

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF OREGON

3 PORTLAND DIVISION

4  
5 JOHN ALLEN GORDON, )

6 Plaintiff, )

7 v. )

8 KLEINFELDER WEST, INC., )

9 Defendant. )

No. 03:11-CV-00245-HU

**MEMORANDUM OPINION AND ORDER  
ON CROSS-MOTIONS FOR  
SUMMARY JUDGMENT**

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15  
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23 HUBEL, Magistrate Judge:

24 The plaintiff John Allen Gordon brings this case against the  
25 defendant Kleinfelder West, Inc. ("Kleinfelder") for damages  
26 arising from Gordon's termination by Kleinfelder on February 2,  
27 2010, and events occurring immediately thereafter. The case is  
28 before the court on motions for summary judgment filed by both  
parties. Gordon seeks partial summary judgment on the issue of

1 liability as to two of his claims against Kleinfelder; i.e., his  
2 Third Claim for Relief, for malicious prosecution, and his Fourth  
3 Claim for Relief, for conversion.<sup>1</sup> Dkt. #24; see Dkt. #1-1. He  
4 also seeks summary judgment on all four of Kleinfelder's Counter-  
5 claims, which seek damages for conversion, breach of contract,  
6 violation of Oregon's Uniform Trade Secrets Act, and defamation.  
7 See Dkt. #23, Kleinfelder's Amended Answer and Counterclaims.

8 Kleinfelder seeks summary judgment on all of Gordon's claims  
9 against it, or alternatively, partial summary judgment on all  
10 claims as to which no genuine issues of material fact exist.

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12

#### **BACKGROUND FACTS**

13 There are few undisputed facts. Kleinfelder is a nationally-  
14 based science, architecture, and engineering consulting firm. Dkt.  
15 #26, ECF p. 7 (citing Dkt. #29, Izen Decl. ¶ 2). In approximately  
16 April of 2008, Kleinfelder hired Gordon as a Civil Design  
17 Specialist, which required Gordon to perform civil site design and  
18 plan development. *Id.* (citing Izen Decl. ¶ 4). According to  
19 Gordon, one of the inducements for Kleinfelder to hire him was his  
20 personal portfolio of CAD drawings that he could use in performing  
21 his job. Dkt. #24-2, Gordon Decl. ¶ 2; Dkt. #41, Gordon Decl.  
22 ("Gordon Decl. #2") ¶ 2. At the request of his then-supervisor,  
23 Jay Beeks, Gordon put his CAD drawings onto the "D" drive on his  
24 office computer. *Id.*; Gordon Decl. #2 ¶ 2.

25

26

27 <sup>1</sup>Gordon also moved for summary judgment on his First Claim for  
28 Relief, for defamation, but he abandoned his motion for summary  
judgment on this claim in his reply brief. See Dkt. #56, p. 2.

1 During his tenure at Kleinfelder, a significant amount of  
2 Gordon's time was spent working on a wind power development project  
3 (the "EverPower Project") for one of Kleinfelder's clients,  
4 EverPower Wind Holdings, Inc. Dkt. #26, ECF p. 7 & n.1 (citing  
5 Dkt. #27, Att. 1, Deposition of John Gordon ("Gordon Depo"),  
6 p. 153). Beginning in January 2010, Peter Stroud, a Principal  
7 Engineering Geologist for Kleinfelder, became Project Manager for  
8 the EverPower Project, and served as Gordon's direct supervisor.  
9 *Id.* (citing Dkt. #34, Stroud Decl. ¶ 3). "The EverPower Project  
10 involved potentially repurposing a logging tract into a wind farm."  
11 *Id.* (citing Dkt. #30, Loftis Decl. ¶ 3). As part of Gordon's work  
12 on the EverPower Project, he participated in a feasibility study to  
13 assess what types of vehicles could traverse the existing roadways  
14 at the EverPower Project site. Gordon spent two days at the site  
15 obtaining information about culvert locations and the general  
16 condition of culverts in the logging tract. *Id.* (citing Gordon  
17 Depo. pp. 149, 155-56, 161). A Kleinfelder drafter, Taran Kratz,  
18 accompanied Gordon to the site on the second day. *Id.* (citing  
19 Gordon Depo. pp. 161, 171). Gordon recorded about 100 culvert  
20 locations on a GPS device, and also recorded field data in  
21 handwritten notes. Dkt. #26, ECF p. 9 (citing Stroud Decl. ¶ 4;  
22 Gordon Depo. pp. 330-31). His intention was to transfer the data  
23 into Kleinfelder's CAD system to generate maps and diagrams for use  
24 in connection with the EverPower Project. See Gordon Depo.  
25 pp. 157, 164; Gordon Decl. ¶ 5. According to Gordon, the EverPower  
26 Project could not be completed without this data. Gordon Decl.  
27 ¶ 5.

28

1 On February 2, 2010, Abraham Izen, who at that time was  
2 Kleinfelder's Global Director of Renewable Energy, and Stroud,  
3 Gordon's supervisor, met with Gordon and terminated his employment.  
4 Dkt. #26, ECF p. 8 (citing Izen Decl. ¶ 7). The parties dispute  
5 the reason for Gordon's termination.

6 Kleinfelder claims Gordon was terminated due to poor work  
7 product, poor attitude, uncooperative behavior, and unwillingness  
8 to accept appropriate supervision. Dkt. #26, ECF p. 8 (citing Izen  
9 Decl. ¶ 6; Loftis Decl. ¶ 6, Ex. A). Izen claims he informed  
10 Gordon that he was being terminated for "poor work performance and  
11 behavior," and he "gave Gordon a Performance Improvement and  
12 Corrective Action form . . . that specified that Gordon was being  
13 terminated based on his unsatisfactory work performance and the  
14 fact that Gordon was uncooperative, disrespectful, and combative  
15 with his supervisors." *Id.*, ¶ 7. According to Izen, Gordon  
16 refused to sign the form, writing "Not true" next to the reasons  
17 for his termination. *Id.*; see Dkt. #27-1, ECF p. 70, "Performance  
18 Improvement and Corrective Action" form dated 1/29/2010 (Gordon  
19 Depo. Ex. 13). Under "Reason for action," the form indicates,  
20 "Unsatisfactory Work Performance - work is not completed in  
21 accordance with the standards set by the company or the require-  
22 ments of the position." Dkt. #27-1, ECF p. 70. Under "Facts and  
23 Events," the form indicates, "Per attached documentation, [Gordon]  
24 has been uncooperative, disrespectful and combative with senior  
25 Kleinfelder staff. He has also been resistant to accountability  
26 and supervision." *Id.* Next to each of these items is a hand-  
27 written notation, "Not true." *Id.*

28

1 Gordon claims he was told he was terminated as part of a  
2 reduction in force. On a "Separation Report" completed by Izen in  
3 connection with Gordon's termination, under "Reason for  
4 Separation," Izen noted, "Layoff/Reduction in Force." Izen Decl.  
5 ¶ 8; Dkt. #29-1, Separation Report. In his Declaration, Izen  
6 states he made that notation "so that Gordon would not have to  
7 disclose his performance-based termination to prospective  
8 employers," and also because he believed it "would help Gordon  
9 receive unemployment benefits." Izen Decl. ¶ 8.

10 At the end of the termination meeting, Gordon was instructed  
11 to arrange to meet with Stroud after regular business hours to  
12 retrieve his personal belongings from his office. Dkt. #26, ECF  
13 p. 9. According to Kleinfelder, as Gordon left the termination  
14 meeting, he showed Stroud a GPS device, stating it contained 100  
15 culvert locations from the EverPower Project that had not been  
16 saved onto Kleinfelder's computer yet.<sup>2</sup> *Id.* (citing Stroud Decl.  
17 ¶ 4; Gordon Depo. pp. 330-31) Gordon also mentioned that he had  
18 his original field notes in the trunk of his car, if Kleinfelder  
19 wanted them. No action was taken at that time to transfer the GPS  
20 data or to retrieve Gordon's handwritten field notes. Gordon Decl.  
21 ¶ 3; Gordon Decl. #2 ¶ 5.

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22  
23 <sup>2</sup>It is not clear from the parties' briefs and the depositions  
24 whether Gordon had possession of the GPS unit containing the  
25 culvert locations at the time of the termination meeting, or it was  
26 in his car, or it actually was at Kleinfelder's offices but the  
27 data points just had not been entered on Kleinfelder's computer  
28 system yet. See, e.g., Dkt. #26, ECF p. 9; Dkt. #27-1, Gordon  
Depo., pp. 330-31, 347-48, 350; Dkt. #28-1, Stroud's notes from  
meeting with Gordon on February 3, 2010; Dkt. #28-3, Officer  
Defrain's report stating Izen told her "he verified the GPS was not  
taken by Gordon."

1 Gordon called Stroud around 5:00 p.m. on February 3, 2010, to  
2 arrange to retrieve his personal belongings. Dkt. #26, ECF p. 10  
3 (citing Stroud Decl. ¶ 5). When Gordon arrived at the office,  
4 Stroud accompanied him into his former office. *Id.* (citing Gordon  
5 Depo. p. 342; Stroud Decl. ¶ 5). The parties have conflicting  
6 versions of what occurred during and subsequent to this meeting.

7 Gordon claims that while he was in his office, he picked up a  
8 piece of paper, previously retrieved from a recycling bin, that  
9 contained a portion of an old map - a section of a larger map that  
10 had already been filed of record in Lewis County, Washington. See  
11 Dkt. #54-1, p. 33 (Gordon Depo. Ex. 14). Gordon claims he had  
12 written personal telephone numbers and information relating to a  
13 child support matter on the document, and the document contained no  
14 proprietary or confidential information. Gordon Decl. ¶¶ 4, 8.  
15 Stroud claims the document Gordon picked up was a large, folded  
16 EverPower Project map belonging to Kleinfelder, which Stroud  
17 believed contained proprietary information. Dkt. #26, ECF p. 10  
18 (citing Stroud Decl. ¶ 5). Stroud told Gordon he could not take  
19 the map because it was Kleinfelder's property, but Gordon refused  
20 to relinquish the document, stating he needed the personal phone  
21 numbers written on it. Dkt. #26, ECF p. 10 (citing Stroud Decl.  
22 ¶ 5). A brief scuffle ensued during which Stroud attempted to  
23 prevent Gordon from leaving the office with the document, but  
24 Gordon was able to evade Stroud's attempt and he left the office  
25 with the document. Gordon Decl. ¶ 1. Gordon claims Stroud  
26 assaulted him, and threatened him with further assault. *Id.*;  
27 Gordon Decl. #2, ¶ 6. Gordon also claims he was not allowed to  
28 take his personal CAD drawings, some text files, and gaming "screen

1 shots" that he had placed on his "D" drive, as well as a personal  
2 address book. He claims these items belong to him, not to  
3 Kleinfelder, and they have never been returned to him. Gordon  
4 Decl. ¶¶ 1, 2; Gordon Decl. #2 ¶ 7.

5 In addition, Gordon claims that while he was retrieving his  
6 personal items, he again mentioned to Stroud that his field notes  
7 were in the trunk of his car, if Kleinfelder wanted them, but  
8 again, no one requested the information. Gordon Decl. ¶ 6.  
9 Subsequently, in a letter dated February 11, 2010, Gordon made a  
10 formal offer, through his attorney, to deliver the handwritten  
11 field notes to Kleinfelder; however, according to Gordon,  
12 Kleinfelder never requested the notes until it served Gordon with  
13 a request for production of documents in this case. *Id.*

14 Gordon claims he never took any proprietary or confidential  
15 information or data from Kleinfelder's premises, and the scrap of  
16 the map he took with him had no intrinsic or monetary value to  
17 Kleinfelder. Gordon Decl. ¶¶ 4, 14. He further claims he has  
18 never used, shared, disseminated, or benefitted from any proprie-  
19 tary information or trade secrets of Kleinfelder's. *Id.* ¶ 15.  
20 Gordon also claims that during his employment, Izen and other  
21 Kleinfelder employees created a hostile work environment in an  
22 attempt to dissuade Gordon from continuing to work at Kleinfelder.  
23 Gordon Decl. ¶ 3; Gordon Decl. #2 ¶¶ 8, 9. Gordon claims these  
24 actions included publicly insulting him, demeaning his manhood,  
25 publicly describing him as a "pussy," and systematically harassing  
26 him. *Id.*

27 Kleinfelder claims that on February 2 and 3, 2010, Gordon  
28 asked three Kleinfelder employees to copy some Kleinfelder computer

1 files for him, but all three of the employees refused. Dkt. #26,  
2 ECF p. 9 (citing Gordon Depo. pp. 333-37; Dkt. #31, Steel Decl.,  
3 ¶ 4; Dkt. #33, Wells Decl. ¶ 4; Izen Decl. ¶ 15). Gordon claims he  
4 was only attempting to retrieve his personal computer files, and  
5 not any of Kleinfelder's project files. Gordon Decl. #2 ¶¶ 2, 3.

6 On February 3, 2010, Gordon called the Beaverton Police  
7 Department, and reported that Stroud had assaulted him while he was  
8 removing his belongings from his former office. Dkt. #28, DeFrain  
9 Decl. ¶ 3. On February 4, 2010, after meeting with several  
10 Kleinfelder employees, the police refused to pursue the assault  
11 charge "based on a lack of supporting evidence." *Id.* ¶ 4. During  
12 these interviews, Izen told the police that Gordon had taken a  
13 Kleinfelder map which was believed to contain confidential,  
14 proprietary information. Izen also told police that Gordon had  
15 contacted several Kleinfelder employees in an attempt to obtain  
16 confidential Kleinfelder computer files. *Id.* ¶ 5. The investi-  
17 gating officer told Izen that if a police report were filed, the  
18 police would assume responsibility for returning Gordon's personal  
19 property to him, and for retrieving Kleinfelder's property from  
20 Gordon and returning it to the company. *Id.* ¶ 6.

21 Kleinfelder filed a police report, accusing Gordon of stealing  
22 a map valued at \$3,200 - a statement Gordon asserts Kleinfelder  
23 knew was false at the time it was made. *Id.* ¶ 7 & Att. 2; Dkt.  
24 #24-1, ECF p. 4. On February 4, 2010, Kleinfelder was arrested on  
25 criminal charges arising from the police report. Gordon Decl. ¶ 9;  
26 DeFrain Decl. ¶¶ 10-11. He was taken into custody, handcuffed,  
27 transported to the Washington County Jail, incarcerated, and  
28 formally charged. *Id.* After further investigation, the Washington

1 County District Attorney declined to prosecute Gordon, and the  
2 criminal charge was terminated. Gordon Decl. ¶ 10. Gordon claims  
3 he incurred \$2,500 in attorney's fees in connection with the  
4 criminal matter. *Id.*

5 After Gordon's termination, he contacted David McClain at  
6 EverPower, seeking employment with EverPower. Gordon Decl. #2 ¶ 4;  
7 Dkt. #32, McClain Decl. ¶ 4. Gordon also offered to deliver his  
8 field data regarding the EverPower Project directly to EverPower,  
9 but McClain declined that request and told Gordon he should return  
10 the field data to Kleinfelder. Gordon Decl. ¶ 8; McClain Decl.  
11 ¶ 4. Gordon claims he was told by McClain that Kleinfelder was  
12 asserting he had been terminated for cause, he "was incompetent to  
13 perform the duties and responsibilities of his position as an  
14 engineer," and he had committed the crime of theft. McClain states  
15 he was never told "Gordon was not competent to perform the duties  
16 and responsibilities of his position, that he had been or was going  
17 to be arrested, or that he had been stealing valuable information."  
18 McClain Decl. ¶ 6; see Dkt. #46, McClain Decl. ("McClain Decl. #2")  
19 ¶ 4. Kleinfelder claims the only representation made was that  
20 Gordon had been "let go," which was true. Dkt. #26, ECF p. 14; see  
21 McClain Decl. ¶ 5.

22 McClain acknowledges telling Gordon that Loftis had told him  
23 Gordon had been terminated for cause, although McClain cannot  
24 recall if that actually is what Loftis told him. McClain Decl.  
25 ¶ 7. According to McClain, Loftis called him to advise him that  
26 Gordon no longer worked at Kleinfelder. McClain states Loftis also  
27 told him "Gordon may have removed information from Kleinfelder  
28

1 offices relating to the EverPower Project, and that the police  
2 might be in contact with EverPower." *Id.* ¶ 5.

3

4

***THE PARTIES' CLAIMS IN THIS LAWSUIT***

5 In his First Claim for Relief, Gordon claims Kleinfelder  
6 defamed him, damaging his ability to obtain employment, and  
7 rendering him "sick, sore, nervous and upset." In his Second Claim  
8 for Relief, Gordon claims Kleinfelder's actions caused him to be  
9 "deprived of his liberty and falsely imprisoned." In his Third  
10 Claim for Relief, Gordon claims Kleinfelder's actions "were wanton  
11 and malicious, intending that [he would] be falsely accused and  
12 prosecuted." In Gordon's Fourth Claim for Relief, he claims  
13 Kleinfelder converted his personal property. In his Fifth Claim  
14 for Relief, Gordon claims Kleinfelder intentionally inflicted  
15 emotional distress on him. See Dkt. #1-1.

16 For its Counterclaims, Kleinfelder asserts Gordon converted  
17 its proprietary information for his own purposes; he breached a  
18 Confidentiality and Non-Solicitation Agreement entered into between  
19 the parties as part of Gordon's employment; he removed a project  
20 map containing trade secrets from Kleinfelder's offices, in  
21 violation of Oregon's Uniform Trade Secrets Act; and he defamed  
22 Kleinfelder to EverPower. See Dkt. #23.

23

24

***SUMMARY JUDGMENT STANDARDS***

25 Summary judgment should be granted "if the movant shows that  
26 there is no genuine dispute as to any material fact and the movant  
27 is entitled to judgment as a matter of law." Fed. R. Civ. P.  
28 56(c)(2). In considering a motion for summary judgment, the court

1 "must not weigh the evidence or determine the truth of the matter  
2 but only determine whether there is a genuine issue for trial."  
3 *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002)  
4 (citing *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th  
5 Cir. 1996)).

6 The Ninth Circuit Court of Appeals has described "the shifting  
7 burden of proof governing motions for summary judgment" as follows:

8 The moving party initially bears the burden of  
9 proving the absence of a genuine issue of  
10 material fact. *Celotex Corp. v. Catrett*, 477  
11 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d  
12 265 (1986). Where the non-moving party bears  
13 the burden of proof at trial, the moving party  
14 need only prove that there is an absence of  
15 evidence to support the non-moving party's  
16 case. *Id.* at 325, 106 S. Ct. 2548. Where the  
17 moving party meets that burden, the burden  
18 then shifts to the non-moving party to desig-  
19 nate specific facts demonstrating the exist-  
20 tence of genuine issues for trial. *Id.* at  
21 324, 106 S. Ct. 2548. This burden is not a  
22 light one. The non-moving party must show  
23 more than the mere existence of a scintilla of  
24 evidence. *Anderson v. Liberty Lobby, Inc.*,  
477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed.  
2d 202 (1986). The non-moving party must do  
more than show there is some "metaphysical  
doubt" as to the material facts at issue.  
*Matsushita Elec. Indus. Co., Ltd. v. Zenith  
Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct.  
1348, 89 L. Ed. 2d 528 (1986). In fact, the  
non-moving party must come forth with evidence  
from which a jury could reasonably render a  
verdict in the non-moving party's favor.  
*Anderson*, 477 U.S. at 252, 106 S. Ct. 2505. In  
determining whether a jury could reasonably  
render a verdict in the non-moving party's  
favor, all justifiable inferences are to be  
drawn in its favor. *Id.* at 255, 106 S. Ct.  
2505.

25 *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th  
26 Cir. 2010).

27

28

1 **DEFAMATION**

2 Kleinfelder moves for summary judgment on Gordon's defamation  
3 claim. Gordon moves for summary judgment on Kleinfelder's defama-  
4 tion counterclaim. Gordon also moved for summary judgment on his  
5 own defamation claim, but he conceded in his reply brief that  
6 "there is a triable issue of fact as to the motivation of defendant  
7 in speaking with David McClain at Everpower, and the issue of  
8 qualified privilege which relates to the motivation issue, as one  
9 which needs to be considered by a jury." Dkt. #56, p. 2.

10 To prove defamation under Oregon law,

11 a plaintiff must show that the defendant made  
12 a defamatory statement about the plaintiff to  
13 a third person. *Wallulis v. Dymowski*, 323 Or.  
14 337, 342-43, 918 P.2d 755[, 758] (1996). A  
15 defamatory statement is a false statement that  
16 would subject the plaintiff "to hatred, con-  
17 tempt or ridicule . . . [or] tend to diminish  
the esteem, respect, goodwill or confidence in  
which [the plaintiff] is held or to excite  
adverse, derogatory or unpleasant feelings or  
opinions against [the plaintiff]." *Farnsworth*  
*v. Hyde*, 266 Or. 236, 238, 512 P.2d 1003[,  
1004] (1973). . . .

18 *Tubra v. Cooke*, 233 Or. App. 339, 349, 225 P.3d 862, 867 (2010).

19 Oregon law recognizes two privilege defenses to a defamation  
20 claim: a qualified privilege and an absolute privilege. An  
21 absolute privilege is a complete bar to a plaintiff's claim.  
22 However, absolute privilege applies only in a very narrow range of  
23 circumstances, none of which is present here. A qualified  
24 privilege, on the other hand, generally "exists to protect three  
25 kinds of statements: (1) those made to protect the defendant's  
26 interests; (2) those made to protect the plaintiff's employer's  
27 interests; or (3) those made on a subject of mutual concern to the  
28 defendant and the persons to whom the statement was made." *DeLong*

1 v. *Yu Enterprises, Inc.*, 334 Or. 166, 170, 47 P.3d 8, 10 (2002)  
2 (citing *Wallulis v. Dymowski*, 323 Or. 337, 350, 918 P.2d 755, 762  
3 (1996), in turn citing *Wattenburg v. United Medical Lab.*, 269 Or.  
4 377, 380, 525 P.2d 113, 114 (1974)). To overcome a qualified  
5 privilege, a plaintiff must “prove that a defendant acted with  
6 actual malice[.]” *Christianson v. State*, 239 Or. App. 451, 459,  
7 244 P.3d 904, 908 (2010) (quoting *DeLong*, 334 Or. at 170, 47 P.3d  
8 at 10). “It must be borne in mind . . . that it is for the court,  
9 and not the jury, to decide where the line is to be drawn between  
10 a protected and an unprotected defamatory publication.” *Post v.*  
11 *Oregonian Pub. Co.*, 268 Or. 214, 222, 519 P.2d 1258, 1261 (1974).

12 The court begins with a determination as to whether Gordon’s  
13 allegations potentially state a claim for defamation. Gordon  
14 claims that after his termination, Kleinfelder’s employees  
15 “informed David McLain [sic] at EverPower that [Gordon] had been  
16 terminated for cause and had been arrested for stealing from  
17 Kleinfelder . . . [and] that [he] was not competent to perform the  
18 duties and responsibilities of [his] position as an engineer[.]”  
19 Gordon Decl. ¶¶ 11, 13. Gordon claims these statements were false,  
20 Kleinfelder knew they were false, and the statements engendered a  
21 negative image of him that prevented him from finding suitable  
22 employment. In his reply brief, Gordon characterizes his defama-  
23 tion claim differently, asserting that the basis of the claim “is  
24 the false statements by [Kleinfelder] that [Gordon] had been  
25 discharged for cause, imputing both an unfitness for his profession  
26 and lack of integrity in the discharge of [his] employment and an  
27 inability or incompetency to pursue his trade or profession as a  
28 civil engineer, together with the indication that [Gordon] had

1 removed information from the Kleinfelder offices relating to the  
2 Everpower project, implying the commission of a theft." Dkt. #40,  
3 p. 2.

4 Thus, we have two allegedly defamatory statements: (1) that  
5 Gordon was terminated for cause, and (2) that he removed, impliedly  
6 or expressly without authorization, information from Kleinfelder's  
7 offices relating to the EverPower project. Both of these alleged  
8 statements are enmeshed with factual disputes. With regard to the  
9 first, Gordon claims he was terminated due to a reduction in force,  
10 pointing to the form he was given that lists reduction in force as  
11 the reason for his termination. Kleinfelder claims Gordon was  
12 terminated for cause, pointing to the termination forms that cite  
13 performance-related reasons for the termination. The determination  
14 as to why Gordon actually was fired depends largely on the credi-  
15 bility of the witnesses - a determination distinctly within the  
16 jury's purview.

17 However, Kleinfelder argues even if it communicated to  
18 EverPower that Gordon had been fired for cause, Gordon's defamation  
19 claim fails for several reasons. First, Kleinfelder claims such a  
20 representation would have been true, because Gordon was fired for  
21 cause. As noted above, the reason for Gordon's termination is a  
22 disputed question of fact that precludes summary judgment on that  
23 basis. Kleinfelder also argues such a representation, if made, was  
24 privileged as a matter of law. Oregon law "clearly recognizes that  
25 a former employer has a qualified privilege to make defamatory  
26 communication about the character or conduct of his employees to  
27 present or prospective employers." *Walsh v. Consolidated Freight-*  
28 *ways, Inc.*, 278 Or. 347, 355, 563 P.2d 1205, 1210 (1977) (citing,

1 *inter alia*, 3 Restatement of Torts 247, § 595 & comment (h)). The  
2 court finds that here, Kleinfelder's statements to EverPower - its  
3 existing client on whose project Gordon had been working prior to  
4 his termination - regarding the reason for Gordon's termination  
5 were privileged. The burden of proving Kleinfelder abused the  
6 qualified privilege rests upon Gordon. See *Walsh*, 278 Or. at 356,  
7 563 P.2d at 1211. To do so, Gordon must prove Kleinfelder acted  
8 with malice. *Christianson, supra*.

9 The qualified privilege of a former employer to defame a  
10 former employee regarding the employee's character or conduct is a  
11 shield that protects an employer from *good faith communications* to  
12 a present or prospective employer; it is not a sword that allows  
13 the former employer to knowingly lie. If the jury believes Gordon  
14 was discharged due to a reduction in force, rather than for cause,  
15 then the jury could conclude Loftis knowingly lied to McClain for  
16 the purpose of damaging Gordon's reputation. Thus, the question of  
17 malice also is fraught with factual disputes, precluding summary  
18 judgment for Kleinfelder on Gordon's defamation claim.

19 As for the statement that Gordon had removed information from  
20 Kleinfelder's offices relating to the EverPower Project, the  
21 evidence indicates Loftis, Kleinfelder's Vice President and Global  
22 Director of Renewable Energy, contacted McClain at EverPower to  
23 tell him Gordon had been terminated. Loftis Decl. ¶ 8; McClain  
24 Decl. ¶ 5. According to McClain, Loftis told him that he might be  
25 contacted by the police because Gordon had removed information  
26 relating to the EverPower Project from Kleinfelder's offices. *Id.*  
27 McClain responded that he already had been contacted by Gordon, who  
28 stated he was no longer working at Kleinfelder, but he was avail-

1 able to work directly for EverPower to finish the EverPower  
2 Project. Loftis Decl. ¶ 9; McClain Decl. ¶ 5. Gordon told McClain  
3 he had notes that would assist EverPower in completing the project,  
4 and McClain told Gordon to return whatever EverPower information he  
5 had to Kleinfelder. McClain Decl. ¶ 4.

6       As with Loftis's statement regarding the reason for Gordon's  
7 termination, Loftis was passing along information to its client,  
8 EverPower, that was on a subject of mutual concern to EverPower and  
9 Kleinfelder. The statement, therefore, could be privileged - if it  
10 was not made maliciously. Regardless of the reason for Gordon's  
11 termination, what was the motivation for telling McClain that  
12 Gordon had stolen documents? It is disputed that Gordon took  
13 anything of value from Kleinfelder's offices. With regard to the  
14 field notes, the current record raises the issue of whether  
15 Kleinfelder had abandoned any claim to them, or at least had  
16 forgotten about them until this litigation was underway. Even  
17 after McClain told Loftis that Gordon had offered to give EverPower  
18 the field notes, no one from Kleinfelder contacted Gordon to  
19 request the field notes until they were requested during discovery  
20 in this case. On these facts, a jury could conclude that  
21 Kleinfelder's only motivation for telling McClain that Gordon had  
22 stolen documents from Kleinfelder was malicious, intended to damage  
23 Gordon's reputation and chill his attempts to gain employment. Too  
24 many material factual issues exist to prevent the jury from  
25 deciding this claim. Thus, Kleinfelder's motion for summary  
26 judgment is **denied** with regard to Gordon's defamation claim, as  
27 that claim relates to Kleinfelder's statements that Gordon was  
28 fired "for cause," and that Gordon had taken information relating

1 to the EverPower Project from Kleinfelder's offices and EverPower  
2 might be contacted by the police.

3 Gordon makes another assertion of defamation in connection  
4 with Kleinfelder's police report alleging Gordon had stolen a  
5 project map with a value of \$3,200. Significant factual questions  
6 exist regarding what Gordon actually took with him, its value, and  
7 Kleinfelder's motivation for filing the police report. Resolution  
8 of these questions will affect the jury's decision as to whether  
9 Izen acted maliciously in filing the police report. See *DeLong*,  
10 334 Or. at 173-74, 47 P.3d at 12 (citizens' statements to police  
11 officers generally are subject to a qualified privilege, receiving  
12 "protection only if they were made in good faith, to discourage an  
13 abuse of the privilege"; citing Van Vechten Veeder, *Absolute*  
14 *Immunity in Defamation*, 9 Colum. L. Rev. 463, 480 (1909)).  
15 Therefore, Kleinfelder's motion for summary judgment on Gordon's  
16 defamation claim with regard to the police report is **denied**.

17 Turning to Kleinfelder's claim for defamation, the company  
18 alleges that subsequent to his termination, Gordon "falsely  
19 informed Everpower that Kleinfelder had been overcharging Everpower  
20 for work." Dkt. #23, p. 8, ¶ 9. In Gordon's deposition, he  
21 testified he "explained to David McClain that . . . Kleinfelder was  
22 planning on trying to overcharge them for work that was already  
23 included in the scope. . . ." Dkt. #43-1, p. 16 (Gordon Depo.  
24 p. 299). He also told McClain that Kleinfelder was "planning on  
25 charging [EverPower] for stuff, for items that are already included  
26 in the budget and [he] told them they had burned the budget by  
27 bringing in Paul Fisher." *Id.*, p. 17 (Gordon Depo. p. 300).  
28 Gordon told EverPower that Kleinfelder had "burned the budget," and

1 was "looking to charge EverPower more money" for work that had  
2 already been paid for. *Id.*, p. 19 (Gordon Depo. p. 306).

3 Gordon argues these statements were true. "It is axiomatic  
4 that 'truth' is a complete defense in a defamation case." *Bahr v.*  
5 *Statesman Journal Co.*, 51 Or. App. 177, 180, 624 P.2d 664, 666  
6 (1981). Kleinfelder disputes the truth of Gordon's statements.  
7 However, neither party has offered any evidence beyond these bald  
8 assertions on this issue. As a result, the current record is  
9 insufficient for the court to grant or deny summary judgment on  
10 this issue, and Gordon's motion for summary judgment on  
11 Kleinfelder's Fourth Counterclaim is **denied**.

#### 12 13 **MALICIOUS PROSECUTION**

14 The elements of a malicious prosecution claim under Oregon law  
15 are as follows:

16 "(1) the institution or continuation of the  
17 original criminal proceedings; (2) by or at  
18 the insistence of the defendant; (3) termina-  
19 tion of such proceedings in the plaintiff's  
20 favor; (4) malice in instituting the pro-  
ceedings; (5) lack of probable cause for the  
proceeding; and (6) injury or damage because  
of the prosecution."

21 *Blandino v. Fischel*, 179 Or. App. 185, 191, 39 P.3d 258, 261 (2002)  
22 (quoting *Rose (Betty) v. Whitbeck*, 277 Or. 791, 795, 562 P.2d 188,  
23 190, *mod. on other grounds* 278 Or. 463, 564 P.2d 671 (1977)).

24 Thus, to prevail on his claim for malicious prosecution,  
25 Gordon must prove: (1) Kleinfelder instituted a criminal proceeding  
26 against him; (2) the proceeding terminated in Gordon's favor; (3)  
27 Kleinfelder did not have probable cause to institute the  
28 proceeding; and (4) Kleinfelder "acted with malice; *i.e.*, a primary

1 purpose other than that of bringing [Gordon] to justice." *Ledford*  
2 *v. Gutoski*, 121 Or. App. 226, 230, 855 P.2d 196, 198 (1993) (citing  
3 *Rogers v. Hill*, 281 Or. 491, 497, 576 P.2d 328, 331-32 (1978);  
4 *Fleet v. May Dept. Stores, Inc.*, 262 Or. 592, 601, 500 P.2d 1054,  
5 1059 (1972)).

6 "In the context of a malicious prosecution claim, 'probable  
7 cause' refers to the subjective and objectively reasonable belief  
8 that the defendant committed a crime." *Blandino*, 179 Or. App. at  
9 191, 39 P.3d at 261 (citation omitted). The question of whether  
10 Kleinfelder had probable cause to institute criminal proceedings  
11 against Gordon is one of law. *Fleet v. May Dept. Stores, Inc.*, 262  
12 Or. 592, 601, 500 P.2d 1054, 1059 (1972) (citations omitted).  
13 However, "[w]here the facts under which the defendant acted are in  
14 dispute, it is the function of the jury, not the court, to resolve  
15 the dispute." *Id.* With regard to the question of malice, if the  
16 facts surrounding the probable cause issue are in dispute, the jury  
17 is entitled to consider whether the defendant's conduct was  
18 malicious. *Id.* *Cf. Gustafson v. Payless Drug Stores Northwest,*  
19 *Inc.*, 269 Or. 354, 356-59, 525 P.2d 118, 120-21 (1974) (observing  
20 "that instructing on the issue of probable cause is very difficult  
21 when the jury can find a number of different fact combinations,"  
22 and discussing possible procedures for trial).

23 Here, the facts are in dispute. Gordon claims Kleinfelder  
24 knew he had taken nothing of value and no proprietary information.  
25 Kleinfelder claims Izen believed Gordon had taken a proprietary  
26 project map that would cost over \$3,200 to recreate, and he  
27 therefore had probable cause to file the police report. The jury  
28 must resolve the factual dispute before the court can make a

1 determination as to probable cause. Therefore, both parties'  
2 motions for summary judgment on Gordon's malicious prosecution  
3 claim are **denied**.

4  
5 **FALSE IMPRISONMENT**

6 Gordon claims Kleinfelder caused his false imprisonment on two  
7 separate occasions. The first occurred when Stroud allegedly  
8 prevented Gordon from leaving his former office. The second  
9 occurred when Gordon was arrested "based on incomplete and  
10 inaccurate information intentionally supplied to the Beaverton  
11 Police Department" by Kleinfelder. Dkt. #40, p. 8.

12 The Restatement (Second) of Torts, upon which the Oregon  
13 Supreme Court has relied in false imprisonment cases, see, e.g.,  
14 *Pearson v. Galvin*, 253 Or. 331, 454 P.2d 638 (1969), provides: "An  
15 actor is subject to liability to another for false imprisonment if  
16 (1) he acts intending to confine the other or a third person within  
17 boundaries fixed by the actor, and (b) his act directly or  
18 indirectly results in such a confinement of the other, and (c) the  
19 other is conscious of the confinement or is harmed by it."  
20 Restatement (Second) Torts § 35. The defendant must actually  
21 confine the plaintiff, unlawfully restraining the plaintiff against  
22 his will. *Stone v. Finnerty*, 182 Or. App. 452, 458, 50 P.3d 1179,  
23 1184 (2002) (citations omitted). However, no particular length of  
24 time is required to constitute false imprisonment; "[t]he restraint  
25 need not be for more than a brief time." *Lukas v. J.C. Penney Co.*,  
26 233 Or. 345, 353, 378 P.2d 717, 720 (1963) (citing Restatement  
27 (Torts) § 35).

1 Taking Gordon's allegations as true for purposes of  
2 Kleinfelder's summary judgment motion, Gordon has stated a claim  
3 for false imprisonment in connection with Stroud's alleged actions  
4 in preventing Gordon from leaving his former office. It is for the  
5 jury to determine which version of the events - Gordon's or  
6 Stroud's - to believe. See, e.g., *State v. Hyde*, 28 Or. App. 809,  
7 813, 561 P.2d 659, 662 (1977) ("[I]t is for the jury, not the  
8 court, to resolve conflicting evidence."); see also, e.g., *State v.*  
9 *Guy*, 229 Or. App. 611, 616, 212 P.3d 1265, 1268 (2009) ("It is well  
10 established in Oregon that the determination of a witness's  
11 credibility is the sole province of the trier of fact.") (citations  
12 omitted). Kleinfelder's motion for summary judgment is, therefore,  
13 **denied** as to Gordon's false imprisonment claim as it relates to the  
14 events that occurred in Gordon's former office.

15 Considering Gordon's claim relating to his arrest, the  
16 Restatement provides, "One who instigates or participates in the  
17 unlawful confinement of another is subject to liability to the  
18 other for false imprisonment." Restatement (Second) Torts § 45A.

19 In *Pearson*, the court considered what is necessary to make out  
20 a substantive case of "instigation." The court relied on a comment  
21 to Restatement § 45A, which provides, in pertinent part, as  
22 follows:

23 "Instigation consists of words or acts which  
24 direct, request, invite or encourage the false  
25 imprisonment itself. In the case of an  
26 arrest, it is the equivalent, in words or  
27 conduct, of "Officer, arrest that man!" It is  
28 not enough for instigation that the actor has  
given information to the police about the  
commission of a crime, or has accused the  
other of committing it, so long as he leaves  
to the police the decision as to what shall be

1 done about any arrest, without persuading or  
2 influencing them.”

3 *Pearson*, 253 Or. at 335, 454 P.2d at 640 (quoting Restatement  
4 (Second) Torts § 45A, comment c). Thus, to prevail on his claim  
5 for false arrest, Gordon must show that Kleinfelder “participated  
6 by taking an active part in bringing about [his] arrest.” *Pearson*  
7 *v. Galvin*, 253 Or. 331, 337, 454 P.2d 638, 641 (1969).

8 Ordinarily, the filing of a police report alleging that a  
9 crime has been committed would not be enough to hold Kleinfelder  
10 liable for “instigating” Gordon’s arrest and subjecting him to  
11 false imprisonment. “Oregon follows the widely accepted principle  
12 that a person is not liable for false arrest if he or she merely  
13 lays facts before a law enforcement or judicial officer who makes  
14 the arrest on the basis of the officer’s own judgment and  
15 discretion.” *Harrell v. Costco*, No. 08-cv-3092-PA, 2010 WL  
16 331773, at \*6 (D. Or. Jan. 27, 2010) (Panner, J.) (quoting *Hiber v.*  
17 *Creditors Coll. Serv.*, 15 Or. App. 408, 418 n.13, 961 P.2d 898, 904  
18 n.13 (1998)).

19 However, if Kleinfelder acted maliciously, with some improper  
20 purpose or motive, then Kleinfelder would be liable for instigating  
21 Gordon’s arrest. See, e.g., *Brown v. Far West Fed. Sav. & Loan*  
22 *Ass’n*, 66 Or. App. 387, 393, 674 P.2d 1183, 1186 (1984) (“public  
23 policy will protect the victim of a crime who, **in good faith and**  
24 **without malice**, identifies another as the perpetrator of the crime,  
25 although that identification may, in fact, be mistaken.” Emphasis  
26 added.) (quoting *Shires v. Cobb*, 271 Or. 769, 772, 534 P.2d 188,  
27 189 (1975)); cf. *Hiber v. Creditors Coll. Serv. of Lincoln County,*  
28 *Inc.*, 154 Or. App. 408, 414-15, 961 P.2d 898, 902 (1998)



1 office computer, as well as his personal address book. Kleinfelder  
2 argues Gordon cannot show that the company acted with the intent to  
3 control his address book, and Gordon "had no right to control the  
4 data on his work computer, which indisputably belonged to  
5 Kleinfelder[.]" Dkt. #26, p. 20 (citing *Naas v. Lucas*, 86 Or. App.  
6 406, 409, 739 P.2d 1051, 1052 (1987) ("Bad faith is not required;  
7 the gravamen of the tort is the defendant's intent to exercise  
8 control over the chattel inconsistently with the plaintiff's  
9 rights.")). Kleinfelder asserts it has not been able to locate  
10 Gordon's address book, and all of Gordon's personal property that  
11 was located on Kleinfelder's premises was boxed up and given to the  
12 Beaverton Police for delivery to Gordon. With regard to the  
13 computer files at issue, Kleinfelder argues Gordon never owned  
14 those files, which constituted work product created for  
15 Kleinfelder's use. Kleinfelder points to its "computer policy,  
16 which was given to [Gordon] as part of his hire packet," in arguing  
17 none of the data on Gordon's computer belonged to him. See Dkt.  
18 #26, p. 21 (citing Dkt. #27-1, p. 77 - Ex. 21 to Gordon's Depo).

19 The company policy to which Kleinfelder refers is entitled  
20 "Use of Kleinfelder Business Equipment and Communication Systems."  
21 In section 4.2, Use of Electronic Media, the policy states, in  
22 pertinent part:

23 Kleinfelder provides equipment and systems to  
24 all employees to assist in performance of  
25 their job. These systems include, but are not  
26 limited to telephone, fax, e-mail, voice mail,  
27 computers, LAN/WAN, Internet access, Oracle,  
28 software, printers, and copiers. These  
systems are sole property of Kleinfelder, and  
access to them is provided for business  
purposes. . . . Employees have no privacy  
rights with regard to any information resident  
on Kleinfelder's computers and/or computer

1 networks. Kleinfelder reserves the right to  
2 access, intercept, review, and disclose the  
3 contents of all computer files and e-mail  
4 messages.

5 . . .  
6 1. All messages, data, pictures, text, etc.  
7 **composed upon, or sent on these systems are**  
8 **the property of Kleinfelder.** They are not the  
9 private property of any employee.

10 Dkt. #27-1, p. 77 (emphasis added).

11 Kleinfelder further asserts that because "all information  
12 found on the computer belonged to Kleinfelder, subsequent to  
13 [Gordon's] termination, Kleinfelder removed the information it  
14 needed from [the] computer and then, pursuant to company policy,  
15 reformatted the computer to be used by another employee. Any  
16 information left on the work computer would have been erased."

17 Dkt. #26, p. 21 n.8 (citing Dkt. #Dkt. #29, Izen Decl. ¶ 23).

18 Further, Izen states that he instructed Kleinfelder's IT department  
19 "to work with Gordon in retrieving his personal files from his work  
20 computer, and [he] remember[s] that the IT department burned  
21 Gordon's personal files onto a DVD for him." Dkt. #29, ¶ 23. Izen  
22 asserts Kleinfelder did not intentionally keep any of Gordon's  
23 personal computer files. *Id.*

24 The "Use of Electronic Media" clause refers to information  
25 "composed upon, or sent on" Kleinfelder's systems; the policy is  
26 silent on the issue of an employee's personal computer files that  
27 are stored on the company's computers. Gordon claims his  
28 supervisor at the time he was hired asked him to download his  
29 portfolio of CAD files onto the "D" drive of his work computer; he  
30 complied; and those files have never been returned to him. He  
31 further maintains that he left a personal address book in his

1 office, and Kleinfelder has refused to return the book to him.  
2 Like many of the other issues in this case, resolution of this  
3 claim comes down to a determination of whose version of the facts  
4 is to be believed. Gordon has offered evidence sufficient to  
5 create a genuine issue of fact for trial. The parties' motions for  
6 summary judgment are **denied** as to Gordon's conversion claim.

7 As for Kleinfelder's conversion counterclaim, Kleinfelder  
8 claims Gordon converted its proprietary information for his own  
9 purposes, including the project map Kleinfelder has accused Gordon  
10 of stealing, and the field notes and GPS data in Gordon's  
11 possession at the time of his termination. Gordon has offered  
12 evidence to refute Kleinfelder's claim, including evidence that he  
13 tendered the field notes to Kleinfelder both informally and by  
14 letter from his attorney, and his repeated assertions that the  
15 portion of a map he took from his former office contained no  
16 proprietary data and had no intrinsic value. Indeed, in Gordon's  
17 declaration, he identifies Dkt. #54-1, p. 33 (Gordon Depo. Ex. 14)  
18 as that map. Kleinfelder has not identified any proprietary  
19 information on that document, but seems to question whether the  
20 exhibit is, in fact, what Gordon took with him. Again, the court  
21 is faced with varying issues of material fact that must be decided  
22 by the jury at trial. Gordon's motion for summary judgment on  
23 Kleinfelder's conversion counterclaim claim is **denied**.

24  
25 ***INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS***

26 Gordon alleges that the actions of three Kleinfelder employees  
27 - Amie Weitz, Kellie Stratton, and Abe Izen - created a hostile  
28 work environment that intentionally inflicted emotional distress on

1 Gordon, rendering him "sick, sore, nervous and upset," and  
2 "interfer[ing] with his ability to seek and maintain gainful  
3 employment[.]" Dkt. #1-1, ¶ 13; Dkt. #27-1, p. 16 (Gordon Depo,  
4 p. 242). Regarding Weitz, Gordon testified that "she stormed  
5 through the office trying to get people to say things about [him],  
6 trying to get people to turn against [him]. It was her mission."  
7 Dkt. #27-1, pp. 16-17 (Gordon Depo. pp. 242-43). He stated Weitz  
8 was extremely rude to him, and she instigated arguments "at every  
9 opportunity." *Id.*, p. 17 (Gordon Depo. p. 243). She had "gossipy  
10 type conversations with other employees," which he found "very  
11 upsetting." *Id.*, p. 18 (Gordon Depo. p. 244).

12 Gordon claims Izen demeaned him and made sexually-based  
13 comments to him that were overheard by others. He claims Izen made  
14 statements about taking Gordon's "man card" on several occasions,  
15 he called Gordon a "pussy" in front of other employees, and he  
16 talked to Gordon like he was a five-year-old. See *id.*, pp. 21-25  
17 (Gordon Depo. pp. 261-63, 267, 281).

18 No testimony was elicited from Gordon during his deposition to  
19 elaborate on his claim that Stratton contributed to the hostile  
20 work environment.

21 In *Mayorga v. Costco Wholesale Corp.*, the Ninth Circuit Court  
22 of Appeals, applying Oregon law, observed:

23 To succeed on a claim for intentional infliction of emotional distress, a plaintiff must  
24 prove: "(1) the defendant intended to inflict  
25 severe emotional distress on the plaintiff,  
26 (2) the defendant's acts were the cause of the  
27 plaintiff's severe emotional distress, and (3)  
28 the defendant's acts constituted an extraordinary transgression of the bounds of  
socially tolerable conduct." *McGanty v. Staudenraus*, 321 Or. 532, 901 P.2d 841, 849

1 (1995) (internal quotation marks and citation  
2 omitted).

3 *Mayorga*, 302 F. App'x 748, 749 (9th Cir. 2008); accord *Grimmett v.*  
4 *Knife River Corp.-Northwest*, No. CV-10-241, slip op., 2011 WL  
5 841149 (D. Or. Mar. 8, 2011) (Hubel, MJ); see *House v. Hicks*, 218  
6 Or. App. 348, 357-58, 179 P.3d 730, 736 (2008) (IIED plaintiff must  
7 prove defendants "intended to cause plaintiff severe emotional  
8 distress or knew with substantial certainty that their conduct  
9 would cause such distress"; their conduct was "outrageous . . .  
10 i.e., conduct extraordinarily beyond the bounds of socially  
11 tolerable behavior"; and their "conduct in fact caused plaintiff  
12 severe emotional distress") (citing *McGanty v. Staudenraus*, 321 Or.  
13 532, 543, 550, 901 P.2d 841 (1995)). "'A trial court plays a  
14 gatekeeper role in evaluating the viability of an IIED claim by  
15 assessing the allegedly tortious conduct to determine whether it  
16 goes beyond the farthest reaches of socially tolerable behavior and  
17 creates a jury question on liability.'" *Ballard v. Tri-County*  
18 *Metro. Transp. Dist. of Oregon*, No. 09-873, slip op., 2011 WL  
19 1337090 (D. Or. Apr. 7, 2011) (Papak, MJ) (quoting *House*, 218 Or.  
20 App. at 358, 179 P.3d at 736; and citing *Pakos v. Clark*, 253 Or.  
21 113, 453 P.2d 682, 691 (1969) ("It was for the trial court to  
22 determine, in the first instance, whether the defendants' conduct  
23 may reasonably be regarded as so extreme and outrageous as to  
24 permit recovery.'").

25 For conduct to be sufficiently "extreme and outrageous" to  
26 support a claim for IIED, the conduct must be "'so outrageous in  
27 character, and so extreme in degree, as to go beyond all possible  
28 bounds of decency, and to be regarded as atrocious, and utterly

1 intolerable in a civilized community.'" *House*, 218 Or. App. at  
2 358-60, 179 P.3d at 737-39 (quoting *Restatement (Second) of Torts*,  
3 § 46, comment d). The determination of whether conduct rises to  
4 this level "is a fact-specific inquiry, to be considered on a case-  
5 by-case basis, based on the totality of the circumstances." *Id.*  
6 However, although the inquiry is fact-specific, the question of  
7 whether the defendant's conduct exceeded "the farthest reaches of  
8 socially tolerable behavior" is, initially, "a question of law."  
9 *Houston v. County of Wash.*, 2008 WL 474380, at \*15 (D. Or. Feb. 19,  
10 2008) (citation omitted).

11 On summary judgment, then, the court must assess whether, if  
12 Kleinfelder's conduct as alleged by Gordon is proven at trial, that  
13 conduct is sufficiently beyond the pale to state an IIED claim.  
14 The court finds it is not. Taking Gordon's allegations as true,  
15 the conduct of Kleinfelder's employees, while objectionable and  
16 likely upsetting, did not rise to the level of the "extreme and  
17 outrageous" conduct required to sustain an IIED claim. As I have  
18 observed on previous occasions:

19 Conduct that is merely "rude, boorish,  
20 tyrannical, churlish, and mean" does not  
21 support an IIED claim. *Patton v. J.C. Penney*  
22 *Co.*, 301 Or. 117, 124, 719 P.2d 854, 858  
23 (1986). "[T]he tort does not provide recovery  
24 for the kind of temporary annoyance or injured  
25 feelings that can result from friction and  
26 rudeness among people in day-to-day life even  
27 when the intentional conduct causing plain-  
28 tiff's distress otherwise qualifies for liabi-  
lity." *Hall v. The May Dep't Stores Co.*, 292  
Or. 131, 135, 637 P.2d 126, 129 (1981); see  
also *Watte v. Maeyens*, 112 Or. App. 234, 237,  
828 P.2d 479, 480-81 (1992) (no claim where  
employer threw a tantrum, screamed and yelled  
at his employees, accused them of being liars  
and saboteurs, then fired them all); *Madani v.*  
*Kendall Ford, Inc.*, 312 Or. 198, 205-06, 818

1 P.2d 930, 934 (1991) (no claim where employee  
2 terminated for refusing to pull down pants).

3 *Wolf v. Ron Wilson Center for Effective Living, Inc.*, slip op.,  
4 2010 WL 4638888, at \*5 (D. Or. Nov. 8, 2010).

5 Kleinfelder's motion for summary judgment on this claim is  
6 **granted.**

7  
8 **BREACH OF CONTRACT**

9 Gordon moves for summary judgment on Kleinfelder's counter-  
10 claim for breach of contract. Kleinfelder claims Gordon breached  
11 the company's Confidentiality and Non-Solicitation Agreement (the  
12 "Agreement") by retaining Kleinfelder's confidential information  
13 for his benefit or in a manner adverse to Kleinfelder's interests,  
14 and by disparaging Kleinfelder and its employees. See Dkt. #3,  
15 p. 9, ¶¶ 14-17; see Dkt. #43-1, pp. 60-63 (Gordon Depo. Ex. 4,  
16 "Employee Covenants Agreement, Confidentiality and Non-Solicita-  
17 tion"). In Gordon's motion for summary judgment on this claim, he  
18 states only that his "Affidavit establishes that he made no such  
19 breach, and [Kleinfelder] cannot contradict that assertion." Dkt.  
20 #24-1, p. 5.

21 Gordon signed an "Employee Covenants Agreement - Confiden-  
22 tiality and Non-solicitation" on April 15, 2008. Dkt. #43-1, pp.  
23 60-63 (the "Agreement"). The "Confidentiality" covenants are  
24 applicable to the period of time an employee is working for  
25 Kleinfelder, and for two years thereafter. The covenants require  
26 employees to use "Confidential Information" only in the course of  
27 performing their duties for Kleinfelder, and not for their  
28 "personal benefit, for the benefit of any other third party, or in

1 any manner adverse to the interests of [Kleinfelder], its clients  
2 or its or their affiliates[.]” *Id.*, ¶ 1(a). Employees also are  
3 required to “return all materials containing or relating to  
4 Confidential Information to [Kleinfelder] when his/her employment  
5 relationship with [Kleinfelder] terminates or otherwise upon  
6 demand.” *Id.*, ¶ 1(b). This includes not retaining copies of  
7 “correspondence, memoranda, reports, notebooks, drawings, photo-  
8 graphs, databases, diskettes, or other documents or electronically  
9 stored information of any kind relating in any way to the business,  
10 potential business or affairs of [Kleinfelder], its clients or its  
11 or their respective affiliates.” *Id.* Exempted are copies of  
12 reports an employee is required to maintain as part of his/her  
13 “professional registration.” *Id.*

14 The Agreement defines “Confidential Information” as follows:

15 “Confidential Information” includes all  
16 trade secrets, know-how, technical, operating,  
17 financial, and other business information,  
18 specifically including but not limited to  
19 information regarding documentation, designs,  
20 inventions, improvements, methodology, con-  
21 cepts, records, files, memoranda, reports,  
22 plans, price lists, client and supplier infor-  
23 mation, product development and project pro-  
24 cedures. Confidential Information does not  
25 include general skills, experience or informa-  
26 tion that is generally available to the  
27 public, other than information that has become  
28 generally available as a result of Employee’s  
act or omission.

23 *Id.*, ¶ 1.

24 Factual issues similar to those discussed above in this  
25 opinion also exist regarding whether Gordon breached the confiden-  
26 tiality covenants. The parties dispute whether Gordon took any  
27 confidential information with him, or retained any confidential  
28

1 information without Kleinfelder's consent, whether actual or  
2 implied.

3       The "Non-Disparagement" section of the Agreement prohibits  
4 employees, "at any time (during or after Employee's employment with  
5 [Kleinfelder])," from disparaging "the reputation of [Kleinfelder],  
6 its clients and its or their respective officers, directors, agents  
7 or employees." *Id.* ¶ 4. Little discussion is required to resolve  
8 Gordon's motion for summary judgment on this clause of the  
9 Agreement. Kleinfelder has offered evidence that Gordon solicited  
10 employment from EverPower, and made statements to EverPower  
11 indicating Kleinfelder intended to overcharge EverPower for work.  
12 Kleinfelder further claims Gordon made disparaging comments to  
13 EverPower regarding Kleinfelder employee Paul Fisher. The parties  
14 dispute the exact content of Gordon's statements, and the intent  
15 and impact of those statements.

16       Taking Kleinfelder's allegations as true for purposes of  
17 Gordon's summary judgment motion, the court finds Kleinfelder has  
18 offered evidence sufficient to raise a genuine issue of fact for  
19 trial as to whether Gordon breached the Agreement. Gordon's motion  
20 for summary judgment on this claim is **denied**.

21  
22                                   **OREGON UNIFORM TRADE SECRETS ACT**

23       Gordon moves for summary judgment on Kleinfelder's counter-  
24 claim asserting a violation of the Oregon Uniform Trade Secrets  
25 Act, ORS § 646.461, *et seq.* Kleinfelder claims the project map  
26 Gordon allegedly took from his former office, and information  
27 Gordon disclosed to EverPower concerning Gordon's work on the  
28

1 EverPower Project, constituted trade secrets under the Act. Dkt.  
2 #23, p. 10, ¶¶ 19-23.

3       The Act defines a "trade secret" as "information, including a  
4 drawing, cost data, customer list, formula, pattern, compilation,  
5 program, device, method, technique or process that (a) [d]erives  
6 independent economic value, actual or potential, from not being  
7 generally known to the public or to other persons who can obtain  
8 economic value from its disclosure or use; and (b) [i]s the subject  
9 of efforts that are reasonable under the circumstances to maintain  
10 its secrecy." ORS § 646.461(4). Kleinfelder claims it "employed  
11 reasonable measures to maintain the secrecy of the information  
12 located on the project map and other trade secret information  
13 wrongfully disclosed by [Gordon], and expressly instructed [Gordon]  
14 not to remove the project map from [Kleinfelder's] offices." Dkt.  
15 #23, p. 10, ¶ 21.

16       As discussed previously in this order, the parties dispute  
17 whether Gordon misappropriated the project map or other informa-  
18 tion, as well as whether the document Gordon took with him had any  
19 "independent economic value." In addition, Gordon claims the  
20 document he took with him was a portion of a map that already had  
21 been recorded in the public record. If that is the case, then the  
22 document likely does not meet the definition of a "trade secret"  
23 under the Act. See ORS § 646.461(4) (a) ("'Trade secret' . . .  
24 [d]erives independent economic value, actual or potential, from not  
25 being generally known to the public. . . .").

26       The parties also dispute whether Gordon disclosed any infor-  
27 mation to EverPower about the work it paid Kleinfelder to perform  
28 that could be considered a trade secret. These factual questions

1 present genuine issues for trial. While Kleinfelder's eventual  
2 success on this claim is in doubt, I cannot say on this record how  
3 the issues will be resolved by the finder of fact. As a result,  
4 Gordon's motion for summary judgment on this counterclaim is  
5 **denied.**

6  
7 **CONCLUSION**

8 In summary, then, Kleinfelder's motion for summary judgment on  
9 Gordon's IIED claim is **granted**, and both parties' motions for  
10 summary judgment are **denied** as to all other claims and  
11 counterclaims.

12 IT IS SO ORDERED.

13 Dated this 5th day of March, 2012.

14 /s/ Dennis J. Hubel

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16 Dennis James Hubel  
17 Unites States Magistrate Judge  
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