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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ANI A. AVETISYAN, Plaintiff and Appellant, v. MICHAEL W. MCTIGUE JR., et al., Defendants and Respondents.	B275931 (Los Angeles County Super. Ct. No. BC551859)

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Ani A. Avetisyan, in pro. per., and for Plaintiff and Appellant.

Drinker Biddle & Reath, Alan J. Lazarus, Kate S. Gold and Philippe A. Lebel for Defendants and Respondents.

INTRODUCTION

Ani Avetisyan, a former associate at the law firm of Drinker Biddle & Reath LLP, sued the firm for, among other things, breach of contract, wrongful discharge, and fraud, after the firm terminated her employment in December 2013. Avetisyan also asserted causes of action against four of the firm's partners, Michael W. McTigue Jr., Sheldon Eisenberg, George T. Caplan, and Kristopher S. Davis (collectively, the partners), for libel, slander, intentional and negligent interference with prospective economic relations, intentional interference with contractual relations, and violation of Labor Code section 1050.

Avetisyan appeals from the judgment dismissing her complaint against the partners after the trial court sustained their demurrer to each cause of action against the partners—and most of the causes of action against the firm—without leave to amend. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *Avetisyan Starts at the Firm*

Avetisyan began her legal career in 2009 as an associate at Sidley Austin. Two years later, Avetisyan decided to make a lateral move, and in February 2012 Drinker Biddle, a

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[1] Because Avetisyan appeals from a judgment after an order sustaining a demurrer, we "accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law." (*Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919, 924.)

Philadelphia-based law firm with offices nationwide, hired her as a litigation associate in its Los Angeles office.

Avetisyan worked primarily on litigation matters with Caplan and Davis, in coordination with another attorney, Paul Gelb, and her work was "apparently well received." With Caplan's permission, Avetisyan also worked on an appellate matter for Eisenberg, who initially was not entirely satisfied with her work, but, after providing guidance, was impressed with her revised work product.

Things began to go awry two months after she started at Drinker Biddle, when the firm asked Avetisyan to interview Tessa Raisin, a lateral associate candidate with one more year of experience than Avetisyan. Avetisyan reported that Raisin was too informal during the interview and Avetisyan recommended against hiring Raisin. Caplan and Davis did not appreciate Avetisyan's review of Raisin. Ultimately, the firm hired Raisin, at the insistence of Caplan and Davis, for whom she would work exclusively, along with Gelb. Meanwhile, the firm asked Avetisyan to take on a part-time, in-house secondment assignment with one of the firm's data privacy clients.[2] Her secondment assignment went well, and the firm's data privacy team encouraged Avetisyan to consider joining their practice

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[2] A "secondment" is an assignment of an individual from one company or firm to another for a defined period of time. (*Presbyterian Church of Sudan v. Talisman Energy, Inc.* (S.D.N.Y. 2006) 453 F.Supp.2d 633, 649.) "[S]econdments on average last a year, and attorneys most often work on-site with the client, but may also work at home, or a mixture of the two." (Williams et al., *Disruptive Innovation: New Models of Legal Practice* (2015) 67 Hastings L.J. 1, 41.)

group full time. The data privacy client also offered Avetisyan a job. At the time, however, Avetisyan felt secure in her position with the firm and the litigation group.

B. *The Firm Reviews Avetisyan's Performance*

In November 2012 Avetisyan received her first annual performance evaluations, some of which were positive and extolled Avetisyan's professionalism and "her high level of competency" in handling her secondment. However, the reviews by Caplan, Davis, and Eisenberg—on which Avetisyan based her libel cause of action—took her by surprise. Avetisyan claimed the evaluations by Caplan and Davis were "unfair and inaccurate" and were in retaliation for her recommendation against hiring Raisin, whom Caplan and Davis, for "various personal and business reasons," sought to protect. Avetisyan alleged Eisenberg's review, while admittedly "accurate to some extent," was unfair, tailored to support Caplan's and Davis's reviews, and intended to motivate Avetisyan either to join the firm's data privacy group or to accept the client's job offer.

Avetisyan had her associate review meeting with the chair of the litigation practice group, Wilson Brown. Brown told her "he did not read or perceive the reviews as negatively as Avetisyan did" and "indicated that there was no issue, as far as he was concerned, that could not be resolved." Caplan and Davis, however, began to exclude Avetisyan from case-related discussions and strategy sessions, in part because Avetisyan, unlike Raisin, did not approve of using profane language or participating in racy conversations about personal matters. Avetisyan also believed Caplan and Davis excluded her from

certain case meetings and discussions because they knew she would not follow improper instructions or engage in misconduct.

In March 2013 Avetisyan expressed her interest in joining the firm's data privacy group to one of its members, who responded enthusiastically. That same day, Avetisyan spoke with Eisenberg about her future in the litigation department, and he encouraged her to pursue the data privacy opportunity. Eisenberg warned Avetisyan that her interim performance review, scheduled for the following week, was not going to be entirely positive and that he felt it was not working out for her in the litigation department.

Avetisyan's interim performance reviews were mixed and included some positive evaluations, particularly in connection with her data privacy secondment. While Caplan and Davis did not provide reviews, Avetisyan claimed Eisenberg's review was "even more unfair, disingenuous, and tailored to serve the interests of Caplan and Davis than before." At her interim review meeting with Brown and Eisenberg, Brown stated it was his hope, and the firm's goal, that Avetisyan would remain at the firm and succeed long term, despite Eisenberg's previous intimations she should start looking for a new job or move out of the litigation group. Avetisyan remained in the litigation group for the next five months, believing Caplan and Davis viewed her work favorably.

C. *The Firm Decides To Make a Change*

In August 2013 Eisenberg and McTigue, the new chair of the litigation group, met with Avetisyan and delivered an unexpected message: The firm wanted her to find new employment by the end of the year, but would be flexible if she

needed more time. Eisenberg and McTigue told her certain lawyers in the firm "continued to lack confidence in her ability to handle the work they would want to give her" and "did not feel 'comfortable' giving her the kind of work they do." Avetisyan thought these reasons were false. She believed the firm was firing her because the firm wanted to appease Caplan and Davis, did not have enough billable work to support two litigation associates and preferred to keep Raisin, and wanted to avoid bad publicity for laying off associates.

In mid-December 2013 McTigue informed Avetisyan the firm would officially terminate her employment at the end of the year, even though she was in the middle of scheduling interviews with other firms. As a result, at her interviews in January 2014 Avetisyan had to inform prospective employers that the firm had ended her employment as of December 31. She also had to repeat the firm's stated reasons for the termination of her employment: certain partners lacked "confidence in," or were not comfortable with, having her work on their cases. Avetisyan believed the firm, or certain lawyers in the firm, repeated those reasons to prospective employers. Avetisyan ultimately received one job offer, which she declined because the salary was lower, the position required a great deal of travel, and she did not have experience in the practice area. On July 14, 2014 Avetisyan commenced a solo law practice.

D. *Avetisyan Decides To Sue*; *The Trial Court Dismisses Her Case Against the Partners*

Two days later Avetisyan filed this action. Her original complaint contained 16 causes of action, eight of which were against the firm only, including breach of contract, fraud,

promissory estoppel, and wrongful discharge. The other eight causes of action were against the firm and one or more of the firm's partners, including for libel, slander, intentional interference with prospective economic relations, negligent interference with prospective economic relations, intentional interference with contract, and violation of Labor Code section 1050.[3] The defendants demurred to all causes of action against the partners, and most of the causes of action against the firm, and filed a motion to strike certain allegations in Avetisyan's complaint. The trial court sustained the demurrer to all causes of action with leave to amend and granted the motion to strike.

Avetisyan's operative first amended complaint contained some new factual allegations but also reasserted allegations the trial court had stricken from the original complaint. The defendants again demurred to all causes of action against the partners and all but two causes of action against the firm, and again moved to strike the portions of Avetisyan's complaint they had previously moved successfully to strike.

The trial court sustained the demurrer without leave to amend and granted the motion to strike. Avetisyan timely

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[3] Labor Code section 1050 provides: "Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor."

appealed from the trial court's judgment of dismissal of Avetisyan's complaint against the partners.[4]

DISCUSSION

A. *Standard of Review*

"In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory." (*T.H. v. Novartis Pharmaceuticals Corporation* (2017) 4 Cal.5th 145, 162; accord, *Association of Irritated Residents v. Department of Conservation* (2017) 11 Cal.App.5th 1202, 1218; see *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1162 ["we exercise our independent judgment as to whether a cause of action has been stated under any legal theory when the allegations are liberally construed"].) "'We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law.'" (*Ramirez v. Tulare County District Attorney's Office* (2017) 9 Cal.App.5th 911, 924; see *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 809 ["[w]e must assume the truth of all properly pleaded facts as well as those that are judicially noticeable"].) "'"We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated

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[4] The firm is not a party to this appeal. The trial court ultimately granted the firm's motion for summary adjudication on the two remaining causes of action against the firm. Avetisyan states she intends to appeal that ruling.

a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale.'"" (*Ramirez*, at p. 924.)

"When the trial court sustains a demurrer without leave to amend, 'we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.'" (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 833.)

B. *The Trial Court Did Not Err in Sustaining the Demurrer to Avetisyan's Defamation Causes of Action*

1. *Applicable Law*

"'Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injure or which causes special damage.'" (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 946.) "Defamation has two forms" (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723): libel, a statement communicated "by writing . . . or other fixed representation," and slander, an "orally uttered" statement. (Civ. Code, §§ 44, 45, 46.)[5]

"[C]ourts distinguish between statements of fact and statements of opinion for purposes of defamation liability."

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[5] Undesignated statutory references are to the Civil Code.

(*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1261.) This distinction is important because "'[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.'" (*Reed v. Gallagher* (2016) 248 Cal.App.4th 841, 855 (*Reed*); see *Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1313 (*Doe 2*) ["statements of opinion can never subject the speaker to liability for making a false and defamatory statement"]; *GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 155 (*GetFugu, Inc.*) ["'[a]lthough statements of fact may be actionable as libel, statements of opinion are constitutionally protected'"].) However, "[s]tatements of opinion do not enjoy blanket protection," and "'[s]tatements of opinion that imply a false assertion of fact are actionable.'" (*Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 685; cf. *Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1049 [""'statements that cannot 'reasonably [be] interpreted as stating actual facts'" cannot give rise to a cause of action for defamation"].) "'The dispositive question . . . is whether a reasonable trier of fact could conclude that the published statements imply a provably false factual assertion.'" (*Yelp Inc. v. Superior Court* (2017) 17 Cal.App.5th 1, 16; see *Jackson*, at p. 1261; *Reed*, at p. 856.)

"'To ascertain whether the statements in question are provably false factual assertions, courts consider the "'"totality of the circumstances."'"'" (*Reed, supra,* 248 Cal.App.4th at p. 856; see *GetFugu, Inc.*, *supra*, 220 Cal.App.4th at p. 156.) This analysis involves two steps: "'"'First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense.'"'" (*Reed*, at p. 856.) "In

considering the *language* of the statement itself, we look to whether the purported opinion discloses all of the facts on which it is based and does not imply that there are other, unstated facts which support the opinion. If that is the case, the statement is defamatory only if the disclosed facts themselves are false and defamatory. [Citation.] We also consider whether the statement was cautiously phrased in terms of the author's impression." (*Dickinson v. Cosby*, *supra*, 17 Cal.App.5th at p. 686; see *Doe 2*, *supra*, 1 Cal.App.5th at pp. 1314-1315 ["[a] court distinguishing between statements of fact and protected statements of opinion must consider the effect of cautionary language in an allegedly defamatory communication"].) "'The publication in question may not be divided into segments and each portion treated as a separate unit; it must be read as a whole in order to understand its import and effect that it was calculated to have on the reader, and construed in the light of the whole scope and apparent object of the writer, considering not only the actual language used, but the sense and meaning that may be fairly presumed to have been conveyed to those who read it.'" (*Bartholomew v. YouTube, LLC.* (2017) 17 Cal.App.5th 1217, 1227-1228.)

"Second, we examine the context in which the statement was made." (*Dickinson v. Cosby*, *supra*, 17 Cal.App.5th at p. 686.) """This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed."""" (*Reed*, *supra*, 248 Cal.App.4th at p. 856.)

"Whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court." (*GetFugu, Inc., supra*, 220 Cal.App.4th at p. 156; accord, *Yelp Inc.*

v. Superior Court, supra, 17 Cal.App.5th at p. 16; see *Reed*, *supra*, 248 Cal.App.4th at p. 856 [""[w]hether a statement declares or implies a provably false assertion of fact is a question of law for the court to decide [citations], unless the statement is susceptible to both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood"""].)

2. *The Partners' Statements in Avetisyan's Performance Evaluations Were Nonactionable Opinions*

Avetisyan's causes of action for libel against Caplan, Davis, and Eisenberg were based on their November 2012 written evaluations of her as a litigation associate during the firm's annual performance reviews. Avetisyan also alleged Eisenberg's March 2013 interim evaluation was defamatory. (Caplan and Davis did not provide interim reviews.)

Avetisyan alleged Caplan wrote: "'Overall, [Avetisyan] needs improvement in writing and analysis. She conveys focus and professionalism, which I am sure wears well at [the data privacy client.]'"

Davis wrote: "'Admittedly, I am not in the best position to evaluate [Avetisyan] on the assignments she has worked on on my cases. Paul Gelb is as he has been her direct supervisor. That said, I have seen drafts of motions that she has worked on and they need improvement. [Avetisyan's] writing needs to improve if she is to progress especially given the time she spends on the particular assignments. In particular, she did a draft of the summary judgment motion in [a matter] which she spent a lot of time on, was very mediocre and needed a lot of touching up.'" Davis also stated: "'[Avetisyan] needs to improve her

writing ability and efficiency.'" Davis also wrote: "'I would work with [Avetisyan] again but it would not be on anything as challenging as her previous assignments that involved me. My biggest concern is her inefficiency. It is one thing to write something that needs work. It is a whole other thing to do that and take a lot of time in doing so. That creates even bigger issues.'"

Eisenberg, in his capacity as an individual reviewer, wrote: "'[Avetisyan] needs to improve her research skills and needs to bring far greater analytical heft to the legal problems on which she is asked to assist.'" Eisenberg also wrote: "'At this point, I would be concerned about using [Avetisyan] for additional projects unless and until she demonstrates a greater mastery of fundamental skills.'"

Eisenberg, in his capacity as a practice group evaluator, wrote as "development priorities: (1) '[Avetisyan] needs to significantly improve the quality of her analytical and research skills.' (2) '[Avetisyan] needs to improve the quality of her legal brief writing.' (3) '[Avetisyan] needs to become more efficient in completing her assignments.'" Eisenberg also wrote: "'This review period appears to show and highlight two sides of what [Avetisyan] brings to bear on her work as an attorney. She has shown professionalism and a level of substantive competence that has satisfied [the data privacy client] while, at the same time, she has failed to show the analytical heft and research skills necessary to perform the complex litigation work that we do at [the firm]. She will need to focus significant attention on the above priorities in her work within the office.'"

In his interim review evaluation, Eisenberg wrote: "'[Avetisyan] did not focus in on the specific issue that was the

subject of her assignment. While she located authority on the subject, her presentation of her research was somewhat off point and underscored existing concerns about whether she has the top flight analytical skills that are necessary to succeed here [at the firm].'" Eisenberg also wrote: "'In the limited work with [Avetisyan], I have not yet seen enough evidence of strong analytical skills that would allow me to confidently utilize her in complex litigation.'"

And in his interim review practice group evaluation, Eisenberg wrote: "'This review period has underscored the two-sided nature of what [Avetisyan] brings to her work as an attorney. She continues to impress with her professionalism and substantive competence at [the data privacy client], while continuing to display analytical issues that will prevent her from succeeding in the litigation group at [the firm]. She has not pursued obtaining detailed feedback from the partners on the . . . litigation team, and apparently has not done work directly with them in this review period. The result is a limited sample from which to determine if [Avetisyan] has made progress on the issues that were raised with her in her last review.'"

Avetisyan contends these evaluations were actionable assertions of fact, rather than nonactionable opinions, because the partners "essentially accused Avetisyan of incompetence." The statements, however, were not reasonably susceptible of that meaning.

In context, the reviews of Avetisyan's performance were evaluative, subjective judgments and conclusions of the partners based on their opinions of her work product. They were paradigmatic examples of opinions: The overriding sentiment expressed by Caplan, echoed to varying degrees by Davis and

Eisenberg, was that, "[o]verall, [Avetisyan] needs improvement in writing and analysis." That is just the sort of "'"broad, unfocused and wholly subjective comment"' that is generally regarded as protected opinion." (*Carver v. Bonds* (2005) 135 Cal.App.4th 328, 347). The partners' subjective judgments of Avetisyan and the quality of her work were not assertions of fact capable of being proven true or false. (See *Doe 2*, *supra*, 1 Cal.App.5th at p. 1320 ["'[o]pinions that present only an individual's personal conclusions and do not imply a provably false assertion of fact are nonactionable"']; *Reed*, *supra*, 248 Cal.App.4th at pp. 856-857 [statement the plaintiff was "an unscrupulous lawyer" was not an actionable statement of opinion because "[s]uch subjective judgments are incapable of being proved true or false"]; *Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1270 [statement that a priest "is '"extremely rude"' when [a parishioner's] friends come to visit" was not defamatory because it is "a subjective judgment of the person making the statement" and "is not capable of being proven true or false"]; *Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 725 [student's statement that a teacher was "the worst teacher" at the school was "an expression of subjective judgment by the speaker" and contained "no verifiable facts"].)

The partners' statements also included cautionary language and the qualifying introductory use of the first person singular, "I." For example, Davis prefaced his review by stating, "Admittedly, I am not in the best position to evaluate [Avetisyan]." Davis described what he called his "biggest concern," while Eisenberg hedged his opinion by stating his work with Avetisyan was "limited," he had "not *yet* seen enough evidence of strong analytical skills," and he "*would be* concerned

about" working with Avetisyan. (Italics added.) (See *Doe 2*, *supra*, 1 Cal.App.5th at pp. 1314-1315 [introductory phrases like "'apparently,'" "'I think,'" and "'[m]y impression is'" indicate statements of opinion rather than fact].) Similarly, Eisenberg summarized what, to him, the reviews collectively "*appear[ed]* to show and highlight." (See *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260-261 ["[w]here the language of the statement is 'cautiously phrased in terms of apparency,' the statement is less likely to be reasonably understood as a statement of fact rather than opinion"], fn. omitted.)

The context in which the statements arose, during the course of an employee performance evaluation, confirms the subjective nature of the partners' comments and the conclusion that the reviews were nonactionable opinions. "[A]n employer's evaluation of his employee's performance contains an inherent degree of subjectivity, and courts should be extremely cautious before allowing such comments to become the basis of a libel action." (*Campanelli v. Regents of the University of California* (1996) 44 Cal.App.4th 572, 581; see *Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 352 ["a performance evaluation denotes opinion rather than fact"].)

Jensen v. Hewlett-Packard Co. (1993) 14 Cal.App.4th 958 (*Jensen*), cited by both sides, involved a defamation claim in the employment context. In that case an employee sued his former employer for libel based on a supervisor's statements in a performance evaluation. The court in *Jensen* noted the "strong judicial disfavor for libel suits based on communications in employment performance reviews," which "serve the important business purpose of documenting the employer's hiring, promotion, discipline and firing practices" and which are "a

vehicle for informing the employee of what management expects, how the employee measures up, and what he or she needs to do to obtain wage increases, promotions or other recognition." (*Id.* at p. 964.) The court held that, "unless an employer's performance evaluation falsely accuses an employee of criminal conduct, lack of integrity, dishonesty, incompetence or reprehensible personal characteristics or behavior [citation], it cannot support a cause of action for libel. This is true even when the employer's perceptions about an employee's efforts, attitude, performance, potential or worth to the enterprise are objectively wrong and cannot be supported by reference to concrete, provable facts." (*Id.* at p. 965.) The court concluded that none of the supervisor's comments could "reasonably be interpreted as false statements of fact," in part because of the circumstances in which they were made: as part of a routine job performance evaluation that "documented one manager's assessment." (*Id.* at p. 970.) The court also noted "the word 'evaluation' denotes opinion, not fact," and is used "for examining, appraising, [and] judging." (*Ibid.*)

Avetisyan's defamation causes of action fail for the same reasons. The partners made the statements Avetisyan contends were defamatory in the context of communicating, as part of regular employee reviews, the firm's evaluation of Avetisyan's performance, the firm's expectations for her work product, and the firm's suggestions for how she could improve. None of the partners' evaluations accused Avetisyan of committing a crime, lying, behaving inappropriately, or producing incompetent work. To the contrary, they praised her professionalism. They just said that, in their opinions, her work was not good enough. Maybe

they were wrong. But their statements do not support a cause of action for defamation.[6]

Avetisyan argues the partners' written reviews "essentially accused Avetisyan of incompetence." But they didn't. Nothing in the partners' statements, in context, suggested Avetisyan was incompetent, unqualified to practice law, or incapable of doing litigation work at the (or another) firm. Even at their harshest, the evaluations expressed the possibility, and often the hope, that Avetisyan would "focus" on and "improve" certain skills. Even Eisenberg, who expressed concern about working with Avetisyan, suggested he would reconsider once "she demonstrate[d] a greater mastery of fundamental skills." Thus, rather than suggesting Avetisyan was incompetent, the partners' evaluations suggested they believed Avetisyan could improve her work product and achieve "greater mastery" of the required skills.[7]

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[6] Avetisyan's reliance on *Kahn v. Bower* (1991) 232 Cal.App.3d 1599 and *Webber v. Nike USA, Inc.* (S.D.Cal., Oct. 9, 2012, No. 12-CV-00974 BEN (WVG)) 2012 WL 4845549, is misplaced. Neither case involved an employee performance evaluation. (See *Kahn v. Bower*, at p. 1609 [facility director's complaint letter to the plaintiff's supervisor accused the plaintiff of "'incompetence'" that made "'it impossible . . . to work with her'"]; *Webber v. Nike USA, Inc.*, at p. 6 [distinguishing *Jensen* because the statement at issue "was not made in a job performance evaluation"].)

[7] The partners' comments also seem relatively innocuous compared to those in the performance review in *Jensen*. The supervisor in *Jensen* told the employee "to learn the technical aspects of a project," "to work on becoming a 'competent resource person,'" and "to learn to become confident with an assigned

Avetisyan attempts to distinguish *Jensen* by arguing that, unlike the supervisor's statement in *Jensen*, the partners' evaluations about her work "did not serve a legitimate purpose and contained false statements of *fact* that were objectively unjustified." In particular, Avetisyan contends the statements she spent "a lot of time" on work that "needed a lot of touching up" and that "create[d] even bigger issues" were provably false assertions of fact. She argues she can "prove [the] falsity" of these statements with evidence the partners "charged clients for all or the majority of her time," filed court papers she had drafted with "minimal editing," assigned her tasks commensurate with an associate at her level or higher, and "trusted her with substantial responsibility." While such evidence could conceivably undermine the credibility of the partners' statements about Avetisyan and her work, it would not transform subjective evaluations and judgments into provably false statements of fact. (See *Jensen*, 14 Cal.App.4th at pp. 971, 975 ["even if the comments were objectively unjustified or made in bad faith, they could not provide a legitimate basis for [the plaintiff's] libel claim because they were statements of opinion, not false statements of

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project," and warned the employee that, if he did not improve, he might be placed on probation or terminated. (*Jensen*, *supra*, 14 Cal.App.4th at p. 971, fn. 13.) The supervisor also stated the employee "had not 'increased his skill' in project definition and control," "was not 'pulling his weight,'" "had 'weak' knowledge of project management and process control," and "showed 'lack of direction, inflexibility and lack of dependability.'" (*Id.* at p. 971, fn. 14.) The court in *Jensen* nevertheless held that the statements in the evaluation did not suggest the employee "lacked . . . the inherent competence, qualification, capability or fitness to do his job." (*Id.* at pp. 970-971.)

fact," and "employers should [not] be required to justify performance evaluations by reference to objectively provable facts"]; see, e.g., *Banks v. Dominican College* (1995) 35 Cal.App.4th 1545, 1554 [statements about the plaintiff's "unsuitability for a teaching position" were "necessarily statements of subjective opinion"]; *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1153 [statement by a supervisor accusing an employee of "'poor performance'" was not defamatory but rather was "clearly a statement of opinion" that did "not suggest any lack of honesty, integrity or competency on [the employee's] part"]; *Dong v. Board of Trustees* (1987) 191 Cal.App.3d 1572, 1586-1587 [professor's letter to the dean criticizing his colleague, which included the statement "there was precious little data" to back up his colleague's work, was an expression of professor's opinion].)

Therefore, because the alleged statements were nonactionable expressions of the partners' subjective opinions and judgments, made in the context of regular performance evaluations, the trial court did not err in sustaining the partners' demurrer to the defamation causes of action against Caplan, Davis, and Eisenberg based on their written evaluations. Because Avetisyan did not suggest she could make any additional allegations to cure this deficiency, or identify any other statements by partners that might be defamatory, the trial court did not abuse its discretion in sustaining the demurrer without leave to amend. (See *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618 [the burden of proving a reasonable possibility of curing a defect in the complaint by amendment """is squarely on the plaintiff,""" and to "satisfy this burden, "'a plaintiff 'must show in what manner he can amend his complaint

and how that amendment will change the legal effect of his pleading"" by clearly stating not only the legal basis for the amendment, but also the factual allegations to sufficiently state a cause of action"].)

3. *The Statement in McTigue's Email Was Not Reasonably Susceptible of a Defamatory Meaning*

Avetisyan bases her libel cause of action against McTigue on an email he sent to Eisenberg and Caplan on August 2, 2013 stating that he preferred the firm address Avetisyan's termination that day and that he "had capable associates in the system" to handle the firm's litigation workload at the time. Avetisyan contends McTigue's email was libelous because "[h]e clearly implied thereby that Avetisyan was not a capable associate."

The statement, however, read in its context as a reply to Eisenberg's previous email, shows McTigue's reference to "capable associates" was in response to Eisenberg's expression of concern about firing Avetisyan that day because he thought the firm might need her to work on new cases and there might be a high demand for her time. Eisenberg had written: "Perhaps it is better to be lucky than diligent. I think we are getting extremely busy out here . . . . [¶] I want to analyze the July numbers, and see if we need to keep [Avetisyan] on for now. Let me look at those and huddle with [Caplan] and others on what demand they might forecast for her time." In the context of the email exchange, McTigue's statement that he had "capable associates in the system" was not about Avetisyan, let alone her capabilities or competence. (See *Doe 2*, *supra*, 1 Cal.App.5th at p. 1312 [to be

actionable, "[t]he defamatory statement must specifically refer to, or be '"of and concerning,"'" the plaintiff].) Rather, McTigue's statement, that other capable associates were available to handle the workload "demand" if the firm terminated Avetisyan's employment immediately, answered Eisenberg's specific query about whether they needed to retain Avetisyan as an employee for the moment. The statement related to the timing of terminating Avetisyan's employment with the firm, after McTigue and Eisenberg had decided to end the employment relationship. (See *Bartholomew v. YouTube, LLC.*, *supra*, 17 Cal.App.5th at pp. 1227-1228 [communication must be '"construed in the light of the whole scope and apparent object of the writer, considering not only the actual language used, but the sense and meaning that may be fairly presumed to have been conveyed to those who read it"']; *Reed*, *supra*, 248 Cal.App.4th at p. 856 [court must consider '"'"the knowledge and understanding of the audience to whom the publication was directed"'"'].) Because McTigue's statement was not about Avetisyan or her competence, the trial court properly sustained the demurrer to the libel cause of action against McTigue based on the statement.

4. *The Statements About the Reasons for Avetisyan's Termination Were Nonactionable Opinions*

Avetisyan's slander cause of action is based on the statements that partners, or others at the firm, "continue to lack confidence in [Avetisyan's] ability to handle the work we would want to give her" and "do not feel comfortable giving [Avetisyan] the kind of work we do." Avetisyan contends that these statements, which were orally conveyed to her as explanations for

her termination, "amounted to an accusation that Avetisyan was incompetent" and "incapable of doing the work that partners would normally assign to associates of her level," and "insinuated and/or implied" that the firm was firing her because of "poor or inadequate performance." Again, however, the statements were nonactionable statements of opinion because they did not imply a provably false assertion of fact.

Like the evaluative statements in Avetisyan's performance reviews, the partners' statements about their "confidence" in her abilities and whether they felt "comfortable" having her work on their cases were expressions of the attorneys' opinions. (See *Campanelli v. Regents of the University of California*, *supra*, 44 Cal.App.4th at p. 579 [statement that a parent "felt" the basketball coach was putting too much pressure on the parent's son was not actionable where "the statement was not couched in terms of a factual assertion, but a *feeling*," and where "[t]he very word 'felt' inherently connotes a subjective judgment"].) Avetisyan cannot maintain a cause of action for slander based on these statements.[8]

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[8] To the extent Avetisyan's cause of action for violation of Labor Code section 1050 is based on the communication to prospective employers of the reasons for the termination of her employment with the firm, the cause of action fails for the same reason her slander cause of action fails: Those reasons were nonactionable statements of the partners' opinions. Avetisyan also contends the partners violated Labor Code section 1050 by responding to inquiries by only confirming the dates of her employment, which, Avetisyan asserts, "is readily heard as 'do not hire' within the legal community." Perhaps, but such an admittedly true statement of fact is not a "misrepresentation" under Labor Code section 1050. (See *Kelly v. General Telephone*

C. *The Trial Court Did Not Err in Sustaining the Demurrer to Avetisyan's Interference Causes of Action*

1. *The Partners Did Not Interfere by Communicating with Other Law Firms*

Avetisyan asserts causes of action for intentional and negligent interference with prospective economic advantage based on the partners' alleged disruption of her prospects of obtaining employment with law firms with whom she had interviews. The elements of intentional interference with prospective economic advantage are "'"(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant."'" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153.) The elements of negligent interference with prospective economic advantage are "(1) an economic relationship existed between the plaintiff and a third party which contained a

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Co. (1982) 136 Cal.App.3d 278, 288 ["Labor Code section 1050 applies only to misrepresentations made to prospective employers other than the defendant"]; *Breitegger v. Columbia Broadcasting System, Inc.* (1974) 43 Cal.App.3d 283, 293 ["the terms of [Labor Code] section 1050 refer only to misrepresentations by the former employer"]; see also *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1078 [employers wishing to avoid potential tort liability for misrepresentations in reference letters for former employees could "writ[e] a 'no comment' letter . . . merely verifying basic employment dates and details"].)

reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786.)

To state a cause of action for intentional or negligent interference with prospective economic advantage, the plaintiff must allege the defendant engaged in an independently wrongful act. (*Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th at p. 1158.) "With respect to the type of intentional disruptive acts that are actionable, they must be wrongful by some independent legal measure, beyond interference." (*Golden Eagle Land Investment, L.P. v. Rancho Santa Fe Association* (2018) 19 Cal.App.5th 399, 429.)

Avetisyan alleged the partners wrongfully disrupted her relationship with potential employers by relaying, or compelling Avetisyan to republish, to prospective employers the "false" reasons for her termination and the statements in her performance reviews. Defamatory statements may satisfy the independently wrongful conduct element of an interference cause of action. (*Marsh v. Anesthesia Service Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 505.) Here, however, as discussed, the partners' performance evaluations, and their reasons for

terminating Avetisyan's employment, were not defamatory. Therefore, the statements were not independently wrongful.

2. *The Partners Did Not Interfere by Terminating Avetisyan's Employment Prematurely*

Avetisyan alleged the partners "prematurely" terminated her employment on December 31, 2013, after four months, in breach of their promise to give her six months to look for a new job. Both intentional and negligent interference causes of action, however, require a nonspeculative economic relationship that existed at the time of the wrongful act. Avetisyan admitted in her complaint, however, that in December 2013 she was merely "in the process of scheduling interviews" with potential employers when the firm allegedly interfered by firing her prematurely. Without a cognizable existing relationship with a potential employer, these interference causes of action failed because, at the time the firm committed the allegedly wrongful act of firing her, there was no prospective economic relationship with which to interfere.

The Supreme Court recently discussed the requirements for alleging an economic relationship sufficient to survive a demurrer to an interference cause of action. In *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505 (*Roy Allan*) the Supreme Court explained the economic relationship element "has two parts: (1) an existing economic relationship that (2) contains the probability of an economic benefit to the plaintiff." (*Id.* at p. 512.) The Supreme Court stated the economic relationship element "has been found lacking when either the economic relationship with a third party is too attenuated or the probability of economic benefit too speculative." (*Id.* at p. 515.)

The Supreme Court explained the tort of interference with prospective economic advantage "'protects the expectation that the relationship eventually will yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will eventually arise.'" (*Id.* at p. 516.) The Supreme Court stated "case law recognizes that 'the interference tort applies to interference with *existing* noncontractual relations which hold the promise of future economic advantage,'" and "'presuppose[s] the relationship existed *at the time* of the defendant's allegedly tortious acts lest liability be imposed for actually and intentionally disrupting a relationship which has yet to arise.'" (*Id.* at pp. 517-518.) In other words, "'the plaintiff's "expectancy" must necessarily precede the interfering conduct.'" (*Id.* at p. 518.)

Avetisyan alleged she had a prospective economic relationship with the law firms with which she interviewed and that some of her interviews in January 2014 "went very well." The allegedly interfering act here, however, was her "premature" termination in December 2013, at which time she was merely in the process of "scheduling interviews." (See *Roy Allen*, *supra*, 2 Cal.5th at p. 518 ["[p]laintiffs cannot rely on the outcome of *later* events to prove that [the defendant] interfered with an *existing* economic relationship"].) Thus, her claim that "one or more of [the other law firms] would probably have made an offer of employment (and one of them would eventually have hired her)," is speculation. Avetisyan does not allege any facts to support her claim that one of the firms "probably" would have hired her, such as callback interviews, salary discussions, or other expressions of serious interest, other than the allegation that she believed "in light of her credentials, experience, and personality . . . [s]he

would have been a highly desirable candidate." Such speculation, however, does not an interference cause of action make. (See *id.*, at pp. 517-518.)

Avetisyan argues that under *Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367 and *Greenberg v. Hollywood Turf Club* (1970) 7 Cal.App.3d 968 her relationships with possible future employers "qualify as prospective economic relations." The potential economic relationships in those cases, however, were qualitatively different. The plaintiff in *Heller* was a former law firm partner who had relationships with two prospective law firms—one had previously offered him a partnership position and the other "began interviewing" him in the summer and sent him a draft offer letter containing the terms of a proposed contract in the fall. (*Heller*, at p. 1378.)

The plaintiff in *Greenberg* was a horse trainer and stable agent who had been excluded from the track stables, one of the few places where he could find future employment. (*Greenberg*, *supra*, 7 Cal.App.3d at p. 978.) Significantly, the plaintiff had an existing contract with a licensed horse trainer that had given him access to the stables and that the defendants' conduct prohibited him from performing. (*Id.* at p. 972.) His duties with the licensed horse trainer at the stable put him "in a position to realize extensive economic benefits by negotiating for future employment with other trainers and owners in the stable area," which he alleged he "would have realized . . . had he not been excluded," and "in the past all of [his] employment had been procured in the stable areas of other tracks . . . ." (*Id.* at p. 975.) The court held the plaintiff had stated a claim because he had an existing contract and "the stable areas of race tracks are the natural places where negotiations for future employment can be

conducted because that is where the prospective employers are to be found." (*Id.* at p. 976, fn. omitted.) In contrast, Avetisyan did not allege she had an existing employment agreement with a law firm at the time of the alleged interference, nor do her allegations describe any reasonable likelihood she would have obtained such employment at that time.

3. *The Partners Did Not Interfere with Avetisyan's Prospective Employment Relationship with the Firm's Data Privacy Group*

Avetisyan's remaining three causes of action, for intentional and negligent interference with prospective economic relations and intentional interference with contract, were based on allegations that Caplan, Davis, and Eisenberg, as partners in the firm's litigation group, interfered with the prospective economic relationship and "existing contract" between Avetisyan and the firm's data privacy group. The trial court properly sustained the partners' demurrer to these causes of action because the firm's data privacy group was not a third party. (See *Winchester Mystery House, LLC v. Global Asylum, Inc.* (2012) 210 Cal.App.4th 579, 596 [interference with contract requires "'a valid contract between plaintiff and a third party,'" and interference with prospective economic advantage requires """"an economic relationship between the plaintiff and some third party"""""]; *Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594, 1603 ["only 'a stranger to [the] contract' may be liable for interfering with it"].) The firm and its partners cannot interfere with a contract or prospective economic advantage between themselves and Avetisyan. (See *Redfearn v. Trader Joe's Company* (Feb. 27, 2018, B270487) ___ Cal.App.5th

___, ___, fn. 1 [2018 WL 1062596, at p. 2, fn. 1]; *Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 262.)

Avetisyan argues the departments within the firm are "external to one another for all primary intents and purposes" and analogous to "sister companies." But they aren't. Employees in different offices or divisions within the same company are not "strangers" to each other for purposes of interference claims. (See *Mintz v. Blue Cross of California*, *supra*, 172 Cal.App.4th at p. 1604 ["'corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract'"]; *Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 288 [employer cannot be liable for interfering, through acts of a supervising employee, with its contract with subordinate employee]; see also *Copperweld Corp. v. Independence Tube Corp.* (1984) 467 U.S. 752, 770 ["the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor" because "[t]he existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor"].) The trial court did not err in ruling Avetisyan could not state interference causes of action based on a contract or prospective economic relationship with another department of the firm.[9]

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[9] Avetisyan argues the trial court abused its discretion in granting the defendants' ex parte application to continue the hearing on her motion to compel discovery from the partners until after the hearing on defendants' demurrer, and then ruling the motion against the partners was moot because the partners had been dismissed. Because we affirm the judgment of dismissal of Avetisyan's complaint against the partners, we do not reach Avetisyan's arguments regarding these discovery issues.

DISPOSITION

The judgment is affirmed. The partners are to recover their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.