[Cite as *Louscher v. Univ. of Akron*, 2016-Ohio-4679.]

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

{¶1} On October 22, 2015, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). With leave of court, plaintiff filed her response on November 19, 2015, and defendant filed a reply on November 30, 2015. The parties filed additional material on December 1 and 4, 2015. Defendant's motion is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

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

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977.)

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

{¶5} In May 2008, The College of Engineering became the academic home for the corrosion engineering degree despite Dean Haritos' opposition to it. (Amended complaint, ¶ 22.) In June 2009, plaintiff became Project Director in the College of Engineering. In July 2010, plaintiff became the Executive Director of Strategic Partnerships and Government Programs for the College of Engineering. Plaintiff reported to both Proenza and Haritos. (Complaint, ¶ 45.) The United States Department of Defense provided federal grant funding to support NCERCAMP, and eventually, defendant established the nation's first baccalaureate degree in corrosion engineering. Grant funds were provided to hire academic faculty for the degree program, and to build laboratory space for NCERCAMP. (Amended complaint, ¶ 38.) Plaintiff asserts that Dean Haritos "never believed in the merits of the program, saw it as a competitor for space, funding, students, [and] faculty" and unreasonably opposed her work in the establishment of NCERCAMP programs, which resulted in delayed curriculum development and missed deadlines. (Amended complaint, ¶ 24.) Plaintiff further alleges that "Dean Haritos and others viewed NCERCAMP's funds as a way to solve financial problems in the College of Engineering and used NCERCAMP monies for things not included in the agreements, such as new staff in the College of

Engineering Co-Op Office and in the Department of Chemical and Biomolecular Engineering." (Amended complaint, ¶ 40.)

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

{¶7} In her amended complaint, plaintiff asserts three claims: 1) defamation; 2) intentional infliction of emotional distress; and, 3) negligent supervision and retention of Dean Haritos. In its motion, defendant asserts that plaintiff's defamation claim is barred by the applicable statute of limitations, the doctrine of qualified privilege, and the fact that Dean Haritos' statements were opinions. Defendant further asserts that plaintiff has failed to state a claim for both intentional infliction of emotional distress and negligent hiring and retention.

DEFAMATION

{¶8} "In Ohio, defamation occurs when a publication contains a false statement 'made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession.'" *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, ¶ 9, quoting *A & B-Abell Elevator Co., Inc. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7 (1995).

{¶9} "To succeed on a defamation claim, a plaintiff must establish: (1) a false statement, (2) about the plaintiff, (3) published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) the statement was either defamatory per se or caused special harm to the plaintiff." *Watley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 07AP-902, 2008-Ohio-3691, ¶ 26.

{¶10} "'Slander' refers to spoken defamatory words, while 'libel' refers to written or printed defamatory words." *Schmidt v. Northcoast Behavioral Healthcare*, 10th Dist. Franklin No. 10AP-565, 2011-Ohio-777, ¶ 8. "Under Ohio common law, actionable defamation falls into one of two categories: defamation per se or defamation per quod." *Am. Chem. Soc. v. Leadscope, Inc.*, 10th Dist. Franklin No. 08AP-1026, 2010-Ohio-2725, ¶ 49.

{¶11} "In order to be actionable per se, the alleged defamatory statement must fit within one of four classes: (1) the words import a charge of an indictable offense involving moral turpitude or infamous punishment; (2) the words impute some offensive or contagious disease calculated to deprive a person of society; (3) the words tend to injure a person in his trade or occupation; and (4) in cases of libel only, the words tend to subject a person to public hatred, ridicule, or contempt." *Woods v. Capital Univ.*, 10th Dist. Franklin No. 09AP-166, 2009-Ohio-5672, ¶ 28.

{¶12} "On the other hand, a statement is defamatory per quod if it can reasonably have two meanings, one innocent and one defamatory. Therefore, when the words of a statement are not themselves, or per se, defamatory, but they are susceptible to a defamatory meaning, then they are defamatory per quod. Whether an unambiguous statement constitutes defamation per se is a question of law." (Citations omitted.) *Woods* at ¶ 29.

{¶13} "When a statement is found to be defamation per se, both damages and actual malice are presumed to exist." *Knowles v. Ohio State Univ.*, 10th Dist. Franklin No. 02AP-527, 2002-Ohio-6962, ¶ 24. "When, however, a statement is only defamatory per quod, a plaintiff must plead and prove special damages." *Am. Chem. Soc.* at ¶ 51.

STATUTE OF LIMITATIONS

{¶14} R.C. 2743.16(A), states, in part: "[C]ivil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." "An action for libel, slander * * * shall be commenced within one year after the cause of action accrued * * *." R.C. 2305.11(A). A cause of action for defamation accrues upon the date of publication of the defamatory matter. *Reimund v. Brown*, 10th Dist. Franklin No. 95APE04-487, 1995 Ohio App. LEXIS 4824 (Nov. 2, 1995). Plaintiff asserts that Dean Haritos began defaming her in 2006, and that his defamation of her ended in March 2015, when he went on sabbatical after her lawsuit was filed. (Amended complaint; Plaintiff's affidavit, ¶ 20.) However, the continuing violation exception does not apply to defamation claims. *Rosenbaum v. Chronicle Telegram*, 9th Dist. Lorain No. 01CA007896, 01CA007908, 2002-Ohio-7319. Plaintiff filed her initial complaint March 17, 2015. Accordingly, pursuant to R.C. 2305.11(A), any claims of defamation are limited to statements that Dean Haritos made after March 17, 2014.

{¶15} Plaintiff filed the depositions of Katie Watkins-Wendell, Luis Proenza, Joe Payer, and Annie Hanson to support her claims. Watkins-Wendell, Assistant Vice President, testified that she attended a meeting with Dean Haritos, plaintiff, Harry Cheung, Ajay Mahajan, and George Newkome, to discuss a proposed plan to move a portion of NCERCAMP from the College of Engineering to a university-level center reporting to Dr. Newkome. Watkins-Wendell testified that the meeting did not go well and the plan was not accepted. Watkins-Wendell testified that during the meeting, Dean Haritos stated that plaintiff was not an engineer, and that he made disparaging comments about the NCERCAMP program. (Watkins-Wendell deposition, p. 13.) Watkins-Wendell testified that during the meeting, she indicated to Dean Haritos that she felt that his comments were inappropriate. (Watkins-Wendell deposition, p. 59.) Although neither Dr. Proenza nor Joe Payer attended the meeting, they were told by Watkins-Wendell and plaintiff afterward that Dean Haritos stated that plaintiff "was not qualified to oversee the research program for NCERCAMP" and that she "was not qualified for her job." (Proenza deposition, p. 51; Payer deposition, p. 70.) Watkins-Wendell testified that the meeting occurred on February 12, 2014. (Watkins-Wendell deposition, p. 15.)

{¶16} Construing the evidence most strongly in plaintiff's favor, the only reasonable conclusion is that the meeting when Dean Haritos stated in front of others that she was not qualified for her job occurred on February 12, 2014. Plaintiff filed her complaint on March 17, 2015. Accordingly, any claims of defamation that plaintiff alleges with regard to the statements that Dean Haritos made during the February 12, 2014 meeting are barred by the one-year statute of limitations found in R.C. 2305.11(A).

{¶17} Although plaintiff does not identify any other alleged defamatory statements that Dean Haritos made on or after March 17, 2014 in her amended complaint, plaintiff filed her own affidavit in response to defendant's motion. Plaintiff refers to Dean Haritos' "misuse of NCERCAMP funds for unauthorized purposes in the College of

Engineering" beginning in 2011; that from 2011 through 2015, she "communicated [her] adamant opposition to this misuse of government funds in numerous ways and at numerous times over a period of multiple years to the deaf ears of Dean Haritos and to the detriment of [her] health"; and that "Dean Haritos purposely informed faculty and leadership that [she] agreed to this misuse of government funds, which was completely false." (Plaintiff's affidavit, ¶ 1-3.) Plaintiff asserts that in the spring of 2015, Watkins-Wendell communicated that the College of Engineering was "finally reimbursing NCERCAMP $641,189" in federal grant funds. (Plaintiff's affidavit, ¶ 8.) Plaintiff further avers that: "As a result of the inappropriate use of NCERCAMP funding, Dean Haritos was misleading management that I had agreed with this blatant misuse of government funds causing further damage to my reputation, integrity and causing stress related to the possibility of any culpability to the misuse of funds either criminally or for any future interaction with the Department of Defense in my career." (Plaintiff's affidavit, ¶ 9.) Plaintiff asserts that Haritos falsely stated that she approved of the way that Haritos had spent federal grant funds on things that were not covered under the grant; i.e., he used them inappropriately and falsely stated that she had approved their use for that purpose. Plaintiff also states that in September 2014, Dean Haritos designated Mike Cheung as an "intermediary/barrier between the College of Engineering faculty (aka corrosion engineering academic program) and myself, and that Dean Haritos retained approval of any joint efforts or activities." (Plaintiff's affidavit, ¶ 13). Plaintiff avers that having Cheung become involved "created the distinct understanding that faculty and students should not work directly with me," which harmed her reputation. (Plaintiff's affidavit, ¶ 14.)

{¶18} Plaintiff further avers that on January 8, 2015, Dean Haritos informed Provost Sherman (plaintiff's supervisor at the time) that plaintiff was "locking faculty and students out of their labs. Not only was this blatantly false, it sent a message that I was refusing to work collaboratively with my peers. * * * Haritos' mistruths about me

misrepresented my actions, damaged my reputation, professionalism, standing, respectability, and capacity to accomplish my tasks, and eroded my standing with senior leadership. * * * This further bolstered Dean Haritos' campaign to faculty that I was not qualified for the position with NCERCAMP." (Plaintiff's affidavit, ¶ 15.)

{¶19} Plaintiff also avers that on February 27, 2015, she learned that Dean Haritos was "attempting to convince senior leadership that [she] had purposely excluded faculty from participating in a Department of Defense corrosion conference," which was false and sent a message that she was uncooperative, harming her reputation. (Plaintiff's affidavit, ¶ 16.) Finally, plaintiff avers that in 2015, she learned that Haritos had told both Wendell-Watkins and Provost Sherman that she made commitments to the Department of Defense without his knowledge or agreement, which was false, and that she had to prove the falsity of his statements in an email. (Plaintiff's affidavit, ¶ 17.)

{¶20} Defendant argues that any statements made by Dean Haritos would be subject to a qualified privilege. "The purpose of a qualified privilege is to protect speakers in circumstances where there is a need for full and unrestricted communication concerning a matter in which the parties have an interest or duty. * * * A qualified privilege exists when a statement is: made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest * * *. Further, the essential elements of a communication protected by qualified privilege are: [1] good faith, [2] an interest to be upheld, [3] a statement limited in its scope to this purpose, [4] a proper occasion, and [5] publication made in a proper manner and to proper parties only. Finally, if a defendant establishes all five elements for application of a qualified privilege, a plaintiff can defeat its application only by showing by clear and convincing evidence that the defendant acted with actual malice." (Internal citations omitted.) *Mallory v. Ohio University*, 10th Dist.

Franklin No. 01AP-278, 2001-Ohio-8762, ¶ 21-22. Construing the evidence most strongly in plaintiff's favor, issues of material fact exist with regard to whether the statements that Dean Haritos made about plaintiff were made in good faith. Therefore, the court finds that defendant is not entitled to summary judgment with regard to any alleged statements that Dean Haritos made about plaintiff after March 17, 2014.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

{¶21} Plaintiff's remaining claims for intentional infliction of emotional distress, and for negligent hiring and retention are subject to the two-year statute of limitations found in R.C. 2305.16.

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

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

{¶24} The Tenth District Court of Appeals has also addressed this issue and held that "major outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not

enough. Only conduct that is truly outrageous, intolerable and beyond the bounds of decency is actionable; persons are expected to be hardened to a considerable degree of inconsiderate, annoying and insulting behavior. Insults, foul language, hostile tempers, and even threats must sometimes be tolerated in our rough and tumble society." *Strausbaugh v. Ohio Dept. of Transp.,* 150 Ohio App.3d 438, 444, 2002-Ohio-6627 (10th Dist.). Plaintiff asserts that Dean Haritos created so much conflict in the workplace that she became physically ill and had to take time off from work.

{¶25} Construing the evidence most strongly in plaintiff's favor, reasonable minds could reach different conclusions as to whether Dean Haritos knew or should have known that his actions would result in serious emotional distress to plaintiff, and whether his conduct was extreme and outrageous. Therefore, defendant is not entitled to summary judgment with regard to plaintiff's claim of intentional infliction of emotional distress.

NEGLIGENT HIRING AND RETENTION

{¶26} Plaintiff also asserts a claim for negligent hiring or retention of Dean Haritos. The elements necessary for a plaintiff to prove an action for negligent hiring or retention are: "(1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries." *Evans v. Ohio State University,* 112 Ohio App.3d 724, 739 (10th Dist.1996). Construing the evidence most strongly in plaintiff's favor, the only reasonable conclusion is that Dean Haritos was not incompetent. Plaintiff has not brought forth facts from which a reasonable factfinder could infer that Dean Haritos was not competent for his position. Although his actions could be found to be unprofessional, obstructionist, and adversarial to plaintiff, the only reasonable conclusion is that he was competent to be a Dean of the College of Engineering.

{¶27} Accordingly, defendant's motion for summary judgment shall be GRANTED, in part, as to plaintiff's claim of negligent hiring and retention and plaintiff's claims of defamation prior to March 17, 2014. Plaintiff's claims of defamation with regard to any alleged statements by Dean Haritos after March 17, 2014, and her claim of intentional infliction of emotional distress remain for trial. This case is ready to be set for trial.

PATRICK M. MCGRATH
Judge

[Cite as *Louscher v. Univ. of Akron*, 2016-Ohio-4679.]

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

{¶28} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED, in part, as to plaintiff's claim of negligent hiring and retention, and as to any claim of defamation prior to March 17, 2014. Defendant's motion for summary judgment is DENIED as to any claims of defamation after March 17, 2014, and as to plaintiff's claim of intentional infliction of emotional distress.

PATRICK M. MCGRATH
Judge

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