[Cite as *Louscher v. Univ. of Akron*, 2017-Ohio-4316.]

SUSAN M. LOUSCHER Plaintiff v. UNIVERSITY OF AKRON Defendant	Case No. 2015-00212 Judge Patrick M. McGrath Magistrate Holly True Shaver <u>DECISION</u>

{¶1} On May 3, 2016, the court granted, in part, defendant's October 22, 2015 motion for summary judgment, finding that plaintiff's claims of defamation prior to March 17, 2014 were barred by the applicable statute of limitations, and that defendant was entitled to summary judgment on plaintiff's claim of negligent hiring and retention. The court denied defendant's motion as to any claims of defamation on or after March 17, 2014, and plaintiff's claim of intentional infliction of emotional distress.

{¶2} On March 6, 2017, defendant filed a second motion for summary judgment pursuant to Civ.R. 56(B). On March 20, 2017, plaintiff filed a response. On March 27, 2017, defendant filed a motion for leave to file a reply to plaintiff's response, which is GRANTED. Defendant's second motion for summary judgment is now ripe for review by the court. *See* Civ.R. 56, L.C.C.R. 4.

{¶3} Civ.R. 56(C) states, in part, as follows:

{¶4} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable

minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶5} The following facts are taken from the court's May 3, 2016 decision:

{¶6} "Plaintiff is employed at defendant's university as the Project Manager and Executive Director of the National Center for Education and Research on Corrosion and Materials Performance (NCERCAMP). In 2006, defendant's president, Dr. Luis Proenza, appointed plaintiff to conduct a preliminary exploration of the potential opportunities associated with a new academic program that would support the corrosion prevention and mitigation industry. Plaintiff asserts that George Haritos, Dean of the College of Engineering, opposed the idea of a new program, and that from 2006 forward, he harassed her, obstructed her work, made false statements about her, and subjected her to humiliation, emotional distress, and mental anguish.

{¶7} "In May 2008, the College of Engineering became the academic home for the corrosion engineering degree despite Dean Haritos' opposition to it. (Amended complaint, ¶ 22.) In June 2009, plaintiff became Project Director in the College of Engineering. In July 2010, plaintiff became the Executive Director of Strategic Partnerships and Government Programs for the College of Engineering. Plaintiff reported to both Proenza and Haritos. (Complaint, ¶ 45.) The United States Department of Defense provided federal grant funding to support NCERCAMP, and eventually, defendant established the nation's first baccalaureate degree in corrosion engineering. Grant funds were provided to hire academic faculty for the degree program, and to build laboratory space for NCERCAMP. (Amended complaint, ¶ 38.) Plaintiff asserts that Dean Haritos 'never believed in the merits of the program, saw it as a competitor for space, funding, students, [and] faculty' and unreasonably opposed her

work in the establishment of NCERCAMP programs, which resulted in delayed curriculum development and missed deadlines. (Amended complaint, ¶ 24.) Plaintiff further alleges that 'Dean Haritos and others viewed NCERCAMP's funds as a way to solve financial problems in the College of Engineering and used NCERCAMP monies for things not included in the agreements, such as new staff in the College of Engineering Co-Op Office and in the Department of Chemical and Biomolecular Engineering. (Amended complaint, ¶ 40.)

{¶8} "During a meeting to discuss a proposal to move NCERCAMP from the College of Engineering to a university-level center that would report to Dr. George Newkome, Vice President for Research and Dean of the Graduate School, plaintiff asserts that Dean Haritos became irate and falsely accused her in front of the Associate Dean for Research and the Chair for Chemical Engineering of 'deliberately undermining the Department of Transportation's proposal and blaming [her] for its failure.' (Amended complaint, ¶ 65.) Plaintiff asserts that Dean Haritos' false statements damaged her professional reputation, undermined her authority to fulfill NCERCAMP's obligations, and caused her emotional distress and mental anguish. (Amended complaint, ¶ 65.) Plaintiff further asserts that from 2006 through March 2015, Dean Haritos 'made false and defamatory statements concerning Plaintiff personally, and her qualifications and abilities'; that his delays in allocating office equipment and making necessary decisions in purchasing equipment and hiring personnel resulted in faculty expressing concerns that any research that they conducted for NCERCAMP would not be counted toward research to obtain tenure; and that he falsely told others that she was unqualified and overpaid for her job. (Amended complaint, ¶ 54-55, 72, 80.)"

{¶9} In its second motion for summary judgment, defendant asserts that every allegedly defamatory statement that plaintiff asserts Haritos made about her is either a constitutionally protected opinion or subject to a qualified privilege, and that plaintiff has not brought forth evidence from which to reasonably conclude that Haritos acted with

actual malice. In addition, defendant asserts that Haritos' alleged conduct does not support a claim for intentional infliction of emotional distress. The court notes that the depositions of Elizabeth Estep, Rex Ramsier, George Haritos, and plaintiff have been filed since the decision on the original motion for summary judgment. Upon review of the evidence permitted by Civ.R. 56, the court makes the following determination.

I. DEFAMATION

{¶10} "In Ohio, defamation occurs when a publication contains a false statement 'made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession.'" *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, ¶ 9, quoting *A & B-Abell Elevator Co., Inc. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7 (1995). "To succeed on a defamation claim, a plaintiff must establish: (1) a false statement, (2) about the plaintiff, (3) published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) the statement was either defamatory per se or caused special harm to the plaintiff." *Watley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 07AP-902, 2008-Ohio-3691, ¶ 26. "'Slander' refers to spoken defamatory words, while 'libel' refers to written or printed defamatory words." *Schmidt v. Northcoast Behavioral Healthcare*, 10th Dist. Franklin No. 10AP-565, 2011-Ohio-777, ¶ 8. "Under Ohio common law, actionable defamation falls into one of two categories: defamation per se or defamation per quod." *Am. Chem. Soc. v. Leadscope, Inc.*, 10th Dist. Franklin No. 08AP-1026, 2010-Ohio-2725, ¶ 49. "In order to be actionable per se, the alleged defamatory statement must fit within one of four classes: (1) the words import a charge of an indictable offense involving moral turpitude or infamous punishment; (2) the words impute some offensive or contagious disease calculated to deprive a person of society; (3) the words tend to injure a person in his trade or occupation; and (4) in cases of libel only, the words tend to subject a person to

public hatred, ridicule, or contempt." *Woods v. Capital Univ.*, 10th Dist. Franklin No. 09AP-166, 2009-Ohio-5672, ¶ 28. "On the other hand, a statement is defamatory per quod if it can reasonably have two meanings, one innocent and one defamatory. Therefore, when the words of a statement are not themselves, or per se, defamatory, but they are susceptible to a defamatory meaning, then they are defamatory per quod. Whether an unambiguous statement constitutes defamation per se is a question of law." (Citations omitted.) *Woods* at ¶ 29. "When a statement is found to be defamation per se, both damages and actual malice are presumed to exist." *Knowles v. Ohio State Univ.*, 10th Dist. Franklin No. 02AP-527, 2002-Ohio-6962, ¶ 24. "When, however, a statement is only defamatory per quod, a plaintiff must plead and prove special damages." *Am. Chem. Soc.* at ¶ 51.

{¶11} In its May 3, 2016 decision, the court found that the meeting that plaintiff describes in paragraph 65 of her amended complaint occurred on February 12, 2014. (Decision, p. 6.) Plaintiff filed her complaint on March 17, 2015. The applicable statute of limitations for a defamation claim is within one year after the date of publication of the defamatory matter. *See*, R.C. 2305.11(A); *Reimund v. Brown*, 10th Dist. Franklin No. 95APE04-487, 1995 Ohio App. LEXIS 4824 (Nov. 2, 1995). Accordingly, the court found that any statements that Haritos made during the February 12, 2014 meeting could not serve as a basis for plaintiff's claims of defamation, in that they were barred by the applicable statute of limitations. (*Id.*) Those statements include: 1) that plaintiff "deliberately undermined the Department of Transportation's proposal"; 2) that plaintiff was responsible for its failure; 3) that plaintiff was unqualified and overpaid for her job; and 4) that plaintiff was not an engineer. (Amended complaint, ¶ 65; *See also*, deposition of Watkins-Wendell, pp. 13, 15, 59.) The continuing violation exception does not apply to defamation claims. *Rosenbaum v. Chronicle Telegram*, 9th Dist. Lorain No. 01CA007896, 01CA007908, 2002-Ohio-7319. Therefore, although plaintiff alleges in paragraphs 66-84 of her amended complaint, and in Defendant's Exhibit B to her

deposition that Haritos "continued to stand behind his statements of 12 February 2014 and especially continued to assert his claims that [plaintiff] was unqualified, unwilling and unable to work" with NCERCAMP, the initial publication of those statements was February 12, 2014, and any claim of defamation based upon those statements, or repeated publications thereof, are time-barred.

{¶12} Moreover, plaintiff testified in her deposition that although she has a bachelor's degree in political science and a graduate degree with a science/technology policy subfield, she admitted that she has no background in engineering or physics. (Deposition, pages 4-6.) Therefore, the statement that plaintiff "was not an engineer" is true, and as such, it cannot be defamatory as a matter of law. Accordingly, after reviewing plaintiff's amended complaint, the affidavit that she filed in response to defendant's first motion for summary judgment, her deposition, and the supplemental answers to defendant's interrogatories #17 and #19, the court shall focus on the allegedly defamatory statements that Haritos made about her on or after March 17, 2014. Defendant asserts that any such statements are subject to a qualified privilege.

A. Privilege

{¶13} "As suggested by the definition, a publication of statements, even where they may be false and defamatory, does not rise to the level of actionable defamation unless the publication is also unprivileged. Thus, the threshold issue in such cases is whether the statements at issue were privileged or unprivileged publications." *Sullivan v. Ohio Dept. of Rehab.* & *Corr.,* Ct. of Cl. No. 2003-02161, 2005-Ohio-2122, ¶ 8. "[C]ommunications between an employer and an employee, or between two employees, concerning the conduct of a third employee or former employee, are qualifiedly privileged, and thus, even though such a communication contain matter defamatory to such other or former employee, [s]he cannot recover in the absence of sufficient proof of actual malice to overcome the privilege of the occasion." *McKenna v. Mansfield*

Leland Hotel Co., 55 Ohio App. 163, 167 (5th Dist.1936); *Georgalis v. Ohio Tpk. Commn.*, 8th Dist. Cuyahoga No. 94478, 2010-Ohio-4898, paragraph 25-26.

{¶14} "The purpose of a qualified privilege is to protect speakers in circumstances where there is a need for full and unrestricted communication concerning a matter in which the parties have an interest or duty. * * * A qualified privilege exists when a statement is: made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest * * *. Further, the essential elements of a communication protected by qualified privilege are: [1] good faith, [2] an interest to be upheld, [3] a statement limited in its scope to this purpose, [4] a proper occasion, and [5] publication made in a proper manner and to proper parties only. Finally, if a defendant establishes all five elements for application of a qualified privilege, a plaintiff can defeat its application only by showing by clear and convincing evidence that the defendant acted with actual malice." (Internal citations omitted.) *Mallory v. Ohio University*, 10th Dist. Franklin No. 01AP-278, 2001-Ohio-8762, ¶ 21-22.

{¶15} Plaintiff has the burden of establishing that the allegedly defamatory statements were made with actual malice. *Evely v. Carlon Co.*, 4 Ohio St.3d 163, 165-166 (1983). "In a qualified privilege case, 'actual malice' is defined as acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity." *Jacobs v. Frank*, 60 Ohio St.3d 111, 116 (1991).

CATEGORY #1: STATEMENTS RELATED TO MISUSE OF GOVERNMENT FUNDS

{¶16} Plaintiff alleges that in May 2014, an agreement was reached with senior university leadership and approved by the Board of Trustees to "reimburse" grant funds to NCERCAMP that had been used by the College of Engineering for staff and equipment expenses. Plaintiff alleges that Haritos "continued to delay the

reimbursement of these funds by continuing to purposely inform faculty and leadership that [plaintiff] agreed to this misuse of government funds, which was completely false." Plaintiff generally alleges that Haritos falsely told faculty and university leaders that she agreed with his position that using NCERCAMP grant funds for purchases in the College of Engineering was proper, and that his false statements harmed her professional reputation because she could have been accused of violating the terms of the grant. However, plaintiff has not brought forth evidence to show that Haritos' statements about her agreeing with his position that it was appropriate to use NCERCAMP grant funds for the College of Engineering were either defamatory, or were published without privilege to a third party. Rex Ramsier, acting Dean of the College of Engineering, testified that in the spring of 2014, he was called to a meeting with Dr. Proenza and plaintiff to discuss problems that she had with Haritos, and NCERCAMP in general. (Ramsier deposition, p. 37.) Ramsier testified that plaintiff informed him that she believed that NCERCAMP grant funds had not been used properly. (*Id.*, p. 49.) In addition, Ramsier acknowledged that Katie Watkins-Wendell recommended that the College of Engineering reimburse NCERCAMP $641,189 in federal grant funds. However, after he conducted a review of the grants, Ramsier concluded that the funds had been spent appropriately because they were used to purchase "equipment, primarily for use by faculty and students doing corrosion education and research, which is the mission of [NCERCAMP.]" (*Id.*, p. 90.) In addition, Ramsier filed an affidavit stating that there was no "misuse" of grant funds, and that the university never "reimbursed NCERCAMP." (Affidavit of Ramsier, ¶ 3.)

{¶17} Although plaintiff and Haritos disagreed about the appropriate use of grant funds, plaintiff has not presented evidence to reasonably conclude that Haritos' statement that she agreed with his use of grant funds, which use was found to be appropriate, could reflect injuriously on her reputation or affect her adversely in her trade, business or profession. Moreover, plaintiff has not presented evidence to show

that Haritos made any such statement with actual malice. Accordingly, the only reasonable conclusion is that Haritos' statements regarding grant funds do not support a claim for defamation.

CATEGORY #2: STATEMENTS THAT PLAINTIFF HAD LOCKED FACULTY OUT OF NCERCAMP LABS

{¶18} Plaintiff avers that on January 8, 2015, Dean Haritos informed Provost Sherman (plaintiff's supervisor at the time) that plaintiff was "locking faculty and students out of their labs. Not only was this blatantly false, it sent a message that I was refusing to work collaboratively with my peers. * * * Haritos' mistruths about me misrepresented my actions, damaged my reputation, professionalism, standing, respectability, and capacity to accomplish my tasks, and eroded my standing with senior leadership. * * * This further bolstered Dean Haritos' campaign to faculty that I was not qualified for the position with NCERCAMP." (Plaintiff's affidavit, ¶ 15.) Plaintiff responded to an email Dr. Ramsier had sent to her that although "card swipe pads" had been installed, they had not been activated, and that all faculty had master keys to open the lab doors. (Defendant's Exhibit A to plaintiff's deposition.) With regard to the statement that plaintiff had "locked people out of their labs," the evidence submitted shows that Haritos was relying on information relayed to him by another professor when he made the statement. In his deposition, Haritos testified that he received a call from Professor Scott Lillard early in the morning, complaining that his students could not get into their research labs because cipher locks had been placed on the doors to common area of the laboratory. Haritos then called Ramsier and reported what Lillard had told him. (Haritos' deposition, p. 139.) Accordingly, the evidence shows that Haritos made the statement in good faith, based upon the call from Lillard; he had an interest to be upheld, by allowing students to enter the research laboratory; the statement was limited in its scope to this purpose to Ramsier to discover a way for the students to enter the lab; it was made for a proper occasion, when he was informed by Lillard that students

could not enter their labs; and the statement was made in a proper manner and to proper parties only, i.e., an email to Ramsier. Although plaintiff argues that the locks had been installed but were not operational when the email was sent, plaintiff has presented no evidence to show that Haritos made the statement knowing it was false or with reckless disregard as to its truth or falsity. Accordingly, plaintiff's claim of defamation fails as to the statements made about the students being locked out of the laboratory.

CATEGORY #3: ACCUSATIONS THAT PLAINTIFF HAD EXCLUDED FACULTY FROM PATICIPATING IN A CONFERENCE

{¶19} Plaintiff also avers that on February 27, 2015, she learned that Dean Haritos was "attempting to convince senior leadership that [she] had purposely excluded faculty from participating in a Department of Defense corrosion conference," which was false and sent a message that she was uncooperative. (Plaintiff's affidavit, ¶ 16.) Plaintiff references an email from Ramsier that states that the provost was "getting complaints about a recent corrosion conference that you attended without any faculty involvement." (Plaintiff's Exhibit 15.) Although plaintiff asserts that she did not control who went to the conference, she has brought forth no evidence to show that any statement that Haritos made about faculty not being invited to attend was either false or made with reckless disregard to its truth or falsity.

CATEGORY #4: ACCUSATIONS THAT PLAINTIFF HAD SUBMITTED PROPOSALS AND MADE COMMITMENTS TO THE GOVERNMENT WITHOUT APPROVAL

{¶20} Finally, plaintiff avers that on March 9, 2015, she learned that Haritos had told both Katie Watkins-Wendell and Provost Sherman that she had submitted proposals to the Department of Defense without Haritos' knowledge or approval, which was false, and that she had to prove the falsity of his statements in an email. (Plaintiff's affidavit, ¶ 17.) Plaintiff alleges that in order to defend her reputation and disprove allegations that could have led to the termination of her employment, she had to locate

an email message from Haritos, dated April 1, 2012, with an attached document that showed his tracked changes to the proposal in question. (Defendant's Exhibit A; Plaintiff's Exhibit 16.) Although plaintiff found a document to contradict Haritos' allegation that she did not obtain his approval of a presentation, plaintiff has not brought forth evidence to show that Haritos' allegation was made with reckless disregard to its truth or falsity. The court notes that the email that plaintiff found to refute Haritos' statement was created approximately three years prior to his statement. (Defendant's Exhibit A; Plaintiff's Exhibit 16.) Accordingly, the court finds that it is not reasonable to conclude that Haritos' statement was made with reckless disregard for its truth or falsity.

{¶21} Plaintiff refers to several instances of Dean Haritos' conduct, such as designating Mike Cheung as an "intermediary," and delaying decisions in purchasing equipment and hiring staff. However, conduct, standing alone, cannot serve as a basis for defamation. *Lawson v. AK Steel Corp.*, 121 Ohio App.3d 251, 257 (12th Dist.1997). In addition, plaintiff asserts that Haritos' statements or conduct "created an impression" or "sent a message" that she was uncooperative. However, "Ohio does not recognize libel through implied statements." *Krems v. University Hosps. of Cleveland*, 133 Ohio App.3d 6, 13, (1999), citing *Ashcroft v. Mt. Sinai Medical Center*, 68 Ohio App. 3d 359 (1990).

{¶22} Upon review of the alleged defamatory statements that Haritos made about plaintiff on or after March 17, 2014, the only reasonable conclusion is that Haritos' statements were made subject to a qualified privilege, and that plaintiff has not produced evidence to show that they were made with actual malice. Accordingly, defendant is entitled to summary judgment on plaintiff's claims of defamation. Inasmuch as plaintiff's defamation claims are either barred by either the applicable statute of limitations or subject to the defense of qualified privilege, defendant's argument that Haritos' statements are also statements of opinion shall not be addressed.

II. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

{¶23} Under Ohio law, a plaintiff claiming intentional infliction of emotional distress must show: "(1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff, (2) that the actor's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community, (3) that the actor's actions were the proximate cause of the plaintiff's psychic injury, and (4) that the mental anguish suffered by the plaintiff is serious and of a nature that no reasonable man could be expected to endure it." *Burkes v. Stidham,* 107 Ohio App.3d 363, 375 (8th Dist.1995).

{¶24} "It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. * * * The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Yeager v. Local Union 20,* 6 Ohio St.3d 369, 374-5 (1983).

{¶25} The Tenth District Court of Appeals has also addressed this issue and held that "major outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough. Only conduct that is truly outrageous, intolerable and beyond the bounds of decency is actionable; persons are expected to be hardened to a considerable degree of inconsiderate, annoying and insulting behavior. Insults, foul language, hostile tempers, and even threats must sometimes be tolerated in our rough and tumble society." *Strausbaugh v. Ohio Dept. of Transp.,* 150 Ohio App.3d 438,444, 2002-Ohio-6627, 15 (10th Dist.).

{¶26} Although the court previously found that plaintiff's claim for intentional infliction of emotional distress was subject to the two-year statute of limitations found in R.C. 2305.16, "[w]hen a party suffers emotional distress that is 'parasitic' to another tort, the applicable statute of limitations is the one that applies to actions based upon that other tort." *Manin v. Diloreti,* 94 Ohio App.3d 777, 779-780 (9th Dist.1994). The allegations in plaintiff's amended complaint and in her affidavit all relate to the allegedly defamatory statements made by Haritos. Therefore, in that her claim for intentional infliction of emotional distress is based upon her defamation claim, the one-year statute of limitations applies. However, even if the court were to consider the statements that Haritos made in the February 12, 2014 meeting, those comments, while unprofessional, do not rise to the level of extreme and outrageous conduct required for a claim of intentional infliction of emotional distress. Moreover, none of the statements attributed to Haritos on or after March 17, 2014 rise to that level either. Accordingly, the only reasonable conclusion is that defendant is entitled to summary judgment as a matter of law on plaintiff's claim for intentional infliction of emotional distress. Judgment shall be rendered in favor of defendant.

PATRICK M. MCGRATH
Judge

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SUSAN M. LOUSCHER Plaintiff v. UNIVERSITY OF AKRON Defendant	Case No. 2015-00212 Judge Patrick M. McGrath Magistrate Holly True Shaver JUDGMENT ENTRY

{¶27} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

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