed.
 4 (Docs. 77, 78, 82, 83, 85.) Neither side requested oral argument.

5 **LEGAL STANDARD**

6 “The court shall grant summary judgment if [a] movant shows that there is no
 7 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
 8 of law.” Fed. R. Civ. P. 56(a). “A fact is ‘material’ only if it might affect the outcome of
 9 the case, and a dispute is ‘genuine’ only if a reasonable trier of fact could resolve the issue
 10 in the non-movant’s favor.” *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d
 11 1119, 1125 (9th Cir. 2014). The court “must view the evidence in the light most favorable
 12 to the nonmoving party and draw all reasonable inference[s] in the nonmoving party’s
 13 favor.” *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 459 (9th Cir. 2018). “Summary judgment
 14 is improper where divergent ultimate inferences may reasonably be drawn from the
 15 undisputed facts.” *Fresno Motors*, 771 F.3d at 1125.

16 A party moving for summary judgment “bears the initial responsibility of informing
 17 the district court of the basis for its motion, and identifying those portions of ‘the pleadings,
 18 depositions, answers to interrogatories, and admissions on file, together with the affidavits,
 19 if any,’ which it believes demonstrate the absence of a genuine issue of material fact.”
 20 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “In order to carry its burden of
 21 production, the moving party must either produce evidence negating an essential element
 22 of the nonmoving party’s claim or defense or show that the nonmoving party does not have
 23 enough evidence of an essential element to carry its ultimate burden of persuasion at trial.”
 24 *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). “If . . .
 25 [the] moving party carries its burden of production, the nonmoving party must produce
 26 evidence to support its claim or defense.” *Id.* at 1103.

27 “If the nonmoving party fails to produce enough evidence to create a genuine issue
 28 of material fact, the moving party wins the motion for summary judgment.” *Id.* There is

1 no issue for trial unless enough evidence favors the non-moving party. *Anderson v. Liberty*
2 *Lobby, Inc.*, 477 U.S. 242, 249 (1986). “If the evidence is merely colorable or is not
3 significantly probative, summary judgment may be granted.” *Id.* at 249-50. At the same
4 time, the evidence of the non-movant is “to be believed, and all justifiable inferences are
5 to be drawn in his favor.” *Id.* at 255. “[I]n ruling on a motion for summary judgment, the
6 judge must view the evidence presented through the prism of the substantive evidentiary
7 burden.” *Id.* at 254. Thus, “the trial judge’s summary judgment inquiry as to whether a
8 genuine issue exists will be whether the evidence presented is such that a jury applying that
9 evidentiary standard could reasonably find for either the plaintiff or the defendant.” *Id.* at
10 255.

11 “[W]hen parties submit cross-motions for summary judgment, [e]ach motion must
12 be considered on its own merits,” but the Court must consider all evidence submitted in
13 support of both cross-motions when separately reviewing the merits of each motion. *Fair*
14 *Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir.
15 2001) (quotation marks omitted). For “the party with the burden of persuasion at trial”—
16 usually the plaintiff—to succeed in obtaining summary judgment in its favor, it “must
17 establish beyond controversy every essential element” of each claim on which summary
18 judgment is sought. *S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th
19 Cir. 2003). The party without the burden of persuasion at trial—usually the defendant—is
20 entitled to summary judgment where it establishes that the party with the burden of
21 persuasion will be unable to prove at least one element of its claim in light of the undisputed
22 facts. *Celotex Corp.*, 477 U.S. at 322-23. This distinction reflects that the burden is
23 ultimately on the proponent of each claim to prove it. *Id.* (“Rule 56(c) mandates the entry
24 of summary judgment, after adequate time for discovery and upon motion, against a party
25 who fails to make a showing sufficient to establish the existence of an element essential to
26 that party’s case, and on which that party will bear the burden of proof at trial. In such a
27 situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure
28 of proof concerning an essential element of the nonmoving party’s case necessarily renders

1 all other facts immaterial.”).

2 Although Plaintiff is *pro se*, “litigants in the ordinary civil case should not be treated
3 more favorably than parties with attorneys of record.” *Jacobsen v. Filler*, 790 F.2d 1362,
4 1364-65 (9th Cir. 1986). “The Ninth Circuit directs courts ‘to make reasonable allowances
5 for pro se litigants and to read pro se papers liberally.’” *Wilson v. JPMorgan Chase, N.A.*,
6 2020 WL 6262106, *2 (W.D. Wash. 2020) (quoting *McCabe v. Arave*, 827 F.2d 634, 640
7 n.6 (9th Cir. 1987)). However, “district courts lack ‘the power to act as a party’s lawyer,
8 even for pro se litigants.’” *Id.* (quoting *Bias v. Moynihan*, 508 F.3d 1212, 1219 (9th Cir.
9 2007)). *See also Bias*, 508 F.3d at 1219 (“[Plaintiff] maintains . . . that as a *pro se* litigant
10 the district court should have searched the entire record to discover whether there was any
11 evidence that supports her claims. We disagree. A district court does not have a duty to
12 search for evidence that would create a factual dispute.”).

DISCUSSION

14 I. Dignity Health's Motion For Summary Judgment

15 Dignity Health construes Plaintiff's complaint as asserting a single claim for
16 defamation. (Doc. 1 ¶ 9; Doc. 69 at 15.) Dignity Health seeks summary judgment on that
17 claim on three grounds. (Doc. 69.) First, Dignity Health argues it had a qualified privilege
18 to share the allegations concerning Plaintiff's conduct with Plaintiff's supervisor at
19 Optum360. (*Id.* at 7-10.) Second, in the alternative, Dignity Health argues that any
20 defamation claim fails on the merits because many of the 17 challenged statements are not
21 defamatory, Plaintiff has no evidence to establish fault, and Plaintiff cannot establish harm.
22 (*Id.* at 10-14.) Third, Dignity Health argues that, at a minimum, Plaintiff's allegations do
23 not support an award of punitive damages. (*Id.* at 14-15.)

24 As explained below, the Court agrees with Dignity Health as to the first issue, which
25 is dispositive, and thus declines to reach the other two.

26

27

28

1 **A. Common Interest/Qualified Privilege**

2 1. The Parties' Arguments

3 Dignity Health argues it had a qualified privilege under Arizona law to share its
4 concerns about Plaintiff with Optum360 because "Plaintiff was an Optum360 employee
5 working inside of a Dignity Health facility, and working directly with Dignity Health
6 patients." (Doc. 69 at 8.) Dignity Health continues: "Dignity Health and Optum360
7 naturally had a common interest in Plaintiff's job performance. As a result, Optum360 was
8 entitled to learn that Plaintiff had used extremely inappropriate and unprofessional
9 language in front of a patient." (*Id.*) Dignity Health further contends that it did not abuse
10 its qualified privilege by acting with "actual malice" or "excessive publication." (*Id.* at 8-
11 10.) As for the former, Dignity Health contends that Plaintiff "presented no evidence that
12 Dignity Health knew its statements were false or had serious doubts as to the truth." (*Id.*
13 at 9.) As for the latter, Dignity Health contends that Plaintiff cannot "show that Dignity
14 Health excessively published its allegations, or even that it made the statements to anyone
15 but Ms. Hernandez." (*Id.*) Dignity Health concludes by emphasizing that "Plaintiff's
16 insistence that the statements were false is not enough to establish the requisite level of
17 fault" and notes that, in any event, it "took care in attempting to determine the truth of the
18 statements before conveying its concerns to Optum360." (*Id.* at 9-10.)

19 In response, Plaintiff acknowledges that "both Dignity Health and . . . Optum360[]
20 have a common interest in effective hospital management *independently*" but argues that
21 "Defendant and Plaintiff's employer do not share a common interest in providing quality
22 patient care" because Optum360 is focused on "Revenue Cycle (billing) and health care
23 insurance coverage while that of Defendant is patient care." (Doc. 78 at 2.) Plaintiff further
24 contends that Dignity Health acted in bad faith. (*Id.* at 12.) She asserts that when Juilfs
25 "demanded from Plaintiff to see her supervisor," Plaintiff was under the impression that
26 the "three of them" would be discussing the elevator incident. (*Id.*) However, Juilfs and
27 Dodd spoke with Hernandez for "almost an hour" and then "left . . . without hearing the
28 Plaintiff's side." (*Id.*) Plaintiff concludes that those actions evidence "bad faith for being

1 deceitful to Plaintiff.” (*Id.*) Plaintiff also appears to argue that Dignity Health acted with
2 actual malice because of “major factual inaccuracies and changes” as well as “deliberate
3 alteration[s]” to the “original version of allegations against Plaintiff.” (*Id.* at 12-13.) For
4 example, Plaintiff notes that Dodd first alleged that Plaintiff “screamed the words ‘fucking
5 bitch’ in the presence of several witnesses, nursing students, other patients, medical
6 students, medical doctors, and other hospital personnel,” which was then changed to “Ms.
7 Dodd stated that Ms. Lopez and the patient heard the ‘remark’ as well.” (*Id.* at 12-13.)
8 Finally, Plaintiff argues that Dignity Health acted with “ill will” by making “excessive and
9 exaggerated” allegations. (*Id.* at 14.) In closing, Plaintiff asserts that “the onus probandi
10 now shifts to Defendant to show to this Court that its actions and statements are truthful
11 and not defamatory.” (*Id.* at 16.)

12 In reply, Dignity Health contends that “[a]s an initial matter, Plaintiff’s Response
13 fails to follow the Court’s rules. Her responses to Dignity Health’s Statement of Facts
14 (‘DSOF’) frequently fail to cite to the record, or any evidence, to support her contention
15 that the fact is, in fact, disputed.” (Doc. 82 at 1.) Turning to the merits, Dignity Health
16 argues that Plaintiff “does not present sufficient law or facts to rebut Dignity Health’s claim
17 of the common interest privilege.” (*Id.* at 2.) Dignity Health reiterates that the common
18 interest privilege applies to two entities that share the same “goal” with regard to patients,
19 irrespective of whether they also share the same “role.” (*Id.* at 2-3.) Next, Dignity Health
20 argues that, even viewing the evidence in the light most favorable to Plaintiff, she “fails to
21 present clear and convincing evidence that Dignity Health *knew* the falsity of its statements
22 or had *serious doubts* as to their truth.” (*Id.* at 4.) Dignity Health notes that Plaintiff herself
23 admitted that “Optum360, not Dignity Health, excluded Plaintiff from its conversation with
24 Dignity Health personnel” (*id.* at 4); argues that any of the supposed alterations identified
25 by Plaintiff are not “material” and even if they were, Plaintiff has offered no evidence of
26 Dignity Health’s intent (*id.* at 5); argues that even if the statements were defamatory *per se*
27 (which Dignity Health maintains they are not), Plaintiff is still required to show fault and
28 she “has failed to assert any facts upon which a jury could find actual malice” (*id.* at 6);

1 and argues that Plaintiff has no “admissible evidence that anyone at Dignity Health
2 requested or directed the termination” (*id.* at 6-7).

3 2. Analysis

4 Arizona “follows the Restatement (Second) of Torts . . . on claims relating to
5 defamation of a private person.” *Desert Palm Surgical Grp., P.L.C. v. Petta*, 343 P.3d 438,
6 449 (Ariz. Ct. App. 2015). Under the Restatement, “[t]o create liability for defamation
7 there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged
8 publication to a third party; (c) fault amounting at least to negligence on the part of the
9 publisher; and (d) either actionability of the statement irrespective of special harm or the
10 existence of special harm caused by the publication.” Restatement (Second) of Torts § 558.
11 “Publication for defamation purposes is communication to a third party.” *Dube v. Likins*,
12 167 P.3d 93, 104 (Ariz. Ct. App. 2007).

13 As for the second element of this test, Dignity Health does not dispute that it
14 published the alleged defamatory statements to a third party, Hernandez, but contends this
15 publication was privileged because it fell within the “common interest” privilege. (Doc.
16 69 at 7.) “Whether a privileged occasion arose is a question of law for the court, and
17 whether the occasion for the privilege was abused is a question of fact for the jury.” *Green*
18 *Acres Tr. v. London*, 688 P.2d 617, 624 (Ariz. 1984).

19 a. Common Interest

20 Arizona recognizes the “common interest” privilege, which arises when “one is
21 entitled to learn from his associates what is being done in a matter in which he has an
22 interest in common with them.” *Green Acres*, 688 P.2d at 625 (quoting Restatement
23 (Second) of Torts § 596, cmt. c). “This privilege applies in a context like associates in a
24 commercial enterprise, users of mercantile agencies, co-owners of property, or co-members
25 of the board of trustees of a school district.” *Id.* (internal citations omitted). “In these
26 contexts, each participant in the association, group or organization depends on other
27 participants to supply relevant information. Through the qualified privilege, courts
28 facilitate the exchange of information by protecting statements about matters affecting the

1 goals of that organization or group.” *Id.*

2 In *Green Acres*, the Arizona Supreme Court found there was no common interest
3 between an attorney and a news reporter in providing details of an upcoming class action
4 lawsuit against a retirement home. *Id.* at 626 (“Although it may be true in a loose sense
5 that the reporter and the lawyer defendants shared a ‘common interest’ in the plight of the
6 elderly, this is not the kind of interest that gives rise to a common undertaking which
7 compels protection from a defamation action.”). In contrast, in *Miller v. Servicemaster By
8 Rees*, 851 P.2d 143 (Ariz. Ct. App. 1992), the plaintiff (a man named Miller) was employed
9 by an unnamed company that utilized a janitorial services company (Servicemaster). *Id.*
10 at 144-45. Servicemaster, in turn, employed a woman named Powers. *Id.* After Powers
11 reported to Servicemaster that Miller had sexually harassed her while she was cleaning
12 Miller’s office, Servicemaster relayed this allegation to Miller’s employer. *Id.* Miller, in
13 turn, sued Servicemaster for defamation, under the theory that “the written and verbal
14 reports of the incident are defamatory as a matter of law because they adversely damaged
15 his professional reputation,” but the Arizona Court of Appeals held that Servicemaster was
16 protected by the common interest privilege because “public policy dictates that employees
17 must be protected from workplace sexual harassment” and “Powers’ report and
18 Servicemaster’s transmittal of that report to [Miller’s] employer were for the benefit of
19 protecting her from unwanted harassment, real or perceived.” *Id.* at 145. Similarly, in
20 *Hirsch v. Cooper*, 737 P.2d 1092 (Ariz. Ct. App. 1986), the court found that the common
21 interest privilege applied when a corneal surgeon questioned the competence of another
22 provider in treating his patient while in discussions with a foundation that would be paying
23 for the patient’s surgery. *Id.* at 1095-96. This was because the “discussion concerned the
24 future care of the patient and involved matters of a ‘common interest.’” *Id.*

25 Even construing the evidence in the light most favorable to Plaintiff, Dignity Health
26 and Optum360 shared a common interest in hospital management and patient care. (Doc.
27 69 at 8.) It is undisputed that “[a]lthough employed by Optum360, Plaintiff physically
28 worked at St. Joseph’s Hospital and Medical Center, a Dignity Health facility.” (Doc. 69

1 at 2 ¶ 1; Doc. 78 at 4 ¶ 1.) Plaintiff further does not dispute that part of her role was
2 assisting “hospital admissions by registering patients’ insurance.” (Doc. 69 at 2 ¶ 2; Doc.
3 78 at 4 ¶ 2.) Although Plaintiff asserts that she has “no obligation to perform quality patient
4 care and is only responsible to do compliance” (Doc. 78 at 4 ¶ 3; Doc. 77-1 at 27 [outlining
5 Plaintiff’s job training online courses]), the coaching that Plaintiff received from
6 Optum360 in September 2020 specifically raised performance concerns relating to
7 Plaintiff’s inappropriate interactions with a Dignity Health patient and a registered nurse.
8 (Doc. 69-1 at 45.) The coaching also called for Plaintiff to “focus on treating all patients,
9 coworkers, leaders, anyone that she comes in contact with during her working hours with
10 the above values in mind. Specifically focusing on relationships, compassion, and
11 integrity.” (*Id.* at 46.) Taken together, the shared workspace, the regular interactions with
12 Dignity Health’s patients and staff, and Plaintiff’s performance metrics based on
13 interactions with Dignity Health’s patients and staff demonstrate that Dignity Health and
14 Optum360 shared a common interest in hospital administration and patient care. The
15 situation here has many obvious parallels to the situations in *Miller* and *Hirsch*, and in both
16 of those cases a common interest was found to exist.

17 The Restatement also contemplates the existence of a common interest in this
18 situation. Although Plaintiff did not work *for* Dignity Health, she worked in one of its
19 facilities, and Juilfs and Dracobly made statements that drew attention to potentially
20 inappropriate behavior by Plaintiff directed at other staff members and in front of a patient.
21 Restatement (Second) of Torts § 596 cmt. c (noting that “a partner is entitled to be told not
22 only of the discharge of an employee by his fellow partner but also of the reasons for his
23 discharge, and the fellow partner is conditionally privileged to state the reason even though
24 it reflects upon the conduct or character of the employee in question” and that “[i]n many
25 instances, the common interest makes proper the communication of defamatory matter that
26 has prompted certain action on the part of one of the parties although it has subsequently
27 been discovered that the matter was false”). The Court thus has little trouble concluding
28 that Dignity Health had a conditional privilege to communicate to Optum360 the

1 allegations regarding Plaintiff's inappropriate interactions with Dignity Health employees
2 and patients and regarding Plaintiff's potential violations of Dignity Health's Covid
3 protocols, because such allegations implicated Dignity Health's and Optum360's common
4 interests.

5 Given this determination, the burden shifts to Plaintiff to show "abuse of that
6 privilege either by proving publication with 'actual malice' or by demonstrating excessive
7 publication." *Green Acres*, 688 P.2d at 624 (citing Restatement (Second) of Torts § 604,
8 cmt. a). "This is a question for the jury, but where there is no evidence . . . the court can
9 dispose of the issue." *Aspell v. Am. Cont. Bridge League of Memphis, Tenn.*, 595 P.2d 191,
10 193 (Ariz. Ct. App. 1979).

11 b. Excessive Publication

12 "Abuse through excessive publication results from publication to an unprivileged
13 recipient not reasonably necessary to protect the interest upon which the privilege is
14 grounded." *Green Acres*, 688 P.2d at 624 (internal citations omitted).

15 Plaintiff's only argument on this point is that her "inability to find a job after
16 submitting several applications to third parties" is "evidence that Dignity Health's false
17 and defamatory statements were publicized to these third parties." (Doc. 78 at 10.) This
18 argument lacks merit. As Dignity Health points out, "Plaintiff's inability to obtain
19 employment does not prove publication, let alone excessive publication." (Doc. 82 at 4
20 n.2.) Notably, none of the materials submitted by Plaintiff indicate that the employers who
21 rejected her job applications were even aware of the allegations that Dignity Health
22 previously relayed to Hernandez. (Doc. 73-2 at 22 [Phoenix Children's]; Doc. 73-2 at 24
23 [Mayo Clinic]; Doc. 77-1 at 20 [Plaintiff earned no unemployment benefits in 2021]; Doc.
24 70 at 27 [unemployment claim was not in "active status"].) Additionally, during her
25 deposition, Plaintiff admitted that she could only speculate as to whether the allegations
26 had been relayed to others beyond Hernandez. (Doc. 69-1 at 23.) On this record, there is
27 simply no evidence from which a reasonable juror could conclude that Dignity Health
28 publicized the allegations beyond Hernandez. *See generally Barnes v. Arden Mayfair, Inc.*,

1 759 F.2d 676, 680 (9th Cir. 1985) (“A party opposing summary judgment is entitled to the
 2 benefit of only reasonable inferences that may be drawn from the evidence put forth. The
 3 district court must therefore undertake some initial scrutiny of the inferences that could be
 4 reasonably drawn from the evidence. A reasonable inference is one which supports a viable
 5 legal theory, which by necessary implication cannot be supported by only threadbare
 6 conclusory statements instead of significant probative evidence.”) (cleaned up).

7 c. Actual Malice

8 “An abuse through ‘actual malice’ occurs when the defendant makes a statement
 9 knowing its falsity or actually entertaining doubts about its truth.” *Green Acres*, 688 P.2d
 10 at 624. In other words, “[m]alice is established by showing that [the defendants] acted in
 11 reckless disregard of the truth, or with actual knowledge that their statements were false.”
 12 *Aspell*, 595 P.2d at 193. “Actual malice, however, is not established through a showing of
 13 bad motives or personal ill-will.” *Heuisler v. Phx. Newspapers, Inc.*, 812 P.2d 1096, 1100
 14 (Ariz. Ct. App. 1991). “In a defamation case, if the factual dispute concerns actual malice,
 15 the trial court’s summary judgment inquiry is ‘whether the evidence in the record could
 16 support a reasonable jury finding either that the plaintiff has shown actual malice by clear
 17 and convincing evidence or that the plaintiff has not.’” *Id.* *See also Wietecha v. Ameritas*
 18 *Life Ins. Corp.*, 2006 WL 2772838, *11 (D. Ariz. 2006) (applying the clear and convincing
 19 evidence standard to whether a defendant acted with malice in a qualified privilege
 20 context).

21 Plaintiff’s first argument is that Dignity Health acted in “bad faith.” (Doc. 78 at
 22 12.) As Dignity Health points out, that is the incorrect standard in this context. (Doc. 82
 23 at 4 n.3.) At any rate, Plaintiff’s argument is based on the allegation that when Juilfs
 24 “demanded from Plaintiff to see her supervisor,” Juilfs gave the impression that the “three
 25 of them” would be discussing the elevator incident with Hernandez, yet Plaintiff was not
 26 included in the conversations that immediately followed. (Doc. 78 at 12.) This allegation,
 27 even if true, is not a basis for denying summary judgment because “[i]t is well established
 28 that ‘failure to investigate, sloppy investigation, poor reporting practice and the like are not

1 per se actual malice.”” *Heuisler*, 812 P.2d at 1101 (citation omitted). Additionally,
2 Plaintiff agrees that significant conversations took place between Dodd/Juilfs and
3 Hernandez, suggesting there was some investigation into the allegations. Under these
4 circumstances, a reasonable juror could not conclude (let alone conclude subject to the
5 heightened clear-and-convincing evidence standard) that Dignity Health acted in reckless
6 disregard for the truth when communicating Dodd’s version of the incident to Hernandez.
7 *Aspell*, 595 P.2d at 193 (“Nor does the evidence, viewed in the light most favorable to
8 appellant, show that the board had a reckless disregard for the truth. . . . The minutes state
9 that the board discussed the situation for over an hour.”).

10 Plaintiff’s argument may be that Juilfs misled her into believing she would be part
11 of the discussion with Hernandez. (Doc. 78 at 9 [“Defendant’s OR nurse Juilfs and
12 attendant Dodd were treacherous and deceptive; they left the Patient Access office without
13 informing the Plaintiff.”].) However, Plaintiff admits that Hernandez, her Optum360
14 supervisor, is the one who excluded her from the conversation. (*Id.* at 8 [“Sarah Hernandez
15 excluded Plaintiff in their discussion.”].) Therefore, this allegation, even if true, is not
16 material on the issue of actual malice.

17 Plaintiff also alleges that Dodd had the “opportunity to verify with Plaintiff if
18 Plaintiff really screamed” “fucking bitch” before the walk to Hernandez’s office, but
19 “Dodd did not because she was fully aware of the falsity of her statements.” (Doc. 78 at
20 8.) But this argument is wholly speculative—it is premised on Plaintiff’s attempt to read
21 Dodd’s mind and discern why Dodd failed to engage in a follow-up conversation with her.
22 Such speculation is not clear and convincing evidence of actual malice.

23 Plaintiff next argues that the “deliberate” and “major” factual inconsistencies in the
24 statements show a reckless disregard for the truth. (Doc. 78 at 12-13.) Specifically,
25 Plaintiff points to the following inconsistencies: (1) the initial allegation that Plaintiff
26 “screamed the word ‘fucking bitch’ in the presence of several witnesses, nursing students,
27 other patients, medical students, medical doctors, and other hospital personnel” versus the
28 later statement that Dodd and Lopez merely heard Plaintiff “call[ing] Danyelle [Dodd]”

1 fucking bitch in front of one patient; (2) the allegation that there were only two attendants
 2 with the hospital bed when there were actually three; (3) some of the allegations were
 3 removed in Juilfs's email; and (4) Juilfs added new allegations to the email, such as
 4 Plaintiff "insisted that nurses and patient should wait for the next elevator." (*Id.*)

5 As Dignity Health correctly notes, it is difficult to cast these "alterations" as either
 6 material or relevant to the issue of malice. (Doc 82 at 5.) Whether there were two nurses
 7 or three present does not affect "the substance, the gist, [or] the sting of" the original
 8 accusation that Plaintiff said "fucking bitch" to a nurse in front of a patient. *Fendler v.*
 9 *Phx. Newspapers Inc.*, 636 P.2d 1257, 1261 (Ariz. Ct. App. 1981). And there is no
 10 evidence that any of the changes were made with a "reckless disregard for the truth." In
 11 fact, it appears the alterations are more restrained versions of the originals, which if
 12 anything suggests they were not made with actual malice. Accordingly, the purported
 13 contradictions and inconsistencies do not qualify as evidence (let alone clear and
 14 convincing evidence) from which a reasonable juror could find actual malice.

15 Plaintiff next argues that the allegations against her were "excessive and
 16 exaggerated." (Doc. 78 at 14.) However, the standard Plaintiff cites (relating to "ill will")
 17 is not the law in Arizona.¹⁰ (*Id.*) At any rate, the allegations Plaintiff cites as problematic
 18 are that she was "extremely aggressive," "disrespectful," has "gray shoulder length hair
 19 and is normally wearing a normal jacket," and was "unprofessional." (Doc. 78 at 14; Doc.
 20 69-2 at 5 [Juilfs email: "When I went to speak to her regarding this situation she was
 21 extremely aggressive and started arguing with my employee and when she was told by me
 22 that this was not the time or the place for this discussion she continued to state her case
 23 loudly to which she was sternly asked not to have this discussion in the hall which is when
 24 she stopped and we proceeded to her manager's office."]; *id.* at 7 [Dracobly email: "The

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¹⁰ The Court notes that Plaintiff has cited A.R.S. § 12-653.01, which defines actual malice as "that state of mind arising from personal spite, hatred, or ill will toward the plaintiff, but such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice." That provision's definitions only apply in the context of "damages for the publication of a libel in a newspaper or magazine, or of a slander by radio or television broadcast." A.R.S. § 12-653.02.

1 employee would not give me or the security guard her name this morning during our
 2 interaction. She has gray, shoulder-length hair and is normally wearing an orange jacket.
 3 . . . Upon returning to the unit I was informed by our security staff that the employees
 4 response to them was also disrespectful and unprofessional.”].) Not only does Plaintiff fail
 5 to explain how these statements are exaggerated, but Plaintiff fails to explain how the
 6 exaggeration could qualify as clear and convincing evidence of actual malice—*i.e.*, a
 7 reckless disregard for the truth.¹¹ Given that it is undisputed that Hernandez gave
 8 significant time to Dignity Health’s employees to explain the situation, Plaintiff’s
 9 speculative evidence does not demonstrate that she could meet the clear and convincing
 10 evidence hurdle. Even if these statements vary slightly from Plaintiff’s own recollection
 11 of the events, this does not create a genuine issue of material fact about whether the
 12 statements were made with actual malice.¹²

13 Plaintiff also argues that many of the statements were defamatory per se. (Doc. 78
 14 at 14-15.) But even assuming that some of the challenged statements could be categorized
 15 in this fashion, which is unlikely,¹³ Dignity Health’s defense is that it had a privilege to
 16 relay those statements to Hernandez. Statements that would otherwise constitute
 17 defamation per se are not actionable if the publication was privileged. *McClinton v. Rice*,
 18 265 P.2d 425, 430 (Ariz. 1953) (“*Unless the publication in the instant case was privileged*
 19 *or qualifiedly privileged, the proof of publication of the article carried with it the*
 20 *presumption of its falsity*”) (emphasis added). Similarly, whether the statements
 21 touched on the subject matters that might trigger the defamation per se doctrine is distinct
 22 from whether Plaintiff can show they were made with actual malice.

23 ¹¹ Plaintiff does not dispute that these events occurred, only how they have been
 24 characterized. (Doc. 78 at 5, 13.)

25 ¹² Plaintiff has submitted a black-and-white photo of herself, which shows her hair as
 26 shoulder length. (Doc. 70 at 10.) Even if the photo made clear that Plaintiff’s hair is not
 27 gray, this would not create a material dispute as to whether Dignity Health acted with actual
 28 malice.

27 ¹³ “An utterance is slander Per se when its publication charges a contagious or venereal
 28 disease, or charges that a woman is not chaste, or tends to injure a person in his profession,
 29 trade or business, or imputes the commission of a crime involving moral turpitude.” *Modla*
 v. *Parker*, 495 P.2d 494, 496 n.1 (Ariz. Ct. App. 1972).

1 Finally, Plaintiff contends that Dignity Health asked to have Plaintiff fired, which
 2 constitutes actual malice. (Doc. 78 at 4 (“Defendant, to make sure that its malicious request
 3 is materialized, made a willful presence in the office of Sarah Hernandez, and witnessed
 4 Ms. Hernandez pronouncing her derogatory statements to Plaintiff”); *id.* at 9 (“On March
 5 2, 2021, Plaintiff was terminated based on Defendant’s management request to remove
 6 Plaintiff.”).) Putting aside that there is no admissible evidence that Dignity Health asked
 7 for Plaintiff to be fired—although Plaintiff *asserts* that Hernandez admitted to her that
 8 Dignity Health made such a request (Doc. 77-1 at 13), Dignity Health correctly points out
 9 that “Plaintiff’s assertions about what Ms. Hernandez told her constitute inadmissible
 10 hearsay” (Doc. 82 at 8 n.5)¹⁴—such a request would not qualify as evidence of actual
 11 malice in any event. *Heuisler*, 812 P.2d at 1100 (“[E]vidence tending to show that Murphy
 12 may have had a personal motive to deprive Heuisler of the appointment, although perhaps
 13 relevant to show spite or ill-will amounting to common law malice, would not establish
 14 knowledge of falsity or reckless disregard for the truth, the defining characteristics of actual
 15 malice . . .”).

16 II. Plaintiff’s Motion For Summary Judgment

17 Plaintiff argues she is entitled to summary judgment because Dignity Health
 18 “deliberately violated First (1st) Amendment of the US Constitution, A.R.S. § 12-541, § 12-
 19 651, § 12-653.01, and Arizona Constitution, Art. 2, Sec. 4, including contemporary,
 20 exemplary, and punitive damages, which all of these bundled together as \$10,000,000.00
 21 plus cost.” (Doc. 70 at 2.) Additionally, in her motion papers, Plaintiff seems to make
 22 references to claims for intentional infliction of emotional distress (Doc. 71 at 14) and
 23 tortious interference with contract (Doc. 85 at 11).

24 Even liberally construed, Plaintiff’s complaint only raises a state-law defamation
 25 claim. (Doc. 1-3 at 9-11.) Nor is there any evidence that Plaintiff ever disclosed her intent
 26 to pursue some sort of claim other than a state-law defamation claim. (*See, e.g.*, Doc 10 at

27 ¹⁴ The only admissible evidence in the record on this point is Juilfs’s declaration, in
 28 which Juilfs avows that “I did not ask Ms. Hernandez to fire Plaintiff.” (Doc. 69-2 at 11
 ¶ 9.)

1 4 [in the portion of the Rule 26(f) report requiring Plaintiff to provide a “description of
2 each claim, defense, and affirmative defense,” Plaintiff wrote: “Plaintiff brings a claim for
3 defamation/slander against Dignity Health Corporation”].) Accordingly, the Court limits
4 its analysis to Plaintiff’s defamation claim.¹⁵

5 A. **The Parties’ Arguments**

6 In her motion for summary judgment, Plaintiff makes many of the same arguments
7 she made in her response to Dignity Health’s motion. (Doc. 71 at 10 [arguing that the
8 challenged communications were “slanderous and libelous per se”]; *id.* at 11 [arguing that
9 Dignity Health cannot assert a qualified privilege because it acted “with malice in fact”];
10 *id.* at 12 [arguing that Dignity Health “ha[d] full knowledge of the falsity of its statements
11 after making deliberate alteration of material facts and exhibition of major factual
12 inaccuracies”].) Because those arguments are addressed on the merits in Part I above, the
13 Court will not address them again here.

14 Plaintiff also seems to advance several additional arguments in support of her
15 affirmative request for summary judgment. First, Plaintiff contends that actual malice is
16 only required if the challenged statement addressed a matter of public concern, which is
17 not the case here, and there is “prima facie evidence of actual malice on the tortious conduct
18 of the Defendant.” (*Id.*) Second, Plaintiff contends that Dignity Health’s statements, under
19 any plain interpretation, impeach her “honesty, integrity, or reputation” and thus constitute
20 libel per se. (*Id.* at 13-14.) In a related vein, Plaintiff contends that Dignity Health’s “false
21 allegations are defamation *per se* as [they] stigmatize[] the Plaintiff as guilty of
22 unprofessionalism and lack of work ethics.” (*Id.* at 14.) Finally, Plaintiff argues that

23 ¹⁵ The Court further notes that Plaintiff does not explain how Dignity Health acted
24 under color of state law, as required for a First Amendment claim. *Howerton v. Gabica*,
25 708 F.2d 380, 382 (9th Cir. 1983) (“In order to state a claim under 42 U.S.C. § 1983,
26 [plaintiffs] must show two essential elements: (1) that the defendants acted under color of
27 state law; and (2) that the defendants caused them to be deprived of a right secured by the
28 constitution and laws of the United States.”). As for Plaintiff’s statutory citations, A.R.S. § 12-541 simply identifies the statute of limitations for libel and slander, A.R.S. § 12-561 provides certain definitions to be used in a medical malpractice action, and A.R.S. § 12-653.01 applies only to broadcast television station retractions. Accordingly, those statutes could not provide an independent pathway to liability here. Neither could the due process clause of the Arizona Constitution.

1 Dignity Health cannot be protected by the “Constitution’s First Amendment on freedom of
2 speech, nor can the Defendant raise the doctrine of fighting words to protect itself.” (*Id.* at
3 14-15.)

4 In response, Dignity Health argues that Plaintiff has “not produce[d] sufficient
5 evidence to establish, without genuine dispute, the elements of her defamation claim.”
6 (Doc. 83 at 1-2.) According to Dignity Health, “Plaintiff’s insistence that Dignity Health
7 failed to prove the ‘truth’ of its statements confuses the issue: it is Plaintiff who must
8 establish the statements were false.” (*Id.* at 2.) Finally, Dignity Health argues that “even
9 if the Court finds Plaintiff met her burden as to Dignity Health’s liability, Plaintiff produced
10 no supportive evidence for punitive damages; at a minimum, the Court should deny
11 Plaintiff summary judgment on this relief.” (*Id.* at 2.)

12 In reply, Plaintiff first argues that Dignity Health’s response is untimely. (Doc. 85
13 at 1.) Next, Plaintiff argues that Dignity Health has distorted several facts without any
14 citations to record evidence. (*Id.* at 2-3.) As for Dignity Health’s substantial truth defense,
15 Plaintiff contends that Dignity Health “DID NOT provide any evidence, not one, not even
16 a statement from any lone witness, so to prove the truthfulness to all its accusatory
17 allegations against Plaintiff.” (*Id.* at 3.) Additionally, Plaintiff argues that Dignity Health
18 has disregarded its burden to prove truth by a preponderance of the evidence. (*Id.* at 7-8.)
19 Plaintiff further argues that various pieces of circumstantial evidence show that the
20 allegations against her were false (*id.* at 8-9), that Dignity Health’s objections to her
21 exhibits are “unacceptable” under Federal Rule of Evidence 402 (*id.* at 5-6), and that
22 punitive damages are “assumed after Plaintiff established well the evil intent of the
23 Defendant and the inflicted injuries she suffered” (*id.* at 6). In conclusion, Plaintiff argues
24 that she proved her *prima facie* case by demonstrating that (1) Dignity Health failed to
25 prove the truth of the statements, (2) Dignity Health’s “accusatory allegations are
26 defamatory *per se* as it immediately injured Plaintiff’s character and caused her immediate
27 termination,” (3) “Dignity Health’s defamatory statements were publicized to Plaintiff’s
28 prospective employers, employment agencies, AZ Dept. of Securities, and alma mater

1 schools,” (4) Dignity Health “clearly exhibited reckless disregard of the truth, because
2 having full knowledge of the falsity of its allegations, with an evil mind, intentionally
3 alleged falsehoods, by phone call, email, reported in person, and made an in-person
4 requests for her immediate removal at work which directly defamed Plaintiff,” and
5 (5) Dignity Health’s “defamatory falsehoods were resulted directly to Plaintiff’s immediate
6 sufferings of complete economic losses, loss wages, incapacitated to pay all her debts and
7 credit cards, lost company benefits, maintain a sustainable life, lost medical health benefits,
8 unemployment benefits, and other consequential damages.” (*Id.* at 9-12.)

9 B. Analysis

10 Under Local Rule 7.2(c), a party generally has 14 days to file a response to a motion,
11 subject to the exceptions in Local Rule 56.1. Local Rule 56.1(d), in turn, specifies that a
12 party has 30 days to file a response to one particular type of motion—a motion for summary
13 judgment.

14 Plaintiff’s summary judgment motion was filed on March 31, 2022. (Doc. 70.)
15 Federal Rule of Civil Procedure 6(a)(1), which governs the computation of time, explains
16 that the Court shall exclude the day of the event that triggers the period and that if the final
17 day of the period is a Saturday, Sunday, or legal holiday, then the period “continues to run
18 until the end of the next day that is not a Saturday, Sunday, or legal holiday.” Here, the
19 30th day after March 31, 2022 was April 30, 2022, which was a Saturday. Accordingly,
20 Dignity Health’s response was not due until the following Monday, May 2, 2022. This
21 was the day that Dignity Health filed its response. (Doc. 83.) It follows that Dignity
22 Health’s response was timely.

23 Turning to the merits, any defamation claim against Dignity Health fails based on
24 application of the common interest privilege for the reasons stated in Part I above. Nothing
25 in the briefing related to Plaintiff’s affirmative summary judgment motion undermines this
26 conclusion.

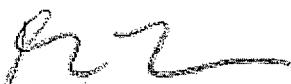
27 ...
28 ...

1 Accordingly,

2 **IT IS ORDERED** that Dignity Health's motion for summary judgment (Doc. 69)
3 is **granted** and Plaintiff's motion for summary judgment (Doc. 70) is **denied**.

4 **IT IS FURTHER ORDERED** that the Clerk enter judgment accordingly and
5 terminate this action.

6 Dated this 18th day of January, 2023.

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Dominic W. Lanza
United States District Judge

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28 U.S. Code § 4101 - Definitions

In this chapter:

(1) **Defamation.**—

The term “defamation” means any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented any person in a false light, or have resulted in criticism, dishonor, or condemnation of any person.

(2) **Domestic court.**—

The term “domestic court” means a Federal court or a court of any State.

(3) **Foreign court.**—

The term “foreign court” means a court, administrative body, or other tribunal of a foreign country.

(4) **Foreign judgment.**—

The term “foreign judgment” means a final judgment rendered by a foreign court.

(5) **State.**—

The term “State” means each of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(6) **United states person.**—The term “United States person” means—

(A)

a United States citizen;

(B)

an alien lawfully admitted for permanent residence to the United States;

(C)

an alien lawfully residing in the United States at the time that the speech that is the subject of the foreign defamation action was researched, prepared, or disseminated; or

(D)

a business entity incorporated in, or with its primary location or place of operation in, the United States.

28 U.S. Code § 1254 - Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1)

By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2)

By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

US Constitution First Amendment

The First Amendment guarantees freedoms concerning religion, expression, assembly, and the right to petition. It forbids Congress from both promoting one religion over others and also restricting an individual's religious practices. It guarantees freedom of expression by prohibiting Congress from restricting the press or the rights of individuals to speak freely. It also guarantees the right of citizens to assemble peaceably and to petition their government.

Rule 13. Review on Certiorari: Time for Petitioning

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.