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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Chad Carpenter, an individual,
10 Plaintiff/Defendant,

No. CV16-01768-PHX DGC

ORDER

11 v.

12 All American Games, a limited liability
13 company, Douglas Berman, an individual,
and Does 1-30, inclusive,

14 Defendants/Counterclaimants.
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16 Defendant All American Games, LLC (“AAG”) has moved for partial summary
17 judgment on Plaintiff Chad Carpenter’s defamation claim. Doc. 37. The motion is fully
18 briefed (Docs. 39, 41), and no party has requested oral argument. For reasons that
19 follow, the Court will deny the motion.¹

20 **I. Background.**

21 AAG, through its subsidiary Football University, LLC, operates a national youth
22 football tournament and football camps in more than 20 U.S. markets, including camps in
23 Phoenix, Seattle, Denver, and various cities in California. Doc. 38 ¶ 1. Carpenter is a
24 former AAG employee. *Id.* ¶ 2. As AAG’s “West Coast Director,” Carpenter was
25 responsible for recruiting athletes to participate in the camps in his region and recruiting
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28 ¹ Defendant filed its motion for summary judgment without first exchanging
letters with Plaintiff and scheduling a telephone conference as required by the case
management order. Doc. 19 at 5, ¶ 11. Although this could provide an independent basis
for denying the motion, the Court will deny the motion on the merits.

1 teams to participate in the national tournament. *Id.* In 2015 Carpenter was being paid a
2 base salary of \$65,000 and was eligible to receive commissions based on his camp and
3 tournament enrollment revenue. *Id.* ¶ 3.

4 Carpenter was terminated on June 10, 2015. On the same day, AAG’s chairman,
5 Douglas Berman, sent the following e-mail to 54 recipients:

6 Everyone –

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8 As of this morning, AAG terminated its employment of Chad Carpenter.
9 Without going further, this move was necessitated because of conduct that
10 was violative of the norms of integrity and professionalism expected of
11 members of the AAG community.

12 We will be adjusting in the short term to execute the LA camp and
13 coordinate the transition of other responsibilities for territories that Chad
14 was responsible for.

15 Douglas Berman
16 Chairman/CEO, All American Games, LLC

17 Doc. 37-1 at 11-12; Doc. 38 ¶ 10. Carpenter asserts a defamation claim based on this e-
18 mail.²

19 The parties offer conflicting explanations of the circumstances leading up to the e-
20 mail. AAG alleges that in May 2015 it “uncovered a troubling and improper relationship
21 between Plaintiff and another former employee,” Karen King, which prompted an
22 investigation and ultimately led to Carpenter’s termination. Doc. 37-1 ¶ 5. AAG claims
23 that King was manipulating AAG’s financial systems to inflate revenue numbers and that

24 ² Carpenter also asserts a claim based on alleged oral statements made by Berman
25 and Carpenter’s supervisor to “notable NFL coaches,” in which they allegedly stated that
26 Carpenter was fired for “stealing money and fixing the books, having an affair and just
27 other bad stuff.” Doc. 39-1 at 5; Doc. 37-2 at 11. But Carpenter has presented no
28 evidence of these oral statements other than his own declaration that various coaches
called him and told him about the statements. The Court will not consider this testimony
for the purpose of ruling on this motion because it is inadmissible hearsay. *See* Federal
Rules of Civil Procedure 56 (declaration used to oppose a summary judgment motion
must “be made on personal knowledge” and “set out facts that would be admissible in
evidence”); *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1555 (10th Cir. 1995) (third
party’s testimony regarding allegedly defamatory statement made between two persons
outside the third party’s presence is inadmissible hearsay).

1 it “found considerable evidence that Plaintiff was fully knowledgeable of [King’s]
2 fraudulent actions.” *Id.* ¶¶ 6, 8. AAG cites two additional reasons for the termination:
3 Carpenter offered discounts to customers without authorization to inflate his revenue and
4 was “gross[ly] insubordinate[e] with respect to his supervisor,” Steve Quinn. *Id.* ¶¶ 9-10.
5 Carpenter disputes each of these reasons and claims that AAG conducted a “half-baked”
6 investigation and fired him because it was struggling financially and Quinn did not like
7 him. Doc. 39-1 at 3, 5. Carpenter asserts that neither he nor King manipulated financial
8 records, and that the “considerable evidence” AAG claimed to possess is discredited by
9 his controverting evidence. Doc. 39-1 at 2-5.

10 To support its claim that it had considerable evidence of financial misreporting,
11 AAG produces various e-mail threads between Carpenter and King, in which the two
12 discuss reaching a certain revenue amount for Carpenter to receive a higher commission.
13 Doc. 39-1 at 17-18; Doc. 37-1 at 7-9. In these e-mails, Carpenter states: “[b]etter get
14 over a 250 FPE seriously Karen,”³ and King makes statements such as “[w]e will get you
15 the higher payout [f]or Seattle” and “I will do everything I can to make it happen
16 . . . [e]ven if I have to sell my soul to the devil.” *Id.* Carpenter’s declaration explains that
17 the e-mails do not suggest fraud, but simply evidence tactics he used to motivate his team
18 to reach their target FPE numbers – part of his job. Doc. 39-1 at 3.

19 AAG also produces screenshots from its accounting systems, AGGIS and
20 Cybersource, which allegedly prove that King misreported revenue on eight occasions.
21 Doc. 39-1 at 13-15, 26-43. AGGIS was used to track customers and report revenue for
22 calculating commissions, while Cybersource was used to process actual payments
23 received. Doc. 39-1 at 15-16. AAG identifies eight instances where there were
24 discrepancies between the amount King reported in AGGIS and the amount actually
25 processed in Cybersource. Doc. 39-1 at 14-15. Carpenter responds with a number of

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27 ³ “FPE” is an abbreviation for “fully paid equivalent.” Doc. 39-1 ¶ 19. AAG sets
28 a threshold FPE number, which the employee must reach in order to receive a
commission. *Id.* The number is calculated by dividing a camp’s total revenue by the
price of one camp admission. *Id.*

1 explanations, including that AGGIS experienced technical glitches during the 2015
2 camps that may have caused the discrepancies, and that participants often pay portions of
3 their fee in cash when they arrive at camp, but the cash receipts are not always reflected
4 in AGGIS. Doc. 39-1 at 2-3, 5. Carpenter also argues that the screenshots AAG
5 provided are illegible, some of the corresponding screenshots appear to have different
6 names on them, AAG has refused to provide bank statements that would account for cash
7 payments, and AAG discontinued using AGGIS and Cybersource, which prevents him
8 from substantiating his claim that there was no misreporting.⁴ Doc. 39 at 5-6.

9 In support of its second reason for the termination – unauthorized discounts –
10 AAG cites four e-mails in which Carpenter directed another employee to give a reduced
11 price. Doc. 39-1 at 13. Carpenter asserts that it was an AAG practice to offer these
12 discounts, that Quinn trained him to give discounts, and that every AAG sales person
13 gave these discounts. Doc. 39-1 at 3-5. Carpenter contends that he is the only sales
14 person who has ever been penalized for doing so. *Id.* Carpenter also claims that AAG
15 did not investigate the discounts until after his termination. Doc. 39-1 at 4.

16 In support of the alleged “gross insubordination,” AAG cites three e-mails
17 Carpenter sent to King, in which Carpenter referred to Quinn “in an insulting,
18 undermining and unprofessional manner.” Doc. 39-1 at 11. Carpenter responds that even
19 if these comments constitute gross insubordination (which he disputes), they could not
20 have served as the basis for his termination because they were not discovered until after
21 he was fired. Doc. 39-1 at 4.

22 Carpenter also alleges that when AAG representatives interviewed him before his
23 termination, they refused to provide him with any evidence and refused to allow him to
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26 ⁴ Carpenter’s response asks the Court to grant an adverse inference for spoliation
27 of evidence based on AAG’s failure to maintain access to AGGIS and Cybersource.
28 These systems apparently contain electronically stored information (“ESI”), and yet
Carpenter fails to address the standards for spoliation of ESI added to the Federal Rules
of Civil Procedure on December 1, 2015. *See* Fed. R. Civ. P. 37(e). Because Carpenter
has failed to address this controlling law, he has not shown that he is entitled to an
adverse inference instruction.

1 explain. Doc. 39-1 at 3. Carpenter did not receive a written explanation of the reasons
2 for his termination. Doc. 39 at 8.

3 **II. Summary Judgment Standard.**

4 A party seeking summary judgment “bears the initial responsibility of informing
5 the district court of the basis for its motion, and identifying those portions of [the record]
6 which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*
7 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the
8 evidence, viewed in the light most favorable to the nonmoving party, shows “that there is
9 no genuine dispute as to any material fact and the movant is entitled to judgment as a
10 matter of law.” Fed. R. Civ. P. 56(a). Summary judgment is also appropriate against a
11 party who “fails to make a showing sufficient to establish the existence of an element
12 essential to that party’s case, and on which that party will bear the burden of proof at
13 trial.” *Celotex*, 477 U.S. at 322. Only disputes over facts that might affect the outcome
14 of the suit will preclude the entry of summary judgment, and the disputed evidence must
15 be “such that a reasonable jury could return a verdict for the nonmoving party.”
16 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

17 **III. Discussion.**

18 The tort of defamation requires a false and defamatory statement, an unprivileged
19 publication of the statement to a third party, and fault on the part of the publisher.
20 *Rowland v. Union Hills Country Club*, 757 P.2d 105, 110 (Ariz. Ct. App. 1988). AAG
21 seeks summary judgment on Carpenter’s defamation claim because (1) the allegedly
22 defamatory statement is true, (2) the statement is protected by a qualified privilege, and
23 (3) Carpenter has not established damages. Doc. 37 at 1. The Court will deny summary
24 judgment because there is a genuine factual dispute as to each of these issues.

25 **A. Truth.**

26 “To be defamatory, a publication must be false and must bring the defamed person
27 into disrepute, contempt, or ridicule, or must impeach plaintiff’s honesty, integrity,
28 virtue, or reputation.” *Dube v. Likins*, 167 P.3d 93, 105 (Ariz. Ct. App. 2007) (quoting

1 *Turner v. Devlin*, 848 P.2d 286 (Ariz. 1993)). A statement cast in terms of opinion is
2 actionable if it implies false facts on which the opinion is based. *Id.* at 106. AAG’s
3 statement that Carpenter’s termination was “necessitated because of conduct that was
4 violative of the norms of integrity and professionalism expected of members of the AAG
5 community” reasonably could be viewed by a jury as implying that Carpenter violated
6 AAG norms related to integrity and professionalism, and that the violation was serious
7 enough to “necessitate” his termination. Such a statement could be viewed as impugning
8 Carpenter’s honesty, integrity, virtue, or reputation. *See id.* (statement suggesting that a
9 university student violated university policy was capable of defamatory meaning).

10 AAG argues that Carpenter has not created a genuine dispute as to the falsity of
11 the statement because its evidence shows Carpenter violated AAG policy in the three
12 ways explained above: financial misreporting, unauthorized discounts, and gross
13 insubordination. But viewing the evidence in the light most favorable to Carpenter, the
14 Court cannot say as a matter of undisputed fact that Carpenter violated AAG norms.
15 Carpenter presents testimony that disputes each of the alleged violations. He presents
16 plausible alternative explanations for the reporting discrepancies; he disputes that seeking
17 authorization for discounts was an AAG norm; and he disputes that referring to a
18 supervisor in an insulting manner violated AAG norms because his own supervisor
19 engaged in similar behavior.⁵ The question of truth does not lend itself to determination
20 as a matter of law on this record. At the summary judgment stage, “the judge does not
21 weigh disputed evidence” or “make credibility determinations.” *Dominguez-Curry v.*
22 *Nev. Transp. Dep’t*, 424 F.3d 1027, 1036 (9th Cir. 2005).⁶

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25 ⁵ The Court also notes that AAG presented no evidence to establish the relevant
“norms” it claims were violated.

26 ⁶ Neither party has suggested that this case involves a matter of public concern. If
27 it does not, Carpenter would not have the burden at trial of proving falsity; rather, AAG
28 would have the burden of proving its affirmative defense of truth. *See Turner v. Devlin*,
848 P.2d 286, 290 (Ariz. 1993). Even if the burden were on Carpenter, however, the
Court finds that he has presented sufficient evidence to create a genuine issue of fact on
the truth of the e-mail’s assertions.

1 **B. Qualified Privilege.**

2 AAG also asserts that Carpenter cannot prove unprivileged publication to a third
3 party because the statement was protected by the “common interest” qualified privilege.
4 Arizona recognizes a qualified privilege for circumstances in which “one is entitled to
5 learn from his associates what is being done in a matter in which he has an interest in
6 common with them.” *Green Acres Tr. v. London*, 688 P.2d 617, 625 (1984) (quoting
7 Restatement (Second) of Torts § 596, cmt. c). “Co-managers in a company would have a
8 common interest in learning of an employee’s termination.” *East v. Bullock’s Inc.*, 34 F.
9 Supp. 2d 1176, 1183 (D. Ariz. 1998) (privilege applied where vice president of human
10 relations informed company’s senior managers that an employee was terminated for
11 falsifying company records). Once a defendant demonstrates that the privilege arose, a
12 plaintiff can defeat the privilege with proof that it was abused, either by actual malice or
13 excessive publication. *Green Acres Tr.*, 688 P.2d at 624.

14 Here, the parties agree that the allegedly defamatory e-mail was sent to at least 54
15 recipients. Berman describes the list as “AAG employees and coaches,” and admits that
16 AAG’s vice president forwarded the e-mail to “part-time coaches and other staff who
17 worked on the FBU camps.” Doc. 37-1 ¶ 11. Carpenter describes the recipients as “a
18 countless number of unnecessary people including volunteers, consultants, independent
19 contractors, part-time coaches, and parents of kids.” Doc. 40 ¶ 21. But neither party
20 actually identifies the recipients or their relations to AAG – information that might allow
21 the Court to determine whether the recipients had a common interest in learning of
22 Carpenter’s termination. On this record, the Court cannot determine as a matter of
23 undisputed fact whether the privilege arose, let alone whether it was abused through
24 excessive publication. The Court therefore cannot grant summary judgment on this
25 basis.⁷

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27 ⁷ AAG argues that Carpenter has presented no evidence of malice, but such
28 evidence is not needed if the privilege never arose or if AAG engaged in excessive
publication. The lack of malice evidence, therefore, does not entitle AAG to summary
judgment.

1 **C. Damages.**

2 AAG argues that summary judgment is warranted because Carpenter failed to
3 present evidence of damages. To prevail on a defamation claim, a plaintiff generally
4 must prove actual damages, which are not limited to out-of-pocket losses but include “the
5 more customary types of harm inflicted by defamatory falsehood” such as “impairment of
6 reputation and standing in the community, personal humiliation, and mental anguish and
7 suffering.” *Boswell v. Phoenix Newspapers, Inc.*, 730 P.2d 186, 196-97 (Ariz. 1986)
8 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350-51 (1974)). A jury’s award of
9 damages “must be supported by competent evidence,” but “there need be no evidence
10 which assigns an actual dollar value to the injury.” *Id.* at 197.

11 AAG asserts that Carpenter did not produce any documents in response to its
12 request for documents relating to damages, and therefore cannot prove the damages
13 element of his defamation claim. Doc. 37 at 3. But AAG cites no case, and the Court has
14 found none, holding that a plaintiff must have documentary evidence of damages in a
15 defamation case. Rather, a plaintiff simply must produce evidence that would be
16 competent to support a jury’s finding of actual reputational harm. *See Boswell*, 730 P.3d
17 at 196-97.

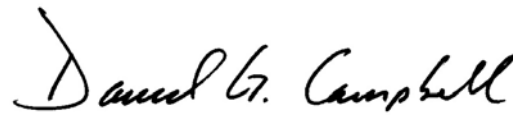
18 Carpenter’s declaration asserts that, as a result of the defamatory e-mail, he
19 received phone calls from people in the community which were “really embarrassing”
20 and that his “friends, colleagues, and future sources of employment now question [his]
21 character and employability.” Doc. 39-1 at 5; Doc. 39-2 at 23. This testimony creates an
22 issue of fact as to whether Carpenter suffered personal humiliation and reputational harm.
23 Moreover, a reasonable jury could conclude that AAG’s e-mail was defamatory per se,
24 which could entitle Carpenter to presumed damages. *See Hirsch v. Cooper*, 737 P.2d
25 1092, 1096 (Ariz. Ct. App. 1986) (when a publication is libelous per se, “presumptive
26 damages may be awarded without proof of special damages”) (citing *Dun & Bradstreet,*
27 *Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)). Libel per se includes a written
28 communication that, on its face and without resort to extrinsic evidence, tends to impeach

1 one's honesty, integrity, virtue, or reputation. *Peagler v. Phoenix Newspapers, Inc.*, 560
2 P.2d 1216, 1222-23 (Ariz. 1977). The statement from Carpenter's employer could be
3 viewed by the jury as calling into question his honesty and integrity.

4 **IT IS ORDERED:**

- 5 1. Defendant's motion for partial summary judgment (Doc. 37) is **denied**.
- 6 2. The Court will schedule a conference call to set a final pretrial conference
7 and trial date by separate order.

8 Dated this 10th day of October, 2017.

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12 David G. Campbell
13 United States District Judge
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