SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ERIC W. PAYNE, Plaintiff,	*	
	*	Case No. 2012 CA 6163B
v.	*	Judge Laura A. Cordero
DISTRICT OF COLUMBIA, *et al.*, Defendants.	*	

ORDER GRANTING DEFENDANTS' SPECIAL MOTION TO DISMISS PURSUANT TO D.C. CODE § 16-5502(a) OR, IN THE ALTERNATIVE, MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

This matter comes before the Court on Defendants District of Columbia's and Dr. Natwar Gandhi's Special Motion to Dismiss Plaintiff's Amended Complaint Pursuant to DC Code § 16-5502(a) or, in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(6), filed November 14, 2012. Plaintiff Eric W. Payne's Opposition to Defendant District of Columbia and Dr. Gandhi's Special Motion to Dismiss ("Plaintiff's Opposition") was filed on December 17, 2012. Defendants District of Columbia and Dr. Natwar Gandhi filed a Reply to Plaintiff Eric W. Payne's Opposition on January 17, 2013. For the reasons stated below, Defendants District of Columbia's and Dr. Natwar Gandhi's Motion to Dismiss is granted.

I. Background

Plaintiff formerly served as the Director of Contracts for the Office of the Chief Financial Officer ("OCFO"), an independent agency within the District of Columbia. Am. Compl. 1. The OCFO is an agency of the District of Columbia and Defendant Ghandi is an employee of the OCFO. Am. Compl. 2. Plaintiff, an attorney licensed to practice in multiple jurisdictions, was terminated by the OCFO in January of 2009. *Id.* at 1-2. Following his termination, Plaintiff initiated a federal lawsuit ("the D.D.C. case")

against the District of Columbia and Defendant Gandhi for a violation of the D.C. Whistleblower Act, wrongful termination and constitutional defamation. *Id.* at 2.

Plaintiff alleges that he started working at the OCFO in 2004, became the OCFO Director of Contracts in 2006 and worked through 2008, all the while receiving stellar employment evaluations. *Id.* at 2-3. Plaintiff alleges that after awarding a contract to a new lottery vendor, significant efforts were made to force him to modify, amend or cancel the contract. *Id.* at 3. Plaintiff alleges those actions were illegal, and hence he refused to comply. *Id.* Plaintiff states that following this incident his managers began to systematically alter their assessments of his performance, with the goal of eventual termination. *Id.* In 2008 Plaintiff's supervisors stripped him of his duties as Director of contracts, and Plaintiff was terminated on January 9, 2009. *Id*. Plaintiff states that his former supervisor testified under oath that no negative performance documentation exists in Payne's personnel file, nor were any negative performance evaluations written about him. *Id.* at 3-4.

Defendants contend that Plaintiff was moved to a non-managerial position and eventually terminated because of serious concerns regarding his performance and failures in dealing with his subordinates. Mot. to Dismiss 2. Plaintiff includes in his Amended Complaint Defendant Ghandi's interrogatory responses from the D.D.C. case, in which Defendant Gandhi in his sworn response stated that he "was not involved in the decision to terminate the plaintiff" and the he "did not decide to terminate the plaintiff's employment." Am. Compl. 5. Defendant asserts that on the day Plaintiff was terminated, Plaintiff began to contact the press, and that between his termination and the filing of the D.D.C. case, Plaintiff was quoted in local D.C. press outlets at least four

times, and that by the time of filing the law suit in question plaintiff and/or his attorney had been quoted in the press at least twelve times. Mot. to Dismiss 3. Defendant attached a list of media outlets that covered the termination and lawsuit. *See* Def. Exhibit A.

Plaintiff alleges that on June 8, 2012 Washington Post Reporter, Colbert I. King, published an article in which Defendant Gandhi's reappointment as Chief Financial Officer was called into question, and that on June 11, 2012, in response to this article, Defendant Gandhi stated in a published email that *he* had decided to terminate Plaintiff because of Plaintiff's poor performance and issues as manager of the OCFO Contracts Office. Am. Compl. 5-6. Plaintiff asserts that Defendant Gandhi's statement that he terminated Plaintiff is false and inconsistent with prior sworn testimony and representation, and further alleges that the statement that Defendant Gandhi fired Plaintiff because of his poor performance is false. *Id.* at 6. Plaintiff asserts that Defendant Gandhi acted maliciously and with knowledge that his statement would cause Plaintiff harm, and impugned his character and competency when he states that Plaintiff was a "very poor manager." *Id.* at 7.

Plaintiff is suing the District of Columbia on four counts: (1) Defamation; (2) False Light; (3) Intentional Infliction of Emotional Distress (IIED); and (4) Constitutional Defamation Violation of Fifth Amendment Liberty Interest 42 U.S.C. § 1983. *See id.* Defendants move to dismiss all counts pursuant to a Special Motion to Dismiss, because Defendant Gandhi's statements are protected by the Anti-SLAPP Act,[1] and Plaintiff cannot show that he is likely to succeed on the merits, or in the alternative to dismiss

[1] SLAPP is an acronym for "Strategic Lawsuits Against Public Participation." D.C. Code § 16-5502.

under 12(b)(6), because plaintiff has failed to state a claim upon which relief can be granted. *See* Mot. to Dismiss.

II. Standard of Review

a. Special Motion to Dismiss Pursuant to D.C. Code § 16-5502(a) ("Anti-SLAPP Act")

The D.C. Anti-SLAPP Act was passed in January of 2001 and went into effect in September of 2012. 58 D.C. Reg. 741 (2011). This law "intentionally follows the lead of other jurisdictions . . . ." Rep. of the D.C. Comm. on Public Safety and the Judiciary on Bill 18–893 (Nov. 19, 2010) at 4. California was the first state to enact an Anti-SLAPP statute, and has been a model for other jurisdictions. *See* Cal. Civ. Proc. Code § 425.16 Historical and Statutory Notes. Therefore, where certain questions remain unresolved in this jurisdiction, California precedent is useful in interpreting certain aspects of the D.C. statute.

The D.C. Anti-SLAPP Act allows a party to file a special motion to dismiss any claim "arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 15-5502(a). If a party filing a special motion to dismiss makes a *prima facie* showing that the claim at issue does actually arise from an act that would fall under subsection (a) of the Act, then the motion "shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied." D.C. Code § 16-5502(b).

While there appears to be no published decisions in this jurisdiction that have assessed the applicable standard of review, courts assessing the standard from the California statute ("probability of success on the merits") have determined that, "To establish the requisite probability of prevailing, the plaintiff need only have stated and

substantiated a legally sufficient claim." *Navellier v. Sletten,* 29 Cal. 4th 82, 88 (Cal. 2002) (quotations and citations omitted). A plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Id.* at 88–89. The plaintiff need only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP. *Soukup v. Law Offices of Herbert Hafif*, 39 Cal.4th 260, 291 (Cal. 2006). Nevertheless, a plaintiff cannot simply rely on his or her pleadings, even if verified; rather, the plaintiff must adduce competent, admissible evidence. *Roberts v. Los Angeles County Bar Assn.*, 105 Cal.App.4th 604, 614, (Cal. 2003); *Hailstone v. Martinez*, 169 Cal. App. 4th 728, 735 (Cal. 2008). If the court grants the special motion to dismiss, the claim must be dismissed with prejudice. D.C. Code § 16-5502(d).

b. Motion to Dismiss Pursuant to Rule 12(b)(6)

A motion to dismiss pursuant to Rule 12(b)(6) challenges the legal sufficiency of a complaint. *See Luna v. A.E. Eng'g Servs.*, 938 A.2d 744, 748 (D.C. 2007). A complaint must, at a minimum, contain a short and plain statement of the claim showing that the plaintiff is entitled to relief. D.C. Super. Ct. R. Civ. P. 8(a)(2). Such a statement must give the opposing party fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Bolton v. Bernabei & Katz, PLLC*, 954 A.2d 953, 963 (D.C. 2008). In reviewing the complaint, the Court must accept all allegations as true, and construe all facts and inferences in a light most favorable to the non-moving party. *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1023 (D.C. 2007).

Dismissal for failure to state a claim upon which relief can be granted is warranted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim. *See Murray v. Wells Fargo Home Mortgage*, 953 A.2d 308, 316 (D.C. 2008). At the same time, "factual allegations must be enough to raise a right to relief above the speculative level." *Clampitt v. Am Univ.*, 957 A.2d 23, 29 (D.C. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Although a complaint does not require detailed factual allegations, it will not suffice if it tenders naked assertions devoid of some further factual enhancement. *See Grayson v. AT&T Corp.*, 980 A.2d 1137, 1144 (D.C. 2009).

Thus, to survive a motion to dismiss under Rule 12(b)(6), a plaintiff must provide more than a formulaic recitation of the elements of a cause of action or labels and legal conclusions couched as fact. *See Grayson*, 980 A.2d at 1144. "'Rule 8 . . . does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543-44 (D.C. 2011) (quoting and adopting *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). "'Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Bell Atl. Corp.*, 550 U.S. 544).

III. Analysis

a. The D.C. Anti-SLAPP Act Applies to the Statements at Issue.

Under the District of Columbia Anti-SLAPP Act of 2010, when faced with a strategic lawsuit against public participation arising from an act in furtherance of the right

of advocacy on issues of public interest, a defendant may file a special motion to dismiss. D.C. Code § 16-5502. In an anti-SLAPP motion, the court first determines whether the defendant has made a threshold showing that the challenged cause of action arises from protected activity. *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal.4th 53, 67 (Cal. 2002). If the cause of action arises from an activity contemplated by the statute, then the motion shall be granted unless the plaintiff can show probability of success on the merits. *Id.*

The Act applies to claims based on any written or oral statement made:

> (i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or
> (ii) In a place open to the public or a public forum in connection with an issue of public interest.

D.C. Code § 16–5501(1)(A).

The Act also applies to "[a]ny other expression or expressive conduct that involves . . . communicating views to members of the public in connection with an issue of public interest." *Id.* § 16–5501(1)(B). An "issue of public interest" is defined as one that is "related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place … [but] shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance." *Id.* § 16–5501(3).

Anti–SLAPP laws have been applied to bar each of Plaintiff's common law claims. *See, e.g., Gardner v. Martino,* 563 F.3d 981, 983 (9th Cir. 2009) (affirming

dismissal of defamation, false light invasion of privacy, intentional interference with economic relations, and intentional interference with prospective economic advantage claims under Oregon's anti-SLAPP statute); *Mefford v. Cameron Park Cmty. Servs. Dist.,* 2010 WL 2816877 (E.D.Cal. July 16, 2010) (dismissing false light invasion of privacy and defamation under California's anti-SLAPP statute). Furthermore, courts have held that the Anti-SLAPP statute can apply to government defendants, whether entities or officials. See *Kapler v. City of Alameda*, A133001, 2012 WL 3861166 (Cal. Ct. App. Sept 6, 2012) (stating that the statute applied in case against the City of Alameda and its officials).

Moreover, anti-SLAPP provisions have been applied in the employer-employee context in other jurisdictions. *See, e.g. Kapler*, 2012 WL at 3861166 (noting that claims for defamation and IIED made after termination following an investigation, "based . . . on alleged communications by the city and its employees with the media, fall squarely within the ambit of the anti-SLAPP statute. . . . They implicate statements made in connection with an issue under consideration or review by a legislative . . . body.") (citations omitted); *McGarry v. University of San Diego*, 154 Cal. App. 4th 97, 110 (Cal. Ct. App. 2007) (holding that the statements concerning plaintiff's employment termination qualify for anti-SLAPP treatment as a matter of public interest, because "his termination was of concern to a substantial number of people, and it is difficult to imagine a greater 'closeness' between the topic of the public interest (the termination) and the challenged statements (the *reasons* for the termination).").

In this case, the claims at issue fall under the broad umbrella of the anti-SLAPP Act. First, Defendant Gandhi's statements were made in connection to an issue under

review by a judicial body. At the time the statement was made, Plaintiff and Defendant were in the midst of litigation surrounding Plaintiff's termination Am. Compl. 2. Defendant submitted evidence that Plaintiff and his attorneys had been discussing the lawsuit with various media and press outlets. Def. Exhibit A. Plaintiff does not deny this. In that context, a reasonable person would understand that Defendant's statement was related to the case under review, as it was a public statement of Defendants' position in that case.

Second, the speech is related to a matter of public interest. Plaintiff was an employee of the District of Columbia in charge of procurement of large contracts. Am. Compl. 2. The statements at issue were made in relation to Plaintiff's termination and the ensuing D.D.C. case. The termination involved actions by a government agency, a government official and a government employee's conduct. Am. Compl. 2-7. This is a matter of public interest under the statute, because the statement was made in connection with the termination of a government employee by the District of Columbia. Mot. to Dismiss 10.

Lastly, Plaintiff has made himself a public figure for purposes of the controversy at issue. The Act defines an issue of public interest to include matters related to a public figure. D.C. Code § 16-5501(3). The term "public figure" is not defined in the statute; however, the concept has been defined in the context of defamation claims to include a "limited purpose public figure." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. at 323, 352, 94 S.Ct. 2997, 3013 (1974)). A limited purpose public figure is one who voluntarily injects himself or is drawn into a particular public controversy and therefore becomes a public

figure for a limited range of issues. *Id*. The relevant examination turns on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* It is uncontested that Plaintiff and/or his attorney have approached the media on several occasions to discuss the controversy out of which the statements at issue arose. *See* Def. Exhibit A.

Accordingly, Defendant's statements fall within the reach of the Act. As such, Plaintiff must show a probability of success on the merits in order to survive Defendant's Motion to Dismiss. *Equilon Enterprises*, 29 Cal.4th at 67. As explained below, Plaintiff cannot do so; thus, Plaintiff's causes of action for Defamation, False Light, IIED, and Constitutional Defamation fail.

b. Plaintiff Fails to Establish a Claim for Defamation or False Light.

Plaintiff cannot establish a likelihood of success on the merits for his defamation and false light claims, because the statement was published with privilege and the statement at issue is not defamatory as a matter of law.

An invasion of privacy-false light claim requires a showing of: (1) publicity (2) about a false statement, representation or imputation (3) understood to be of and concerning the plaintiff, and (4) which places the plaintiff in a false light that would be offensive to a reasonable person. *Kitt v. Capital Concerts, Inc.,* 742 A.2d 856, 859 (D.C.1999) (citing Restatement (Second) of Torts § 652E (1977)). "[A] plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion. In fact, where the plaintiff rests both his defamation and false light claims on the same allegations . . . the claims will be analyzed in the same manner." *Blodgett v. Univ. Club*, 930 A.2d 210, 222-23 (D.C. 2007). Hence, the false

light claim fails for the same reasons discussed below with regards to the defamation claim.

The tort of defamation requires the plaintiff to allege facts showing "(1) that the defendant made a false or defamatory statement concerning the plaintiff; (2) that the defendant published the statement *without privilege* to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Payne v. Clark*, 25 A.3d 918, 924 (D.C. 2011) (emphasis in original).

There is no dispute as to whether the statements made concerned the Plaintiff, or whether these statements were published. The heart of the issue lies in whether Defendant is protected by privilege, and whether the statement is capable of defamatory meaning.

1. The statements at issue were privileged.

In the District of Columbia, the standard for conferring absolute immunity is set forth in *Moss v. Stockard,* 580 A.2d 1011 (D.C.1990). Absolute immunity applies when conduct is (1) within the "outer perimeter" of official duties, and (2) the governmental function at issue was "discretionary" rather than "ministerial." *Id.* at 1020. Discretionary functions qualify for absolute immunity, but ministerial functions do not. *Id*. "The elements underlying absolute immunity are objective in nature and ascertainable by the judge. Accordingly, whether the act in question is subject to official immunity is an issue for the court . . . ." *Id.* at 1020 n. 18.

A. Defendant Gandhi was acting within the outer perimeter of his duties.

An act falls within the outer perimeter of the duties of a government employee if "they are done by an officer *in relation* to matters committed by law to his control of supervision . . . ; or that they have more or less connection with general matters committed by law to his control or supervision . . . ." *Id*. at 1020-21 (quotation omitted). The duty does not need to be expressly prescribed by statute or performed at the specific direction of a superior. *Id.* It is a straight-forward test, that calls for an identification of the act giving rise to the suit and an analysis of the official's proper functions and duties. *Id.*

In this case, Defendant Gandhi was acting within the outer perimeter of his duties, and Plaintiff does not contend otherwise. Defendants assert that making statements to the press about matters pertaining to the Office of the Chief Financial Officer falls within the outer perimeter of Defendant Gandhi's official duties, and the statement concerning Defendant Gandhi's decision to fire Plaintiff, as well as the actual decision, were within his official duties. Mot. to Dismiss 17. This contention is supported by precedent in this jurisdiction. *See Dist. of Columbia v. Jones*, 919 A.2d 604, 608-09 (D.C. 2007) ("Informing the public about the conduct of persons serving in the Office of the Mayor certainly is 'in relation to' the Mayor's official responsibilities. It cannot fairly be questioned that responding to these inquiries (and accusations) was within the 'outer perimeter' of his duties.") (citations omitted); *Kendrick v. Fox Television,* 659 A.2d 814, 819 (D.C. 1995) ("[T]here can be no question that Deputy Chief Wilson's communications with reporters about Operation Recovery were within the outer perimeters of his duties as Deputy Chief of Police for the Sixth District and as the highest ranking officer at the scene.").

Accordingly, Defendant Ghandi was acting within the outer perimeter of his duties, and the first element of absolute immunity has been satisfied. *Moss*, 580 A.2d at 1020. The next inquiry is whether Defendant Ghandi acted in a discretionary manner.

B. Defendant Gandhi was acting in a discretionary and not a ministerial manner.

The crux of Plaintiff's argument regarding Defendant Gandhi's immunity is that the defendant was acting in a ministerial and not a discretionary role. *See* Pl. Opp'n 7. In distinguishing discretionary acts from ministerial acts, the question is "whether the governmental action at issue allows significant enough application of choice to justify official immunity, in order to assure 'fearless, vigorous, and effective' decision-making." *District of Columbia v. Thompson*, 570 A.2d 277, 297 (D.C. 1990). In each case, the court, as a matter of law, must balance the contending interests and determine whether society's concern to shield the particular government function at issue from the disruptive effects of civil litigation requires subordinating the vindication of private injuries otherwise compensable at law. *Id.*

In *Thompson*, the court identified four relevant policy factors to aid in this determination: (1) the nature of the injury, (2) the availability of alternate remedies, (3) the ability of the courts to judge fault without unduly invading the executive's function, and (4) the importance of protecting particular kinds of acts. *Id.* Viewing the case from both the plaintiff's and the official's perspective, the court must evaluate whether the contribution to effective government of the immunity urged would or would not outweigh the harm to the plaintiff. *Id.* The scope of immunity granted should be no broader than necessary to ensure effective governance. *Id.*

Defendant Gandhi's statements to the press about the reasons for Plaintiff's termination are discretionary under *District Of Columbia v Jones*, 919 A.2d 604 (D.C. 2007). There, a plaintiff brought suit based on statements by a mayor made to the press regarding plaintiff's performance and the Mayor's own knowledge of and responsibility for those activities. *Id.* at 608. The court held that informing the public about the conduct of persons serving in the Office of the Mayor certainly is "in relation to" the Mayor's official responsibilities. *Id.* Similarly, Defendant Gandhi's statement of his reasons for terminating Plaintiff was in relation to his official duties.

The court in *Jones* also addressed the four factors outlined in *Thompson* and found that, although it was unclear whether the plaintiff had an alternative remedy, the other three factors weighed heavily in favor of finding immunity. The harm was solely to plaintiff's reputation, and "determining the truth of Jones's claims would require detailed examination of actions of the Mayor and his Executive Office spanning more than a year. This type of discovery would unduly invade the executive's functions." *Id.* at 610. The analysis of the factors in *Jones* applies to the facts at issue here. As in *Jones*, the harm to Plaintiff under his defamation claim is reputational. Further, Defendant Gandhi is the Chief Financial Officer of the OCFO, and an investigation into the extent of his involvement in the termination and his belief in the statements made could take up a significant amount of time and resources and invade his ability to function as the Chief Financial Officer.

Plaintiff contends that even if Defendant Gandhi has immunity, he was acting with actual malice. Pl. Opp'n 7. However, in *Barr v. Mateo*, the Supreme Court established that when an official takes action "within the outer perimeter of his line of

duty," that official is entitled to absolute immunity in damages even though his action was discretionary and was allegedly prompted by actual malice. 360 U.S. 564, 575 (1959). Moreover, the Supreme Court found that "[t]he claim of an unworthy purpose [such as malice] does not destroy the privilege." *Id*.

Accordingly, Defendant Gandhi is entitled to absolute immunity for the statements at issue, because the statements were made within the confines of the outer perimeter of his duties, and the act of making the statements was discretionary rather than ministerial. Because the statements were privileged, the Court need not address the question of whether Defendant Gandhi's statements were defamatory.

c. Plaintiff Fails to Establish a Claim for Intentional Infliction of Emotional Distress (IIED).

Plaintiff alleges that he has suffered severe emotional distress as a result of Defendant Gandhi's false statements regarding Plaintiff's former employment at OCFO Am. Compl. 10. Plaintiff's Amended Complaint states that Defendants' actions have caused Plaintiff "anxiety, stress, and other emotional pain and suffering." *Id*. at 1. Plaintiff alleges that Defendant Gandhi's statements were made with the intent to cause Plaintiff emotional distress or with reckless disregard of the probability of causing serious emotional distress. *Id*. at 10.

To establish a *prima facie* case for intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress. *Howard University v. Best,* 484 A.2d 958, 985 (D.C.1984). "The requirement of outrageousness is not an easy one to meet." *Drejza v. Vaccaro,* 650 A.2d 1308, 1312 (D.C.1994). Plaintiff must show that Defendant's conduct was "so outrageous in

character, and so extreme in degree, as to go beyond all possible bounds of decency." *Jackson v. District of Columbia,* 412 A.2d 948, 957 (D.C.1980). Moreover, the level of proof required to support a claim of intentional infliction of emotional distress in an employment context is particularly demanding. *Kerrigan v. Britches of Georgetowne, Inc.,* 705 A.2d 624, 628 (D.C.1997) (citing *Waldon v. Covington,* 415 A.2d 1070, 1077-78 (D.C.1980) (finding conduct not outrageous when employer refused to give employee-professor keys to laboratory and notice of departmental meetings, threatened to begin actions to test competency with aim to terminate, and assigned employee classes outside specialty knowing it would cause difficulty and embarrassment); *Hoffman v. Hill & Knowlton, Inc.,* 777 F.Supp. 1003, 1005 (D.D.C. 1991) (finding conduct not outrageous when employer intentionally interfered with employee's ability to do job, stated false, pretextual reasons for dismissing an employee knowing it would be communicated to others, and dismissed employee).

In *Wise v. District of Columbia,* the court held that an employee of the District of Columbia whose termination for poor performance was reported in *The Washington Post* did not state a claim for intentional infliction of emotional distress against a supervisor who relayed information to the press. 2005 U.S. Dist. Lexis 6361, at *14, *16 (D.D.C. 2005). Similarly here, Plaintiff's claim for IIED stems from Defendant's allegedly false statement that Defendant terminated Plaintiff for poor performance and that Plaintiff was a "very poor manager." In light of this analysis, as well as the more demanding standard for IIED in the employment context, it is clear that Defendant's statements do not rise to the level of outrageousness required to state a cognizable claim for IIED.

d. Plaintiff Fails to Establish a Claim for Constitutional Defamation for Violation of 5th Amendment Liberty Right.

42 U.S.C § 1983, titled "Civil action for deprivation of rights," creates a cause of action for a violation of due process known as constitutional defamation. This occurs when the government has formally deprived one of a legal right or has so severely impaired one's ability to take advantage of a legal right, such as the right to seek employment, that the government can be said to have foreclosed one's ability to take advantage of it and thus extinguished the right. *See, e.g., Grant v. District of Columbia*, 908 A.2d 1173, 1179 (D.C. 2006). The Constitution protects an individual's right to follow a chosen trade or profession without governmental interference; however, "reputation *per se* is not a protected liberty interest, and, without more, defamation or stigmatization by the government does not give rise to any right to procedural due process, no matter how serious the harm to the subject's good name or the impairment of future employment prospects flowing from such reputational harm." *Id*. at 1181 (citing *Paul v. Davis*, 424 U.S. 693, 694, 711-12 (1976); *Seigert v. Gilley*, 500 U.S. 226, 233-34 (1991)). As such, a loss of rank, status and pay alone is not actionable, nor may a plaintiff sue based purely on the stigma associated with being fired. *Id*. at 1180. Instead, a plaintiff must show that a right or status previously recognized by state law has been distinctly altered or distinguished. *Id.; see also Paul v. Davis*, 424 U.S. 693, 711 (1976).

The two circumstances under which a government recognizes a cause of action in the employment termination context are "reputation-plus" and "stigma or disability." *Id*. at 1179, 1181 n.15. For reputation-plus, a plaintiff must show that there was defamation in the course of the termination of employment. *Id*. (reputation-plus "presumably rests on the fact that official criticism will carry much more weight if the person criticized is at

the same time demoted or fired.") (quoting *O'Donnell v. Barry*, 148 F.3d 1126, 1140 (D.C. Cir. 1998)). In other words, a plaintiff must show that the alleged defamation occurred contemporaneously with a demotion or termination of employment.

To succeed under stigma or disability, there must be a combination of adverse employment action and a stigma or disability that foreclosed plaintiff's freedom to take advantage of other employment opportunities. *O'Donnell*, 148 F.3d at 1140. It does not depend on official speech, but on a continuing stigma of disability arising from official action. *Id*. This stigma or disability can have "formally or automatically excluded [a plaintiff] from work on some category of future . . . government employment opportunities . . . [or] it might . . . still have the broad effect of largely precluding [a plaintiff] from pursuing his chosen career." *Id*. at 1141 (quoting *Kartseva v. Department of State*, 37 F.3d 1524, 1528 (D.C. Cir. 1994)).

In the instant case, Plaintiff contends that his claim falls under the second circumstance. Pl. Opp'n 11 (claiming that Defendant Gandhi "is effectively further and more egregiously blocking Plaintiff from gaining employment in his chosen field of work."). Plaintiff asserts that Gandhi's statements which were made "subsequent to Plaintiff's termination and during a time in which it has been difficult for him to regain employment, further impugned and tarnished Plaintiff's professional reputation and placed a significant impediment on his ability to obtain permanent full-time employment in his chosen field" of employment. Am. Compl. 11. Plaintiff further asserts that Defendant Gandhi's statements exacerbated his prior statements about Plaintiff (made at the time of termination), and created a stigma that foreclosed Plaintiff's freedom to take advantage of other employment opportunities. *Id*.

Plaintiff cites to *Holman v. Williams*, where the court denied a defendant's motion to dismiss under similar circumstances. 436 F. Supp. 2d 68 (D.D.C. 2006). There, an administration official cited by *The Washington Post* told the paper only that the plaintiff "was fired because of the discrimination complaints and 'his inability to get along with staff," and that the situation in the D.C. Office of Human Rights was extremely contentious in the time leading up to plaintiff's termination. *Id*. at 72. The court stated that "[s]uch statements clearly speak only to plaintiff's job performance, rather than to any enduring defect in defendant's personality, character or intellect." *Id*. at 79. The plaintiff, an attorney, alleged in his complaint that the defendant's defamatory remarks, in combination with plaintiff's termination, "denigrated the plaintiff's professional competence and impugned his personal reputation in such a fashion as to effectively put a significant roadblock in his ability to obtain other employment." *Id.* at 80. The court stated that the "broad preclusion from employment in plaintiff's chosen career that plaintiff alleges is sufficient at this early stage of the litigation to state a claim for deprivation of a liberty interest under a 'stigma or disability' theory." *Id*. (quotations omitted).

In *Holman* the statement giving rise to the cause of action was made at the time of or "in combination with" the termination. *Id.* Conversely, in this case, Plaintiff is asserting that the statements made by Defendant Gandhi, nearly four years after the termination, have *further* affected his ability to secure employment in his chosen area of law. Pl. Opp'n 16.

Defendant asserts that Plaintiff cannot succeed on his claim for constitutional defamation because Plaintiff has not been able to make a required showing of harm.

Mot. to Dismiss 27. Defendant also cites to Plaintiff's complaint from the D.D.C. case in which Plaintiff stated that he has not been able to secure employment in his chosen profession of law and government procurement "since his termination." *Id*. Defendant contends that this is evidence that the harm suffered by Plaintiff occurred prior to the statements at issue, thus could not have occurred as a result of Defendant's statements. *Id*.

Defendant's argument comports with the holding found in *Holman*. Plaintiff has not provided any evidence that his inability to find a job was further impaired by the statements at issue. Moreover, Plaintiff must show that "interference with the right to follow a chosen trade or profession is based on reputational harm . . . [that] occurred in conjunction with, or flowed from, some tangible change in status." *O'Donnell*, 148 F.2d at 1141. Here, Plaintiff cannot show that the harm to his liberty interest "occurred in conjunction with, or flowed from" a tangible change in status, as the statement at issue were made several years after Plaintiff's termination. As such, Plaintiff fails to state a claim under 42 U.S.C. § 1983 for which relief can be obtained, and Defendant's Motion to Dismiss is granted.

Upon consideration of Defendant's Motion, Plaintiff's Opposition, Defendants' Reply to Plaintiff's Opposition, and the record herein, it is this 28th day of May, 2013, hereby:

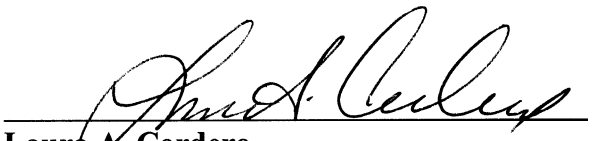
ORDERED, that The District of Columbia's Motion to Dismiss is **GRANTED**; it is further

ORDERED, that Plaintiff's Amended Complaint is **DISMISSED WITH PREJUDICE**, and it is further

ORDERED, that the Scheduling Conference set for May 31, 2013 is **VACATED**; and it is

FURTHER ORDERED, that this matter is **CLOSED**.

SO ORDERED.



Laura A. Cordero
Associate Judge
(Signed in Chambers)

Copies to:

Donald Temple, Esq.
Keith Parsons, Esq.
Sarah Knapp, Esq.