DANNY HANNA	*	**NO. 2017-CA-0293**
VERSUS	*	
		COURT OF APPEAL
SHELL EXPLORATION AND PRODUCTION, INC., BRUNEL ENERGY, INC., CHARLES PERRILLIAT, MARK TIPTON, 123 INSURANCE COMPANY AND XYZ INSURANCE COMPANY	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2012-07799, DIVISION "C"
Honorable Sidney H. Cates, Judge
* * * * * *

Judge Regina Bartholomew-Woods
* * * * * *

(Court composed of Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins, Judge Regina Bartholomew-Woods)

LEDET, J., CONCURS IN THE RESULT
JENKINS, J., CONCURS IN THE RESULT

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AFFIRMED
December 6, 2017

Plaintiff, Danny Hanna ("Appellant" or "Mr. Hanna") appeals the January 3, 2017 judgment of the Orleans Parish Civil District Court granting a motion for summary judgment in favor of Defendants, Shell Exploration and Production Company ("SEPCO"), Shell International Exploration and Production, Inc. ("SIEP"), Mark Tipton, and Charles Perrilliat (collectively, "Appellees"). The judgment additionally dismissed Appellant's claims with prejudice, with each party to bear their own costs. For the reasons that follow, we affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant filed a petition in the Orleans Parish District Court on August 3, 2012. Therein, Appellant stated that he was recruited by Brunel Energy, Inc. ("Brunel"), to work for SIEP/SEPCO as a Cost Engineering Manager, beginning his employment in New Orleans on August 22, 2011. Appellant alleged that his direct supervisor at SIEP/SEPCO, Charles Perrilliat, falsified reports relative to the funding of what was known as the "Cardamom" project, and asserted his obligation to report such "accounting irregularities" and "mis-estimates."

However, Appellant alleged that before he could report such conduct, Mr. Perrilliat entered Appellant's computer, without permission, to "falsify and change" Appellant's financial reports. Based upon this conduct, Appellant alleged several violations of Louisiana law by Mr. Perrilliat, as well as a violation of the contract between SIEP/SEPCO and Brunel. Ultimately, Appellant reported Mr. Perrilliat's conduct to Mr. Tipton, Mr. Perrilliat's direct supervisor at SIEP/SEPCO, alleging that Mr. Tipton took no action thereon. He also alleged to have taken his complaints regarding both Mr. Perrilliat and Mr. Tipton to Kurt Schallenburger, the Cardamom project manager, who took no action.

Based on the allegedly fraudulent and illegal conduct of Mr. Perrilliat and Tipton, Appellant claimed to have suffered a stress-induced cardiac event resulting in hospitalization, generating an unpaid workers' compensation claim. Appellant ultimately scheduled a meeting with SIEP/SEPCO's human resources department in Houston, Texas, for November 11, 2011, after his numerous complaints went ignored. However, Mr. Hanna asserted he was terminated en route to the meeting and threatened with arrest should he appear at the Houston corporate office. Appellant claimed he was wrongfully terminated due to his complaints of the activity described above, in violation of the Louisiana Whistleblower Act ("LWA"), La. R.S. 23:967.[1] Appellant's petition also alleged that he was wrongfully terminated, as provided in La. R.S. 23:1361,[2] as a result of making a

[1] This statute provides as follows:

> A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:
>
> (1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.

(2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of law.

(3) Objects to or refuses to participate in an employment act or practice that is in violation of law.

B. An employee may commence a civil action in a district court where the violation occurred against any employer who engages in a practice prohibited by Subsection A of this Section. If the court finds the provisions of Subsection A of this Section have been violated, the plaintiff may recover from the employer damages, reasonable attorney fees, and court costs.

C. For the purposes of this Section, the following terms shall have the definitions ascribed below:

(1) "Reprisal" includes firing, layoff, loss of benefits, or any discriminatory action the court finds was taken as a result of an action by the employee that is protected under Subsection A of this Section; however, nothing in this Section shall prohibit an employer from enforcing an established employment policy, procedure, or practice or exempt an employee from compliance with such.

(2) "Damages" include compensatory damages, back pay, benefits, reinstatement, reasonable attorney fees, and court costs resulting from the reprisal.

D. If suit or complaint is brought in bad faith or if it should be determined by a court that the employer's act or practice was not in violation of the law, the employer may be entitled to reasonable attorney fees and court costs from the employee.

[2] This statute provides as follows:

A. No person, firm or corporation shall refuse to employ any applicant for employment because of such applicant having asserted a claim for workers' compensation benefits under the provisions of this Chapter or under the law of any state or of the United States. Nothing in this Section shall require a person to employ an applicant who does not meet the qualifications of the position sought.

B. No person shall discharge an employee from employment because of said employee having asserted a claim for benefits under the provisions of this Chapter or under the law of any state or of the United States. Nothing in this Chapter shall prohibit an employer from discharging an employee who because of injury can no longer perform the duties of his employment.

C. Any person who has been denied employment or discharged from employment in violation of the provisions of this Section shall be entitled to recover from the employer or prospective employer who has violated the provisions of this Section a civil penalty which shall be the equivalent of the amount the employee would have earned but for the discrimination based upon the starting salary of the position sought or the earnings of the employee at the time of the discharge, as the case may be, but not more than one year's earnings, together with reasonable attorney's fees and court costs.

workers' compensation claim.

Appellant's petition further noted that he was born without a right hand and with a smaller right arm. He alleged he was terminated because of his disability in violation of the Louisiana Employment Discrimination Law ("LEDL"), La R.S. 23:301, *et seq.* He alleged that Mr. Perrilliat would call him names and ask for high fives "on an almost weekly basis[,]" in violation of La. R.S. 23:322, *et seq*, and La. Const. Art. 1, sections 3 and 12. Hence, Appellant alleged intentional infliction of emotional distress and intentional infliction of assault.

Lastly, Appellant alleged he had been "black balled" in the industry as a result of his alleged wrongful termination, and reporting thereof to third parties by Appellees, which caused ongoing and future lost wages and suffering.

On October 4, 2016, Appellees filed a motion for summary judgment,[3] accusing Appellant of using an "everything but the kitchen sink" approach; that is, alleging numerous claims in his petition, all or most known to be meritless, hoping that at least one would result in some sort of relief.

Appellees first argued that Appellant's LWA and LEDL claims should fail because neither SIEP nor SEPCO employed Appellant.[4] In support, Appellees cited

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> D. The rights and remedies granted by this Section shall not limit or in any way affect any rights and remedies that may be available under the provisions of any other state or federal law.
>
> E. Any party found by a workers' compensation judge or a court of competent jurisdiction to have brought a frivolous claim under this Section shall be held responsible for reasonable damages incurred as a result of this claim, including reasonable attorney's fees and court costs.

[3] Brunel was not among the Defendants that moved for summary judgment.

[4] Appellees noted in their motion that although SEPCO was originally improperly named as the Shell defendant, Appellant later amended his petition to include SIEP as a defendant, but refused to dismiss SEPCO. Appellants submit that Mr. Tipton and Mr. Perilliat were employed by SIEP

the definition of "employer" in La. R.S. 23:302, and submitted that because SIEP did not provide Appellant's compensation, SIEP did not qualify as Mr. Hanna's "employer." Appellees additionally cited jurisprudence from the Louisiana Supreme Court and this Court indicating that in making such a determination, the courts may look to the entity paying the employee's wages, the entity withholding taxes, whether the employee's name appears on the entity's payroll, and whether the employee participates in the entity's benefits plans. Relying thereon, Appellees note that Brunel, not SIEP, paid Appellant's wages; Appellant participated in Brunel's benefits plans, not SIEP's; Brunel, not SIEP, withheld his taxes; and that Appellant did not appear on SIEP's payroll.

Alternatively, Appellees argued that Appellant failed to prove that SIEP, in fact, violated Louisiana state law through Mr. Perrilliat's conduct, as required by the LWA. That Appellant reasonably believed Mr. Perrilliat to have violated state law is not enough; instead, Appellees argued, Appellant was required to prove an actual violation of state law. Appellees noted Appellant's inability to identify any violation of state law based on Mr. Perrilliat's act of changing calculations on monthly reports using Appellant's computer. Appellees highlighted Appellant's inability to identify any such law in his deposition testimony. Furthermore, Appellees argued Appellant failed to report to anyone that he thought Mr. Perrilliat's conduct was illegal.

Appellees further argued that Appellant failed to show a violation of the LWA based on a "threat" made by Mr. Perrilliat. Specifically, Mr. Perrilliat allegedly commented to two other employees, "It's a crazy day. I could just shoot

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at all times relevant to this litigation, and that SIEP entered into the contract with Brunel for Mr. Hanna's services.

somebody." According to Appellees, neither of these other employees testified that they took the comment seriously. Furthermore, Appellants noted there was no evidence that Mr. Perrilliat attempted to carry out this "threat," and that, in any event, the law requires a violation by SIEP as the employer.

Appellees next pointed to Appellant's deposition testimony to show that even Mr. Hanna did not attribute his termination to his disability. They also argued that SIEP was not a party to Appellant's employment services agreement, and, therefore, SIEP could not be held liable for a breach thereof. In a related vein, Appellees argued that the existence of a contract between SIEP and Brunel did not create privity of contract between Appellant and SIEP.

Appellees next attacked Appellant's allegation of intentional interference with his contract of employment with Brunel, arguing Appellant's status as an "at-will" employee fatally undercut his claim. They further noted that SIEP is not a "corporate officer" of Brunel, a necessary predicate to his claim, as established by Louisiana Supreme Court jurisprudence. Additionally, Appellees argued Appellant's contract did not have a fixed-term, eliminating any claim that he had a "legally protected interest" in continued employment.

Lastly, Appellees argued that Appellant's claims of intentional infliction of emotional distress ("IIED") and defamation failed. As to the IIED claim, Appellees argue the conduct in question did not arise to "extreme or outrageous conduct" as that term has been developed and understood in Louisiana jurisprudence. As for the defamation claim, Appellees assert that Appellant relies on nothing more than speculation that Mr. Perrilliat or Mr. Tipton provided negative references to potential employers, despite the jurisprudential requirement that such a claim be demonstrated with "convincing clarity."

Appellant first responded in opposition to the motion by suggesting Appellees used an incorrect definition of "employer," arguing that Appellees' use of a definition from Chapter 3 of Title 23 of the Louisiana Revised Statutes was inappropriate. In any event, Appellant noted that "the source of the funds" used to pay him "was at all times Defendant Shell[,]"[5] as SIEP paid Brunel's invoices. Appellant further noted that Brunel and SIEP had entered into a long term contractual relationship for professional services, and that at all relevant times he "worked at Shell."

Appellant next argued that Mr. Perrilliat's use of his computer violated Shell policy. Further, Appellant argued such conduct violated La. R.S. 14:70 relative to false accounting, La. R.S. 14:73.5 relative to computer fraud, and La. R.S. 14:73.7 relative to computer tampering.

Appellant also suggested a genuine issue of material fact existed as to whether Mr. Perrilliat made a workplace threat when he "threatened to shoot every employee at Shell[.]"

Appellant also addressed Appellees' claim that there existed no genuine issue of material fact as to his termination based on his disability. Appellant referred the court to his deposition testimony in which he testified that he believed his "complaints about disability discrimination were a motivating factor in his termination." He further submitted his IIED claim was meritorious based on his emergency room visit during his time working under Mr. Perrilliat, which his doctor attributed to the stressful working environment created by Mr. Perrilliat.

Appellant also disputed the contention that his contract was an "at-will" agreement. He argued that he expected to be on the job for four years, and would

[5] At times, Appellant referred to SIEP/SEPCO as "Shell" in his petition.

have so remained had he not been wrongfully terminated. He therefore submitted Mr. Tipton's termination of him interfered with that contract between Brunel and Shell for Appellant's services. Lastly, Appellant noted that he has lost recent employment after a "check" of references. Appellant therefore "attributes his inability to find work to Shell reporting [his] wrongful termination" based on an incorrect recitation of the facts regarding his conduct and resulting termination.

After conducting a hearing, the district court rendered judgment on January 3, 2017, granting Appellees' motion and dismissing all claims against them with prejudice. The district court also provided "Reasons for Judgment." Therein, the district court first noted it need not decide the question of the employment relationship between SIEP/SEPCO and Mr. Hanna, "because even if Mr. Hanna was Shell's employee, plaintiff's claims against the Shell defendants, based on some form of employment discrimination, would still fail." Turning next to Appellant's whistleblower claim, the district court noted that Appellant must first "prove that the employer committed an actual violation of state law." The court found that Appellant presented "no evidence" of the violation of any state law or that he was terminated for reporting such violations. It similarly found "no evidence" that Mr. Perrilliat's "inappropriately strange comments" amounted to "actual violations of state law." As for Appellant's employment discrimination claim, the district court again found "no evidence" that his termination was due to his physical disability. Next, the district court ruled Appellant had no claim for breach of contract or intentional interference with contract, finding "[n]o contract existed between Mr. Hanna and any Shell defendant." It further found that Appellant's contract with Brunel was an "at will" contract that could be terminated at any time, vitiating any claim that Appellant should have expected employment

for a specific term of years. The district court also found Appellant's claim of intentional infliction of emotional distress unconvincing, finding the conduct of Mr. Perrilliat and Mr. Tipton was not so extreme or outrageous as to support his claims. Lastly, the district court found Appellant's defamation claim to be without merit, describing his allegations as "pure speculation." Appellant now appeals, alleging nine assignments of error.

STANDARD OF REVIEW

The applicable standard of review in this matter is well-settled:

> We review the granting of a motion for summary judgment utilizing the *de novo* standard of review. *Hutchinson v. Knights of Columbus, Council No. 5747,* 03–1533, p. 5 n. 2 (La.2/20/04), 866 So.2d 228, 232; *Independent Fire Ins. Co. v. Sunbeam Corp.,* 99–2181, p. 7 (La.2/29/00), 755 So.2d 226, 230. We utilize the same standard applied by the trial court in deciding the motion for summary judgment. *Cusimano v. Port Esplanade Condominium Ass'n, Inc.,* 10–0477, p. 4 (La.App. 4 Cir. 1/12/11), 55 So.3d 931, 934; *Lingoni v. Hibernia Nat'l Bank,* 09–0737, p. 3 (La.App. 4 Cir. 3/3/10), 33 So.3d 372, 375. Because we review a motion for summary judgment *de novo,* we do not give deference to the trial court's judgment or its reasons therefor. *Cusimano,* p. 4, 55 So.3d at 934. A trial court's reasoning for granting a summary judgment may be informative, but it is not determinative of the issues to be resolved by this court. *Cusimano,* pp. 4–5, 55 So.3d at 935. If a genuine issue of material fact exists, then summary judgment is inappropriate. La. C.C.P. art. 966 B(2).

Jones v. Buck Kreihs Marine Repair, L.L.C., 2013-0083, pp. 1-2 (La.App. 4 Cir. 8/21/13), 122 So.3d 1181, 1183. Furthermore:

> When . . . the mover will not bear the burden of proof at trial, the mover is not required to negate all essential elements of the adverse party's claim, but only to point out to the court that there is an absence of factual support for one or more of those essential elements. La. C.C.P. art. 966(C)(2). Once the mover has done so, the burden shifts to the adverse party to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial, and if he fails to do so, the mover is entitled to summary judgment. *Schwarz v. Administrators of Tulane Educational Fund,* 97–0222, p. 4 (La.App. 4 Cir. 9/10/97), 699 So.2d 895, 897.

Duboue v. CBS Outdoor, Inc., 2008-0715, p. 2 (La.App. 4 Cir. 10/1/08), 996 So.2d 561, 562.

Based on the foregoing, Appellees, as the party moving for summary judgment, needed only to point to the absence of factual support for one of the essential elements of each of Appellant's claims. Once the trial court found an absence thereof, the burden shifted to Appellant to produce factual support sufficient to show that he could meet his burden at trial. We conduct the same analysis herein.

ANALYSIS

Employment Relationship

Though the district court declined to address which entity employed Mr. Hanna – SIEP or Brunel – we address it here first, as it is a threshold issue. That is, should we find that Appellee showed there existed no genuine issue of material fact as to the employment relationship between Mr. Hanna and SIEP, many of his claims against SIEP would fall, as his claims under the LWA and LEDL require a showing of adverse action by an "employer," to wit:

> B. An employer, labor organization, or employment agency shall not engage in any of the following practices:
>
> * * *
>
> (2) Discharge or otherwise discriminate against an otherwise qualified person with a disability with respect to compensation or the terms, conditions, or privileges of employment on the basis of a disability when it is unrelated to the individual's ability to perform the duties of a particular job or position.

La.R.S. 23:323; and,

> A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:

> (1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.
>
> (2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of law.
>
> (3) Objects to or refuses to participate in an employment act or practice that is in violation of law.

La.R.S. 23:967.

Appellees asserted that the definition of "employer" that applies to both Appellant's LEDL and LWA claim is set forth in La.R.S. 23:302(2), which defines the term as follows:

> [A] person, association, legal or commercial entity, the state, or any state agency, board, commission, or political subdivision of the state receiving services from an employee and, in return, giving compensation of any kind to an employee. The provisions of this Chapter shall apply only to an employer who employs twenty or more employees within this state for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. "Employer" shall also include an insurer, as defined in R.S. 22:46, with respect to appointment of agents, regardless of the character of the agent's employment.

There is no dispute that this definition applies to Mr. Hanna's LEDL claim, as the definition is contained in Chapter 3 of Title 23 relative to employment discrimination. However, the definitional section of Chapter 3 specifically states that the definitions are relevant only "[f]or purposes of this Chapter." Accordingly, Appellant challenged the application of this definition to his LWA claim, the law on which is set forth in Chapter 9 of Title 23. Appellant suggested the applicable definition of employer should instead be drawn from La.R.S. 23:900(3), which provides that an employer is:

> A person, firm or corporation who employs any employee to perform services for a wage or salary and includes any person, firm or corporation acting as an agent of any employer, directly or indirectly.

Much like the definitional section of Chapter 3, however, this definition was limited in its application to "[a]s used in R.S. 23:900 through R.S. 23:904."

We rely on the reasoning of the Louisiana Court of Appeal for the Second Circuit in *Ray v. City of Bossier City*, 37,708, pp. 9-10 (La.App. 2 Cir. 10/24/03), 859 So.2d 264, 272, which held:

> The whistleblower statute does not define "employer;" however, the term "employer" was precisely defined by Louisiana Employment Discrimination Law to require receipt of services by the employee in exchange for compensation to him. La. R.S. 23:302(2); *Langley v. Pinkerton's Inc.,* 220 F.Supp.2d 575 (M.D.La.09/04/02). Specifically, "employer" is defined as "a person, association, legal or commercial entity, the state, or any state agency, board, commission, or political subdivision of the state *receiving services from an employee and, in return, giving compensation of any kind to an employee."* La. R.S 23:302(2). (Emphasis added). Courts have interpreted Section 23:302(2)'s definition of "employer" to apply in cases where employment status is at issue. *Jackson v. Xavier University of Louisiana,* 2002 WL 1482756 (E.D.La.2002)[6], citing *Jones v. JCC Holding Co.,* 2001 WL 537001 (E.D.La.2001)[7].
>
> In determining whether an employment relationship exists in other contexts, jurisprudence of this state has uniformly held that the most important element to be considered is the right of control and supervision over an individual. *Savoie v. Fireman's Fund Ins. Co.,* 347 So.2d 188 (La.1977); *Cassey v. Stewart,* 31,437 (La.App.2d Cir.01/20/99), 727 So.2d 655, *writ denied,* 99–0811 (La.04/30/99), 743 So.2d 209; *Fuller v. U.S. Aircraft Ins. Group,* 530 So.2d 1282 (La.App. 2d Cir.1988), *writ denied,* 534 So.2d 444 (La.1988), *cert. denied,* 490 U.S. 1046, 109 S.Ct. 1954, 104 L.Ed.2d 424 (1989).

Accordingly, we use the definition of "employer" as used in La.R.S. 23:302(2) for both Appellant's LWA and LEDL claims.[8]

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[6] "Section 23:302 provides the definition of employment covered by § 23:967." *Jackson v. Xavier Univ. of Louisiana*, 2002 WL 1482756, at *6 (E.D.La.2002).

[7] "The cause of action under La. R.S. 23:967 is by an employee against her 'employer' for reprisal. La. R.S. 23:302 supplies the following definition of an 'employer' for claims arising under that Chapter[.]" *Jones v. JCC Holding Co.*, 2001 WL 537001, at *3 (E.D.La.2001).

[8] This Court does recognize the seemingly conflicting conclusion reached by the Louisiana Court of Appeal for the Third Circuit in *Hunter v. Rapides Par. Coliseum Auth.*, 2014-784 (La.App. 3 Cir. 2/4/15), 158 So.3d 173, which concerned application of the LEDL definition of employer to

The parties agree on the relevance of the Louisiana Supreme Court's decision of *Dejoie v. Medley*, 2008-2223, pp. 5-9 (La. 5/5/09), 9 So.3d 826, 829-31, which held:

> The courts, in deciding cases under the prior definition of "employer," recognized that determination of the existence of an employer-employee relationship ordinarily relates to the right of control; however, the legislature assigned a specific definition for "employer" for purposes of the discrimination statute[, La.R.S. 23:302(2)]. In determining whether an employer provides compensation to an employee, Louisiana courts have considered such factors as: who paid the employee's wages; who withheld federal, state, unemployment, or social security taxes; whether the employee's name appeared on the employer's payroll; and whether the employee participated in the employer's benefit plans. *See Duplessis v. Warren Petroleum, Inc.,* 95–1794 (La.App. 4 Cir. 3/27/96), 672 So.2d 1019, 1023; *Onyeanusi v. Times–Picayune Publishing Corporation,* 485 So.2d 622, 623 (La.App. 4 Cir.1986).
>
> The critical language of LSA–R.S. 23:302(2) is the phrase "receiving services from an employee and, in return, giving compensation of any kind to an employee." The narrow issue presented for review is whether the State received services from plaintiff and gave compensation of any kind to plaintiff.
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> * * *
>
> Based on the language of the definition of "employer" utilized in the statute, the source of the funds is essential to the analysis.

The *Dejoie* decision made it clear that the traditional test of "control" to determine "employer" status did not apply in the context of LEDL claims. Instead, the "receipt of services" and the "giving of compensation of any kind" became the

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an LWA claim. While *Hunter* acknowledged opinions from both State and federal courts applying the LEDL definition of "employer" to LWA claims, it declined to apply that portion of the LEDL definition requiring an employer have "twenty or more employees" to qualify as an "employer." As a result, the Third Circuit "decline[d] to extend the definition ***as argued*** by the [defendant]." *Id.* at 178 (emphasis added). The Third Circuit did not go on to enunciate what, if any, statutory definition of "employer" should apply. It simply held that defendant "did not prove it [was] entitled to summary judgment as set forth in its motion for summary judgment." *Id.*

relevant considerations for an analysis under the LEDL. *Dejoie* also emphasized the importance of the source of the funds used to compensate an employee. In so doing, the Court concluded the plaintiff could not maintain a cause of action against the State, as her "compensation" came from the "self-generating funds"[9] of the Orleans Parish Judicial Expense Fund ("JEF"), and not the State treasury. *Id.* at 830-31. Though three justices dissented, the majority opinion distinguished these "self-generating funds" from other "State funds" by noting that the former were at no time ever deposited in the State treasury; at all times, the JEF funds were within the control of the JEF.

Relying on *Dejoie*, Appellees submit that Mr. Hanna did not, and could not, establish an employment relationship between himself and SIEP because Brunel, not SIEP, paid his wages; Mr. Hanna participated in Brunel's employee benefits plan; Brunel withheld Mr. Hanna's federal and state taxes; Mr. Hanna was not on SIEP's payroll; and Brunel paid a portion of Mr. Hanna's wages tax free as a "per diem." Appellant did not dispute these points, but instead focused on that portion of *Dejoie* emphasizing the source of the funds used to compensate him. Appellant does not dispute that Brunel paid him; however, the deposition testimony of Joanna Redsell indicated that SIEP paid Brunel's invoices in connection with the services provided by Mr. Hanna, and that Brunel deducted nothing from Mr. Hanna's pay; that is, Shell provided funds to Brunel, and the entire amount rendered would be paid by Brunel directly to Mr. Hanna.

The Third Circuit addressed a similar factual scenario in *Driesse v. Nat'l Oilwell Varco, LP*, 2014-125, pp. 4-5 (La.App. 3 Cir. 1/14/15), 170 So.3d 996, 999–1000:

[9] These funds were generated from filing fees. *Dejoie*, 9 So.3d at 833.

> Attached to NOV's motion for summary judgment was the affidavit of Kisha Adcock. Nineteen NOV invoices were attached to the affidavit as Exhibit A. Adcock attested that she was NOV's human resources representative in 2010 and the custodian of the records attached to her affidavit. Adcock stated that Driesse was Lofton's employee and was assigned to work temporarily with NOV. Adcock attested that Lofton supplied NOV with temporary employees, such as Driesse, to work on NOV projects when NOV needed additional help. Adcock stated that NOV never paid compensation to these temporary workers. Rather, NOV paid a fee to Lofton based upon the number of hours worked by the temporary workers. Adcock attested that NOV did not pay Driesse's wages nor did it withhold federal, state, unemployment, or social security taxes from his check. She stated that Driesse was ineligible to participate in NOV's benefit plans since he was not an NOV employee. Adcock attested that NOV simply verified the hours worked by Driesse and paid the invoices Lofton submitted for its employees.
>
> The invoices NOV received from Lofton for Driesse's work performed from April through August of 2010 were attached to the affidavit. These invoices were printed on Lofton letterhead and addressed to NOV. The money paid by NOV to compensate Driesse for his work was remitted directly to "Lofton Staffing Services" and not to Driesse.
>
> We find that the arrangement described in the affidavits and invoices shows that NOV received services from Driesse and, in return, gave compensation "of any kind" to Driesse, albeit through an intermediary, Lofton. This evidence shows that NOV paid Lofton specifically for work done by Driesse, and Lofton then paid Driesse after withholding taxes and social security. This is sufficient to create an employment relationship for the purposes of the LEDL. The fact that the compensation flowed through Lofton does not change the salient fact that the money was ultimately paid to Driesse for services performed for NOV.
>
> We conclude that NOV paid Driesse's wages through Lofton. Thus, we find that NOV is Driesse's employer under the LEDL, and the trial court's granting of summary judgment in favor of NOV is reversed.

Based on the foregoing jurisprudence, we find that SIEP failed to show there existed no genuine issue of material fact regarding whether SIEP qualified as an "employer" of Appellant as that term is used in La.R.S. 23:302(2) as to both his LEDL and LWA claims. SIEP undoubtedly "received services" from Mr. Hanna in

the form of his cost estimate reports, and SIEP arguably "gave compensation" to Mr. Hanna, though not directly. Furthermore, the opinion placed particular emphasis on the "essential" nature of analyzing the source of the funds, here, SIEP. We therefore turn to the merits of Mr. Hanna's claims.

Assignments of Error Numbers One, Three, Four and Five

Appellant suggests he met his burden of providing sufficient factual support for finding that he was terminated in violation of the LWA, La. R.S. 23:967(A)(1), which prohibits "reprisal against an employee who in good faith, and after advising the employer of the violation of law . . .[d]iscloses or threatens to disclose a workplace act or practice that is in violation of state law[,]"here, various computer laws and assault.

Appellant first challenges the district court's finding that he failed to present evidence sufficient to support his claim that Charles Perilliat violated various Louisiana state computer laws, to wit: false accounting, computer fraud, and computer tampering.

> False accounting is the intentional rendering of a financial statement of account which is known by the offender to be false, by anyone who is obliged to render an accounting by the law pertaining to civil matters.

La.R.S. 14:70.

> Computer fraud is the accessing or causing to be accessed of any computer, computer system, computer network, or any part thereof with the intent to . . . [d]efraud; or . . . [o]btain money, property, or services by means of false or fraudulent conduct, practices, or representations, or through the fraudulent alteration, deletion, or insertion of programs or data.

La.R.S. 14:73.5(A)(1)-(2).

> A. Computer tampering is the intentional commission of any of the actions enumerated in this Subsection when that action is taken knowingly and without the authorization of the owner of a computer:

(1) Accessing or causing to be accessed a computer or any part of a computer or any program or data contained within a computer.

(2) Copying or otherwise obtaining any program or data contained within a computer.

(3) Damaging or destroying a computer, or altering, deleting, or removing any program or data contained within a computer, or eliminating or reducing the ability of the owner of the computer to access or utilize the computer or any program or data contained within the computer.

(4) Introducing or attempting to introduce any electronic information of any kind and in any form into one or more computers, either directly or indirectly, and either simultaneously or sequentially, with the intention of damaging or destroying a computer, or altering, deleting, or removing any program or data contained within a computer, or eliminating or reducing the ability of the owner of the computer to access or utilize the computer or any program or data contained within the computer.

B. For purposes of this Section:

(1) Actions which are taken without authorization include actions which intentionally exceed the limits of authorization.

(2) If an owner of a computer has established a confidential or proprietary code which is required in order to access a computer, and that code has not been issued to a person, and that person uses that code to access that computer or to cause that computer to be accessed, that action creates a rebuttable presumption that the action was taken without authorization or intentionally exceeded the limits of authorization.

(3) The vital services or operations of the state, or of any parish, municipality, or other local governing authority, or of any utility company are the services or operations which are necessary to protect the public health, safety, and welfare, and include but are not limited to: law enforcement; fire protection; emergency services; health care; transportation; communications; drainage; sewerage; and utilities, including water, electricity, and natural gas and other forms of energy.

La.R.S. 14:73.7(A)-(B).

Specifically, Appellant accused Mr. Perilliat of "illegally" changing Mr. Hanna's estimate numbers for the Cardamom project "on several occasions." Appellant stated in his deposition that he saw "Charles Perilliat at my computer changing my cost reports." The portion of the deposition transcript relied upon by

Appellant continues with Mr. Hanna asserting that Mr. Perrilliat would change the numbers "daily." Appellant stated he would go back and fix the numbers, and that Mr. Perilliat would change the numbers back. He continued, "I don't know if his numbers were right or[,]" at which point the record portion of the transcript ends.

Appellant also testified that Mr. Perilliat, along with another individual, prepared the original estimate for the project, but miscalculated the project's cost using incorrect assumptions. Mr. Hanna acknowledged, however, that he was not personally aware of whether or not Mr. Perilliat was involved in preparing the budget for the project, stating, "[t]hat's what I was told. I don't know if he was or wasn't." Later in his deposition, regarding the incorrect values, Mr. Hanna stated, "I mean, it's not as big a deal as – I mean, he could fix it because he had the authority to go in and fix it, okay, which is what he was doing. He was going in and changing the numbers[.]" He also answered affirmatively when asked whether the estimate spreadsheet was "an internal Shell document" that "doesn't go to anybody outside of the people working for Shell." He also affirmed the numbers supposedly changed by Mr. Perilliat were "forecasting numbers," meaning money not yet spent but that Shell planned to spend. When asked how that would affect the project, Mr. Hanna answered "I'm not saying . . . the total number for the budget was off." He did state, however, "it would make people look like they didn't know what they were doing" and that, ultimately, "you have to start answering questions[,]" presumably to superiors. He suggested that Mr. Perilliat did not want to answer such questions, and "[t]hat's why I'm no longer there." He said if he had not raised questions about why the numbers in his reports were not balancing, "then it would have made Kimberly [McNeely] look bad. It's professionalism. We're not supposed to do a shell game shuffling numbers back

and forth all the time." When asked whether forecasting numbers were supposed to change, Appellant agreed, but stated Mr. Perilliat was reporting different numbers than those established by Mr. Hanna to Ms. McNeely, noting that "he would stand over my shoulder and do it." When asked again why changing forecast numbers was significant, Mr. Hanna answered, "[b]ecause we get paid to make sure that the numbers are correct." Mr. Hanna said he did not know if such conduct was illegal, but that it was immoral and unethical.

As a result of this conduct, Appellant asserted that "several hundred million dollars' worth of money . . . was just smoothed through there." He stated he reported this conduct to Mark Tipton and Kimberly McNeely, as well as other employees.

On several of the occasions when Mr. Perrilliat allegedly changed numbers in Appellant's cost reports, Mr. Hanna apparently brought other employees over to observe Mr. Perrilliat's conduct, such as Chris Steadman and Julie Beadle.

According to those portions of the deposition of Chris Steadman provided to this Court on appeal, Mr. Steadman testified that he saw Mr. Perrilliat at Mr. Hanna's desk working on a spreadsheet, but explained, "I cannot tell you the name of the file, because I was 10 feet away. So I could not tell you exactly what file he was working in." At the time Mr. Steadman witnessed these events, "Danny [Hanna] was sitting behind him [Charles Perilliat]." Apparently, Mr. Hanna later complained to Mr. Steadman that Mr. Perilliat was "changing his numbers[.]" Mr. Steadman also stated that he thought it would be "inappropriate for a manager to change numbers" but he did not refer to any specific violation of company policy.

Appellant also cites to the deposition of Julie Beadle, who "discovered" Mr. Perrilliat's conduct through "water-cooler talk[,]" though she did observe Mr.

Perilliat on Mr. Hanna's computer, without further elaboration as to when or what he was doing. She also agreed it would be "inappropriate" and in violation of company policy for Mr. Perilliat to use Mr. Hanna's log-in information "if" he did so. She also agreed it would be "inappropriate" and against policy to change Mr. Hanna's numbers.

As for his claim of assault, Appellant accuses Mr. Perilliat of having made a "threat to kill everybody in the building" where they worked, which he purportedly reported to Mark Tipton and Kimberly McNeely, as well as other employees. In support, Appellant suggests that "Kimberly McNeely testified she was afraid because of the statement made by Charles Perilliat." Ms. McNeely, however, was not present when the alleged threat was made. Instead, Mr. Hanna told Ms. McNeely that Mr. Perilliat had simulated a shooting gesture with his hands in an elevator. Mr. Steadman more specifically testified that, in response to a question about his day, Mr. Perilliat stated, "'It's been one of those days I feel like coming into the office and just shooting everybody." Mr. Steadman said he "assumed it was taken care of" after he reported the incident to Mark Tipton. Mr. Tipton also testified to having been told by Mr. Steadman and Ms. Beadle that Mr. Perilliat made "a shooting type motion with his hand[,]" but not that Mr. Perilliat said "shooting" or "killing." It was this alleged assaultive conduct that Mr. Hanna intended to report at SIEP headquarters in Houston immediately before he was terminated and barred from accessing the premises.

This Court, in *Hale v. Touro Infirmary*, 2004-0003, pp. 8-9 (La.App. 4 Cir. 11/3/04), 886 So.2d 1210, 1215 (citations omitted), discussed the burden imposed by the LWA as follows:

> Thus, what is clear is that we are bound by the language of La. R.S. 23:967, which provides that an employer may not retaliate against an employee who has notified it of a workplace practice in violation of law and who either refuses to participate in the practice or who threatens to publicize the practice . . . we conclude that the very specific language referring to a "violation of law" placed not once, but in several places throughout the statute, manifests a desire by the Louisiana legislature to only provide a remedy to employees of *private* employers whose practices are in *actual* violation of law, and not simply practices disagreed with or found distasteful by the employee. On its face, the Whistleblower Statute supports actions by plaintiffs who are aware of a workplace practice or act in which a violation of law actually occurred. While this burden may seem an unwieldy, if not unwise, one to place upon a plaintiff in a fact-pleading legal system, the Whistleblower Statute only offers protection to a specific class of employees: those employees who face "reprisals" from their employers based solely upon an employee's *knowledge* of an illegal workplace practice and his refusal to participate in the practice or intention to report it. Therefore, the language of the statute leads us to the conclusion that a violation of law must be established by a plaintiff under the Whistleblower Statute in order to prevail on the merits of the case. We are further convinced of this interpretation in light of the damages clause found in the Whistleblower Statute, La. R.S. 23:967 D, which provides for an award of attorneys' fees if a plaintiff brings suit in bad faith ***or*** fails to prove a violation of law by the employer. We do not casually reach this conclusion, but do so after a full analysis of the legislative history of La. R.S. 23:967.

Under the standard set forth in *Hale*, to succeed on this claim at trial, Appellant would be required to prove the following elements: (1) that SIEP committed an actual violation of state law through a prohibited workplace act or practice; (2) that he advised his employer of the violation; (3) that he threatened to disclose the practice; and (4) that he was fired as a result of his threat to disclose the practice. *See id.* at 1216.

We first address Appellant's computer crimes allegations. We note that the deposition testimony of Mr. Steadman and Ms. Beadle is of little, if any, probative value as it relates to the allegedly illegal actions, as neither had direct knowledge of Mr. Perrilliat's conduct (aside from seeing Mr. Perilliat at Mr. Hanna's

computer). Thus, with regard to violations of state law, we are left to rely on Mr. Hanna's deposition testimony, which we find insufficient to establish that Mr. Perilliat committed an actual violation.[10]

While Appellant, in his brief, suggests that Mr. Perilliat engaged in a nefarious and surreptitious scheme to access his computer to change his reports, his deposition testimony (and that of Mr. Steadman) indicates that during most, if not all, of the instances during which Mr. Perilliat changed reports, it was done in the presence of Mr. Hanna, albeit to his disapproval. This fact, in combination with the fact that Mr. Hanna acknowledged Mr. Perilliat's authority to change the numbers fatally undermines his claim of computer tampering.

Furthermore, Mr. Hanna's false accounting and computer fraud claims would require this Court to presume the truth of his allegation that Mr. Perilliat erred by several hundred million dollars in creating the original budget for the project. In declining to adopt such a presumption, this Court cannot further conclude that Mr. Perilliat intentionally rendered a financial statement known to be false, or accessed Mr. Hanna's computer with intent to defraud through fraudulent alteration, deletion, or insertion of programs or data.

Ultimately, Mr. Hanna appeared most disturbed by Mr. Perrilliat's actions because of how it would reflect on him and other members working under Mr. Perilliat, by making them look bad or unprofessional. A whistleblower claim, however, requires more. Once Defendants pointed to the absence of factual support for the essential element of an actual violation of state law, the burden shifted to

[10] Appellant does not raise the issue before this court, but his opposition below also referenced Marilyn Jordan's deposition and questions regarding violations of the Sarbanes-Oxley Act. She agreed that putting false information into Shell's accounting system could be illegal. However, she stated Mr. Perrilliat had the authority as a supervisor to change the numbers before they were

Appellant to produce factual support sufficient to establish that he would be able to satisfy his evidentiary burden at trial. For the foregoing reasons, we find the trial court did not err in granting Defendants' motion for summary judgment in this regard.

We find that Appellant's assault claim fails for similar reasons. "Assault is an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery." La.R.S. 14:36. Battery is the intentional use of force or violence upon the person of another[.]" La.R.S. 14:33. This Court has described the burden of proving an assault as follows:

> In order to support a conviction for assault, the State must prove beyond a reasonable doubt: (1) the intent-to-scare mental element (general intent); (2) conduct by defendant of the sort to arouse a reasonable apprehension of bodily harm; and (3) the resulting apprehension on the part of the victim.
>
> * * *
>
> Assault requires proof of only general criminal intent or a showing that the defendant, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. La. R.S. 14:10(2); *State v. Hill*, 35,013, pp. 5-6 (La.App. 2 Cir. 9/26/01), 796 So.2d 127, 131–32; *State v. Johnston*, 207 La. 161, 20 So.2d 741, 744–45 (1944). "An offender has the requisite intent when the prohibited result may have reasonably been expected to follow from the offender's voluntary act, regardless of any subjective desire on his part to have accomplished the result." *State v. Amos*, 15-0954, p. 11 (La.App. 4 Cir. 4/6/16), 192 So.3d 822, 829, *citing State v. Smith*, 07-2028, p. 10 (La. 10/20/09), 23 So.3d 291, 298.

State v. De Gruy, 2016-0891, pp. 11-13 (La.App. 4 Cir. 4/5/17), 215 So.3d 723, 730. Additionally, the Court of Appeal for the Third Circuit, in *Groff v. Sw. Beverage Co.*, 2008-625, p. 6 (La.App. 3 Cir. 11/5/08), 997 So.2d 782, 787, stated:

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put into the system by Kimberly McNeely, adding, "I don't think Kimberly would enter them if they were wrong."

> Mere words do not constitute an assault. *Muslow v. A.G. Edwards & Sons, Inc.,* 509 So.2d 1012 (La.App. 2 Cir.1987), *writ denied,* 512 So.2d 1183 (La.1987). Yet, a combination of threats, present ability to carry out the threats, and reasonable apprehension of harmful or offensive contact may suffice. *Id.*

Mr. Perrilliat's statement that he could shoot everybody was certainly reckless and unprofessional. However, this Court finds the record lacks evidence supporting the requirements that Mr. Perrilliat intended to scare and adverted to actually carrying out the described conduct, even considering that he may have made a demonstration by forming the shape of a gun using his hand. Indeed, Mr. Perrilliat's alleged assault appears to be more fairly categorized as "mere words" – though poorly chosen – uttered largely out of frustration as opposed to having true intent to carry out such conduct. For these reasons, we find the trial court did not err in granting summary judgment on this issue.

Assignments of Error Numbers Two*, *Six, and Seven

The district court judgment held that "[n]o contract existed between Mr. Hanna and any Shell defendant; and Mr. Hanna's contract with Brunel did not provide for any term, making Mr. Hanna an at-will employee of Brunel. Mr. Hanna's 'expectation' that the job would last four years does not change his employment from that of an 'at-will' employee." In his second assignment of error, Appellant asserts the district court erred in concluding that there existed no "contractual relationship" between SIEP and Mr. Hanna, and finding him to be an "at-will" employee. In his sixth assignment of error, Mr. Hanna argues the district court erred in finding no genuine issue of material fact as to his claim that SIEP intentionally interfered in his contract with Brunel. His seventh assignment of error challenges the district court's finding that his contract did not have a term.

We first address Appellant's contention regarding a "contractual relationship" between Mr. Hanna and Shell. Appellees rightly observe that, at the district court level, Appellant failed to oppose that particular part of Appellees' motion asserting that no contract existed between SIEP and Mr. Hanna, nor was there privity of contract as to the contract between SIEP and Brunel. Accordingly, we consider this issue waived.[11] *See Richardson ex rel. Brown v. Lagniappe Hosp. Corp.*, 33,378, pp. 9-10 (La.App. 2 Cir. 5/15/00), 764 So.2d 1094, 1101, *on reh'g in part*, 33,378 (La.App. 2 Cir. 6/21/00), 801 So.2d 386 (holding that plaintiff's failure to oppose a motion for summary judgment on the merits constitutes waiver of any arguments against summary judgment).

Appellant's additional argument that Mark Tipton intentionally interfered in the contract between Mr. Hanna and Brunel must be considered given the following jurisprudential context:

> The seminal case in Louisiana jurisprudence concerning tortious interference is *9 to 5 Fashions, Inc. v. Spurney,* 538 So.2d 228 (La.1989). That case is best known for its declaration of the five elements of a claim for tortious interference with a contractual relationship as follows:
>
> > (1) the existence of a contract or a legally protected interest between the plaintiff and the corporation; (2) the corporate officer's knowledge of the contract; (3) the officer's intentional inducement or causation of the corporation to breach the contract or his intentional rendition of its performance impossible or more burdensome; (4) absence of justification on the part of the officer; (5) causation of damages to the plaintiff by the breach of contract or difficulty of its performance brought about by the officer.
>
> *Id.,* 538 So.2d at 234.

[11] Appellant failed to sufficiently brief the argument on appeal as well.

> However, *9 to 5 Fashions, Inc.*'s declaration of the existence of a duty is much more direct, simpler and to the point concerning the instant case, where the opinion refers to:
>
> > ... a corporate officer's duty to refrain from intentional and unjustified interference with the contractual relation between his employer and a third person.
>
> *9 to 5 Fashions, Inc. v. Spurney,* 538 So.2d 228, 234 (La.1989).

Active Sols., L.L.C. v. Dell, Inc., 2010-1590, pp. 20-21 (La.App. 4 Cir. 7/21/11), 73 So.3d 934, 947. As it relates to the first of the five elements set forth in *9 to 5 Fashions*, the parties dispute the nature of Mr. Hanna's agreement with Brunel, as "[a]n at-will employee simply has no 'legally protected interest in his employment necessary for a claim for tortious interference with a contract.'" *Favrot v. Favrot*, 2010-0986, p. 20 (La.App. 4 Cir. 2/9/11), 68 So.3d 1099, 1111 (citing *Durand v. McGaw,* 93–2077, p. 4 (La.App. 4 Cir. 3/29/94), 635 So.2d 409, 411).

Appellant argues that he indeed had a "legally protected interest" because he "was assigned for the duration of the Cardamom project" which "was supposed to last four years." Appellant also notes that the purchase contract between SIEP and Brunel would "terminate upon completion of and acceptance of the scope[,]" and that "had Mr. Hanna not been terminated, he would have remained on the job for the whole four years." He further notes that Brunel staff "expected" he would remain on the project to completion.

Appellees, in arguing that the contract was an "at-will" agreement, rely on the language of the contract itself, which reads "Brunel and the Consultant [Mr. Hanna] have the right to terminate the Agreement at any time by providing a written notice."

> A person/business is free to dismiss a worker without assigning any reason. The worker is free to leave without reason or cause. La.C.C. Art. 2747. A person can hire out his services for only a

> specified time or for the performance of certain work or enterprise. La.C.C. Art. 2746. Those are the two types of contracts for hire-the limited duration contract and the contract for services terminable at the will of either party. Under a limited duration contract the parties have clearly agreed to be bound for a certain period of time during which the employee is not free to depart without assigning cause and the employer is not free to dismiss the employee without giving a reason. *Terrebonne v. Louisiana Association of Educators,* 444 So.2d 206 (La.App. 1st Cir.1983), *writ denied* 445 So.2d 1232 (La.1984).
>
> When an employee's job is for an indefinite term, the employment is terminable at the will of either the employer or employee and an employer is at liberty to dismiss an employee at any time for any reason without incurring liability for the discharge. *Williams v. Delta Haven Inc.,* 416 So.2d 637 (La.App. 2d Cir.1982); *Ballaron v. Equitable Shipyards, Inc.,* 521 So.2d 481 (La.App. 4th Cir.1988), *writ denied* 522 So.2d 571 (La.1988); *Gil v. Metal Service Corporation,* 412 So.2d 706 (La.App. 4th Cir.1982), *writ denied* 414 So.2d 379 (La.1982).

Williams v. Touro Infirmary, 578 So.2d 1006, 1008–09 (La.App. 4 Cir. 1991).

Furthermore:

> Neither should a contract be interpreted in an unreasonable or a strained manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion. *Edwards v. Dougherty,* 03–2103, p. 11 (La.10/1/04), 883 So.2d 932, 941. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent and courts must enforce the contract as written. *See,* La. Civil Code Art.2046. Courts lack the authority to alter the terms of contracts under the guise of contractual interpretation when its provisions are couched in unambiguous terms. *Cadwallader v. Allstate Insurance Co.,* 02–1637, p. 4 (La.6/27/03), 848 So.2d 577, 580. The rules of contractual interpretation simply do not authorize a perversion of the words or the exercise of inventive powers to create an ambiguity where none exists or the making of a new contract when the terms express with sufficient clarity the parties' intent. *Edwards,* 03–2103, p. 12, 883 So.2d at 941.

Iteld v. Four Corners Const., L.P., 2012-1504, pp. 15-16 (La.App. 4 Cir. 6/5/13), 157 So.3d 702, 713–14.

As applied to the facts of this case, there can be no dispute that the contract between Brunel and Mr. Hanna was for an indefinite period, as each could

terminate the contract "at any time." Instead of relying on clear or unambiguous provisions of the contract, Appellant would instead have this Court rely on "expectations" or other vague assertions within the depositions in support of his opposition to summary judgment. We decline to do so as the jurisprudence is clear regarding this issue. Accordingly, we find that the trial court did not err in granting summary judgment as to assignments of error numbers two, six, and seven.

Assignments of Error Numbers Eight and Nine

The district court judgment found there was "no evidence whatsoever that Mr. Hanna was terminated or subject to any other adverse employment action based upon his physical disability." Appellant's eighth assignment of error challenges this ruling. More specifically, Mr. Hanna argues that his complaints of disability discrimination were a "motivating factor" in his termination.

The district court also reasoned that Appellant "failed to put forth any evidence that any 'conduct' of Mr. Perrilliat and/or Mr. Tipton was extreme and/or outrageous or that they intended to inflict severe emotional distress upon Mr. Hanna" or that they "knew that severe emotional distress would be certain or substantially certain to result from any of their conduct." Appellant challenges this ruling in his ninth and final assignment of error, alleging Mr. Perrilliat's falsification of numbers and Mr. Tipton's termination of Mr. Hanna as a result of reporting that conduct resulted in severe emotional distress requiring medical treatment.

As to the former assignment of error, Appellees cite to the deposition testimony of Mr. Hanna. Specifically, when deposed as to whether he believed his disability was a motivating factor in his termination, Mr. Hanna responded that he did not believe it to be. Appellees used this statement at the district court level,

arguing there was no basis for his disability discrimination claim based on Mr. Hanna's own sworn testimony. A review of Appellant's response to Appellees' statement of uncontested facts, however, indicates that Appellant "contested" this statement, responding that Mr. Hanna "was offended by being called 'chicken wing' by his supervisor Charles Perrilliat and reported the discriminatory behavior."

Appellees also note that the comment made was an isolated incident, and that it was never reported to Mr. Tipton, the individual ultimately responsible for making the decision to terminate Mr. Hanna's employment.

> To defeat a motion for summary judgment against an employment disability claim, the claimant must establish a prima facie case that 1) he has a disability, as defined by the statute, 2) he is qualified for the job, and 3) an adverse employment decision was made solely because of the disability. *Thomas v. Louisiana Casino Cruises, Inc.,* 03–1937, p. 3 (La.App. 1 Cir. 6/25/04), 886 So.2d 468, 470, *writ denied,* 04–1904 (La.10/29/04), 885 So.2d 598; *Hook v. Georgia–Gulf Corp.,* 99–2791, p. 8 (La.App. 1 Cir. 1/12/01), 788 So.2d 47, 53, *writ denied,* 01–1098 (La.6/1/01), 793 So.2d 200.

Lindsey v. Foti, 2011-0426, pp. 5-6 (La. App. 1 Cir. 11/9/11), 81 So. 3d 41, 44. Even were this Court to set aside the fact that Mr. Hanna stated under oath that he did not believe his disability led to his termination, we would conclude that the district court did not err in granting summary judgment on this issue. Appellant has pointed to nothing in the record that would indicate that his termination had anything to do with his disability. Appellant has not made any showing of a connection between the comment and his ultimate termination, especially in light of the fact that it was not Mr. Perrilliat who made the final decision. We therefore find that this assignment of errors lacks merit.

In order for Appellant to succeed on his claim of IIED, he would be required to show "(1) that the conduct of the defendant was extreme and outrageous; (2)

that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct." *White v. Monsanto Co.*, 585 So.2d 1205, 1209 (La. 1991). In relevant part, Appellees rely on the following reasoning from the *White* decision in arguing that the conduct in question does not give rise to an IIED claim:

> The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Persons must necessarily be expected to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. Not every verbal encounter may be converted into a tort; on the contrary, "some safety valve must be left through which irascible tempers may blow off relatively harmless steam." Restatement, *supra,* comment d, § 46; Prosser and Keaton, *The Law of Torts,* § 12, p. 59 (5th ed. 1984).

Id. Appellant does not address the "extreme and outrageous" requirement of satisfying his burden, but points to that portion of the *White* reasoning where the Court stated that "[a] plaintiff's status as an employee may entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger." *Id.* at 1210 (citations omitted). Appellant also cites *Maggio v. St. Francis Med. Ctr., Inc.*, 391 So.2d 948, 950 (La.App. 2 Cir. 1980), which reversed a grant of summary judgment, reasoning, in part, that "[t]he facts related by plaintiff in a discovery deposition conducted by defendants' counsel are somewhat vague and meager and do not support in detail the allegations of his petition . . . [t]he discovery deposition does not stand as a substitute for trial or the full presentation of plaintiff's case." In *Maggio*, plaintiff alleged as follows:

> [Plaintiff] was employed as assistant administrator of the Medical Center under Sister Magdalen, the chief administrator. In late

> 1976 or 1977 he learned that Sister Magdalen had terminated the practice of returning overpayments to patients and that funds from this source were being illegally transferred out of the country. He confronted Sister Magdalen about the matter and was told it was none of his business. He talked to the Sister's supervisors with the same response. Thereafter, it is alleged, Sister Magdalen, by many and various forms of harassment, interference, intimidation, unfounded accusations, unreasonable acts, and other reprehensible activities directed toward plaintiff, made his life and working conditions at the hospital unbearable. The petition alleges that Sister Magdalen told plaintiff the matter was none of his business and to stay out of it; she told him she would never forgive him for approaching her superiors about the matter; she accused him of assisting in the organization of a union for hospital employees; she replaced him as associate executive director of the Center; she demoted him to a menial position and removed his office to a secluded area; she threatened him with loss of his job; she terminated his employment without just cause when he refused to resign; she intentionally caused him to breach his duty and interfered with his duty to report the wrongful transactions; she intentionally set about a pattern of harassment and frustration to cover up her wrongdoing; and the other defendants were aware of all this and failed to act to prevent the abuses.

Id. at 949–50.

We would first note that *Maggio* preceded *White* and the "extreme and outrageous" standard set forth in the latter. Thus, it is not a given that the "vague and meager" factual allegations alluded to in *Maggio* would survive a motion for summary judgment in the context of *White*, as a court cannot characterize conduct as "extreme or outrageous" without specifics regarding the conduct. Likewise, Appellant's factual allegations, here, could also be described as "vague and meager," as he only generally described a stressful working environment. The source of the stress as alleged by Mr. Hanna was Mr. Perrilliat's "manipulation" of his reports "while hard deadlines were approaching." Mr. Hanna also refers to the deposition testimony of Marilyn Jordan, who confessed to being "sick" from stress while previously working under Mr. Perrilliat. However, Appellant's disagreements with Mr. Perrilliat over the numbers that were ultimately reported to

Ms. McNeely does not give rise to an IIED claim. Indeed, a certain amount of stress is to be expected when one accepts a well-compensated position providing cost estimates on a time-sensitive, multimillion dollar project. There is no indication that the work stress experienced by Mr. Hanna was anything more than stress attendant to his position, and even were it not, there is nothing to indicate that Mr. Perrilliat intentionally inflicted such distress on Mr. Hanna or should have known that it was certain or substantially certain to result. This assignment of error is without merit.

Attorney's Fees

Appellees ask this Court to amend the judgment to tax attorney's fees incurred by them in the district and appellate courts pursuant to La.R.S. 23:967(D) and La.R.S. 23:303 based on Appellant's "kitchen-sink" approach in pursuing this litigation.

> If suit or complaint is brought in bad faith or if it should be determined by a court that the employer's act or practice was not in violation of the law, the employer may be entitled to reasonable attorney fees and court costs from the employee.

La.R.S. 23:967(D). The language of this statute is clearly permissive.

> A plaintiff found by a court to have brought a frivolous claim under this Chapter shall be held liable to the defendant for reasonable damages incurred as a result of the claim, reasonable attorney fees, and court costs.

La.R.S. 23:303. The language of this statute gives the district court discretion whether or not to award attorney's fees. *Morgan v. New Orleans Pub. Facility Mgmt., Inc.*, 98-1952 (La.App. 4 Cir. 3/31/99), 731 So. 2d 977, 978.[12]

[12] The *Morgan* Court addressed a similar statute, La.R.S. 23:325(B), which was repealed at the same time La.R.S. 23:303 was enacted.

As both statutes in question leave the issue of attorney's fees to the discretion of the district court, we decline to amend the judgment ordering each of the parties to bear their own costs.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed in its entirety.

AFFIRMED