STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

DUPAGE COUNTY, ILLINOIS

CONSTANTINE P. XINOS, Plaintiff, v. SUZANNE O'BRIEN, DENNIS O'BRIEN and MIKE STEWART, Defendants.	)	No. 2010 L 001003 The Hon. Dorothy F. French

DEFENDANTS DENNIS and SUZANNE O'BRIENS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DEFENDANTS DENNIS and SUZANNE O'BRIEN ("O'Briens"), by their counsel, Mudd Law Offices, respectfully submit this Memorandum in Support of their Motion for Summary Judgment and state as follows:

INTRODUCTION

This Court must grant summary judgment in favor of the O'Briens. For, there exist no genuine issues of material fact with respect to the statements at issue being privileged and non-defamatory in nature. Indeed, the facts could not be more straightforward and simple. The O'Briens sought to purchase a foreclosed property in the Briarwood Lakes Community ("Briarwood Property"). Defendants' Statement of Undisputed Material Facts ("Defs.' SMF") ¶ 6. The Plaintiff is a real estate broker and also the President of the Briarwood Lakes Community Association ("Association"). Id. ¶ 2. Both the O'Briens and the Plaintiff, on behalf of his clients, submitted bids to Washington Mutual Bank ("WaMu") for the purchase of the Briarwood Property. Id. ¶¶ 13, 19-20. WaMu accepted the O'Briens' bid over the Plaintiff's bid. Id. ¶¶ 14, 21. Undeterred, the Plaintiff conspired with his clients to cause the termination of the O'Briens'

contract with WaMu such that WaMu would have no choice but to sell the Briarwood Property to his clients. Defs.' SMF ¶¶ 23-37, 46-53, 56-62, 89-95. To that end, Plaintiff recommended that the Association invoke a rarely used right of first refusal with respect to the Briarwood Property. Id. ¶¶ 50, 52-53. In response, the O'Briens drafted a letter they sought to distribute to Association members in an effort to protect their contractual interests in the Briarwood Property by advocating against invoking the right of first refusal. Id. ¶¶ 63-65, 87-88. In their arguments, the O'Briens criticized the Plaintiff for interfering with their purchase of the Briarwood Property through such a proposal, particularly given his personal interest in obtaining the Briarwood Property for his clients and his clients' interest in having him succeed in doing so. Id. ¶¶ 67, 78, 80, 84. In the end, WaMu cancelled the contract with the O'Briens, and the Plaintiff succeeded in obtaining the Briarwood Property for his clients. Given these facts (as more fully discussed below), the statements made by the O'Briens were privileged. See *infra* Section II. Additionally, the statements about which the Plaintiff complains happen to be substantially true, protected opinion, subject to innocent construction, and/or not made by the O'Briens. See *infra* Section III. Finally, some of the statements at issue simply cannot be construed as being defamatory *per se*, if defamatory at all. Id. Given the foregoing and as more fully articulated in their Motion and below, this Court must grant the O'Briens' Motion for Summary Judgment. [1]

FACTUAL BACKGROUND

In June 2009, the O'Briens submitted a bid to WaMu for the purchase of the Briarwood Property, a foreclosed residential property in the Briarwood Lakes Community located in Oak

[1] The Plaintiff's Complaint contains two counts of defamation *per se*. Id. Only the first count has been filed against the O'Briens. Compl. ¶¶ 1-23. The second count is against the O'Briens' deceased friend who, allegedly, distributed the O'Briens' letter. Id. ¶¶ 24-28. Although not at issue here, the Plaintiff actually prevented the distribution of the O'Briens' letter.

Brook, Illinois. Defs.' SMF ¶¶ 6-7. As of June 2009, the Briarwood Property had been for sale for nearly a year. Id. ¶ 8. At that time, the Plaintiff served as President and Managing Broker of the Association. Id. ¶ 2. Additionally, the Plaintiff is an attorney and a real estate agent. Id. ¶¶ 2-3. On behalf of his clients Richard and Linda Mullens (collectively, the "Mullens"), the Plaintiff also submitted a bid to WaMu for the purchase of the Briarwood Property. Defs.' SMF ¶¶ 19-20. Consequently, the Plaintiff and the O'Briens submitted competing bids for the Briarwood Property. Id. ¶¶ 6, 19-20.

Eventually, WaMu accepted the O'Briens' bid. Id. ¶ 14. On July 24, 2009, the O'Briens entered into a contract with WaMu for the purchase of the Briarwood Property ("July 24 WaMu Contract"). Id. The July 24 WaMu Contract set the closing date for August 31, 2009. Id. ¶ 15. The O'Briens promptly secured financing and were prepared to close early. Defs.' SMF ¶ 16. Consequently, the O'Briens and WaMu moved the closing date to August 11, 2009. Id. ¶ 17.

As part of the Association, the Briarwood Property was subject to the Association's governing documents that provide the Association with an assignable right of first refusal with respect to the purchase of any property within the Association's boundaries. Id. ¶¶ 9-11. Upon receipt of a written notice of proposed sale, transfer or conveyance of a lot in Briarwood Lakes, the Association has fifteen (15) days in which to approve or disapprove the proposed sale, transfer or conveyance through invocation of the right of first refusal. Id. ¶ 12. In the event that the Association neither approves nor disapproves the proposed sale or transfer within fifteen (15) days, the proposed sale or transfer of the lot is deemed approved. Id. On or around July 28, 2009, the Plaintiff learned of the purchase contract between WaMu and the O'Briens. Id. ¶ 22.

For the O'Briens to close on the Briarwood Property, WaMu required (1) a waiver of the right of first refusal held by the Association and (2) an assessment status letter ("Waiver and

Assessment Letter"). Defs.' SMF ¶ 18. The Plaintiff knew that the purchase of the Briarwood Property required the Waiver and Assessment Letter. Id. ¶¶ 18, 24. Continuing to work toward securing the Briarwood Property for his clients, the Plaintiff informed the Mullens that he would delay the O'Briens in their efforts to close by withholding the Waiver and Assessment Letter. Defs.' SMF ¶¶ 25-26. From this point forward, the Plaintiff began to actively and privately collaborate with the Mullens to terminate the O'Briens' July 24 WaMu Contract and compel WaMu to enter into a purchase contract with the Mullens. Id. ¶¶ 23-37, 46-53, 56-62, 89-95.

Indeed, the Plaintiff and Mullens agreed that the Plaintiff would contact WaMu's broker assisting the O'Briens and indicate that the Plaintiff would refuse to provide the Waiver and Assessment Letter to WaMu and the O'Briens. Id. ¶¶ 25-26. Also, while the Plaintiff actively delayed the O'Briens' closing on the Briarwood Property, he negotiated with the Mullens as early as July 30, 2009 for them to purchase the Association's right of first refusal for $10,000. Id. ¶¶ 32-34. This led to the Plaintiff assisting in the preparation of a contract to sell the Association's right of first refusal to the Mullens for $10,000 on or around August 11, 2009 – before he made any proposal to the Association. Id. ¶ 36. On August 12, 2009, the Mullens gave the Plaintiff a $10,000 check to purchase the Association's right for first refusal. Id. ¶ 37.

On August 12, 2009, Plaintiff presided over an Association meeting ("August 12 Meeting"). Defs.' SMF ¶ 43. The O'Briens attended the August 12 Meeting to represent their contractual interests in the Briarwood Property. Id. ¶¶ 38-42, 45. At the August 12 Meeting, the Plaintiff claimed that he did not receive notice of the O'Briens' contract with WaMu until August 6, 2009, despite having knowledge of the contract as early as July 28, 2009. Id. ¶¶ 22, 46. By using August 6, 2009 as the notice date, the Association had until August 21, 2009 in which to approve or disapprove the O'Briens' purchase of the Briarwood Property. Defs.' SMF

¶ 12. Had July 28, 2009 been used (the date by which the Plaintiff had knowledge of the July 24 WaMu Contract), the Association would have had until August 12, 2009 to make that decision. Given that the Association had not disapproved the O'Briens' purchase of the Briarwood Property by August 12, 2009, the O'Briens' purchase would have been deemed approved had July 28, 2009 been used as the notice date. Defs.' SMF ¶¶ 12, 22.

The Plaintiff then also proposed that the Association open a bidding process and assign the right of first refusal to the highest bidder. Id. ¶¶ 50, 53. By making this proposal, the Plaintiff furthered the plan he privately developed with the Mullens. Id. ¶¶ 33-37, 50-53. Prior to the August 12 Meeting, the Association had not invoked the right of first refusal in more than twenty years. Defs.' SMF ¶ 52. In that rare instance, the Association intervened to prevent a sale of property for significantly less than fair market value. Id. Clearly, given the Plaintiff's communications and collusion with the Mullens, he did not act to protect the Association's interests. Id. ¶¶ 19-37. Because not all members of the Association's Board of Governors ("Board") attended the August 12 Meeting, the Association postponed voting on the O'Briens' purchase of the Briarwood Property and the assignment of the right of first refusal. Id. ¶¶ 54-55. The Board adjourned the August 12 Meeting and set a subsequent meeting for August 18, 2009 on which it would reconvene ("August 18 Meeting"). Id.

Between August 12, 2009 and August 18, 2009, the Plaintiff and the Mullens continued to develop their efforts to undermine the O'Briens' purchase of the Briarwood Property. Id. ¶¶ 56-61. For example, they intended to use the August 18 Meeting to stall the O'Briens and their attorney. Defs.' SMF ¶ 56. Also, they sought to convince WaMu's attorney to cancel the July 24 WaMu Contract with the O'Briens. Id. ¶¶ 56-61. During this same time, the O'Briens prepared for the August 12 Meeting. Id. ¶ 62. On August 13, 2009, the O'Briens drafted a letter

they sought to distribute to the Association's members ("August 13 Letter") with the intent to protect their July 24 WaMu Contract by arguing that the Association's Board should refuse to vote in favor of the Plaintiff's proposals to sell the right of first refusal. Id. ¶¶ 63-87. The August 13 Letter contains the statements about which the Plaintiff complains. Id.

When the Board of Governors reconvened for the August 18 Meeting, it voted 4-2 in favor of the assignment of the right of first refusal to the Mullens for $10,000. Defs.' SMF ¶¶ 89-93. It assigned the right of first refusal for the Briarwood Property to Plaintiff's clients on August 18, 2009. Id. ¶¶ 94-95. Consequently, WaMu cancelled the contract with the O'Briens. Id. ¶ 96. The Plaintiff and Association earned a $10,250.00commission. Id. ¶ 97.

On August 12, 2010, the Plaintiff filed this action based upon certain statements the O'Briens made in their August 13 Letter. Id. ¶ 98; Compl. On December 14, 2010, the O'Briens filed their Answer to the Plaintiff's complaint. Defs.' Answer.

STANDARD UNDER 735 ILCS 5/2-1005

Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005; Horwitz v. Holabird & Root, 212 Ill. 2d 1, 8 (Ill. 2004). Summary judgment should be granted only where the right of the moving party is clear and free from doubt. J. Maki Constr. Co. v. Chi. Reg'l Council of Carpenters, 379 Ill. App. 3d 189, 202-03 (2d Dist. 2008). "While the nonmoving party in a summary judgment motion [need not] prove his or her case, the nonmovant must present a factual basis arguably entitling that party to a judgment." Horwitz, 212 Ill.2d at 8.

ARGUMENT

This Court must grant summary judgment in favor of the O'Briens. As argued below, the

statements about which the Plaintiff complains do not and cannot constitute actionable defamation, particularly per se defamation ("Protected Statements").[2] Consequently, the Plaintiff has not and cannot present any factual basis entitling him to judgment in his favor.

I. Standard on Defamation *Per Se*

"To prove a claim of defamation, plaintiff must show that defendant made a false statement concerning plaintiff, that there was an unprivileged publication of the defamatory statement to a third party by defendant, and that plaintiff was damaged." Gibson v. Philip Morris, Inc., 292 Ill. App. 3d 267, 272 (5th Dist. 1997) (citing Krasinski v. United Parcel Serv., Inc., 124 Ill. 2d 483, 490 (Ill. 1988)). A statement can be defamatory *per se* or defamatory *per quod*. The sole claim at issue in the Plaintiff's complaint is defamation *per se*. See generally Compl. A statement is defamatory *per se* if its "defamatory character is obvious and apparent on its face and injury to the plaintiff's reputation may be presumed." Tuite v. Corbitt, 224 Ill. 2d 490, 501 (Ill. 2006). Illinois recognizes five categories of statements that, assuming all other elements have been made, constitute defamation *per se.* Byrson v. News Am. Publs., Inc., 174 Ill. 2d 77, 88 (Ill. 1996). These five categories are:

> (1) words that impute the commission of a criminal offense; (2) words that impute infection with a loathsome communicable disease; (3) words that impute an inability to perform or want of integrity in the discharge of duties of office or employment; (4) words that prejudice a party, or impute lack of ability, in his or her trade, profession or business; . . . [5] false accusations of fornication and adultery are actionable as a matter of law.

Id. (internal citation omitted). Only the third and fourth categories are at issue. Compl. ¶ 20.

II. O'Briens' Statements Are Subject to a Qualified Privilege

The O'Briens Protected Statements are protected by a qualified privilege. "The Illinois Supreme Court has identified three general situations in which a privilege exists to make what

[2] The Plaintiff has identified specific statements contained in the August 13 Letter he contends to be defamatory. See generally Compl. He does not contend the entire letter to be defamatory. Id.

might otherwise be defamatory statements: (1) where some interest of the person who publishes the defamatory matter is involved; (2) where some interest of the person to whom the matter is published or of some other third person is involved; and (3) where a recognized interest of the public is concerned." Naeemullah v. Citicorp Servs., 78 F. Supp. 2d 783, 792 (N.D. Ill 1999) (citing Kuwik v. Starmark Star Mktg. & Admin., Inc., 156 Ill. 2d 16, 29 (Ill. 1993)). If protected by a qualified privilege, statements that may otherwise be defamatory are not actionable. Zych v. Tucker, 363 Ill. App. 3d 831, 834 (1st Dist. 2006) (citation omitted). Upon a defendant establishing a qualified privilege, a plaintiff must thereafter prove "a direct intention to injure another or a reckless disregard of the defamed party's rights and of the consequences that may result to him." Kuwik v. Starmark Star Mktg. & Admin., Inc., 156 Ill. 2d 16, 30 (Ill. 1993). Moreover, "abuse of a qualified privilege cannot simply be asserted to defeat a motion for summary judgment. Plaintiff has the burden to provide sufficient evidence to create a genuine issue of material fact; absent such evidence, summary judgment is appropriate." Anglin v. Sears Roebuck & Co., No. 93-3438, 1998 U.S. Dist. LEXIS 12635, *8 (N.D. Ill Aug. 10, 1998).

Here, the undisputed facts demonstrate the applicability of two bases on which a qualified privilege exists. Foremost, the O'Briens possessed a contractual interest in purchasing the Briarwood Property. Defs.' SMF ¶¶ 14-15, 17. The Protected Statements sought to protect that interest and encourage the Association to refrain from adopting the Plaintiff's proposal that was adverse to their contractual interests. Id. ¶¶ 67, 78, 80, 84. Indeed, the O'Briens argued against Plaintiff who clearly and actively sought to interfere with their July 24 WaMu Contract. Id. ¶¶ 19-37, 46-55, 56-62, 89-97. Clearly, "some interest" of the O'Briens was involved. See Naeemullah, 78 F. Supp. 2d at 792. Additionally, a privilege arises because the O'Briens directed the August 13 Letter to members of the Association who also had an interest at issue in

the form of the right of first refusal and the decision to exercise such right. Defs.' SMF ¶¶ 10-11, 63, 87-88. The Association's members also had an interest in the Association proceedings and could have possibly affected a different outcome from the Board. Indeed, the O'Briens sought to effectuate just that. Thus, "some interest" of the Association's members was also involved. See Naeemullah, 78 F. Supp. 2d at 792. Under such circumstances, where interests of the O'Briens (who made the statements at issue) and the Association's members (who received the statements at issue) interests were involved, the O'Briens clearly made the statements subject to a qualified privilege. Id. For these reasons, the Plaintiff's claim against the O'Briens for defamation *per se* cannot stand, and the Court must grant summary judgment. Id.

In an implicit effort to overcome this privilege, the Plaintiff alleges that the O'Briens published the statements knowing them to be false or with reckless disregard as to their false nature. Compl. ¶ 21. Here, the O'Briens did not publish the statements knowing them to be false. Defs.' SMF ¶¶ 85-86. Indeed, they continue to believe the statements to be true. Id. For this reason, the O'Briens also did not publish the statements with reckless disregard as to their false nature. For, in this context, Illinois defines reckless disregard as publishing defamatory material despite possessing a high degree of awareness of the probable false nature of the material or entertaining serious doubts as to the truth of the material. Kuwik, 156 Ill. 2d at 24-25. Again, the O'Briens believed the statements to be true in 2009 and continue to believe them to be true. Defs.' SMF ¶¶ 85-86. As such, they cannot have published them with reckless disregard as to their false nature. See Kuwik, 156 Ill. 2d at 24-25. For these same reasons, the O'Briens also did not make the statements with actual malice. See Costello v. Capital Cities Comm'ns., Inc., 125 Ill. 2d 402, 426 (Ill. 1998) (holding that "[a]ctual malice may not be found if the defendants subjectively believed that their accusations were true") (citing St. Amant v.

Thompson, 390 U.S. 727,731 (1968)); see also Defs.' SMF ¶¶ 85-86. Thus, this court should grant summary judgment in favor of the O'Briens based upon qualified privilege.

III. Each Protected Statement Is True, Opinion, or Capable of Innocent Construction

In addition to being privileged, each of the statements Plaintiff alleges to be defamatory is substantially true, opinion, or capable of innocent construction that precludes liability.

A. Two Statements Constitute Statements of Fact

1. Plaintiff's Actions Caused the O'Briens Additional Legal Expenses

In the August 13 Letter, the O'Briens stated that "[t]he recalcitrant actions of this president has cost us many added thousands of dollars in legal expenses." Defs.' SMF ¶ 67. The Plaintiff incredulously contends this to be defamatory. While the use of the term recalcitrant is capable of innocent construction, see *infra* III.C.1., the essence of this statement constitutes a statement of fact. For, the actions of the Plaintiff did cause the O'Briens to incur thousands of dollars in additional legal expenses. Defs.' SMF ¶¶ 71-77. Consequently, the statement is true and cannot be defamatory. See Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc., 227 Ill. 2d 381, 402 (Ill. 2008). Thus, this Court must grant summary judgment in favor of the O'Briens as to this statement. See Id.

2. Plaintiff Does Not Have the Right to Choose to Abide by the Association's Covenants Only When It's Profitable For Him To Do So

In the August 13 Letter, the O'Briens stated:

> Please do not let Connie convince you that he has the right to basically steal this contract from us. The Covenants clearly state that the only reason to disapprove a contract is to maintain a ratio of 85% of the community's residents who are over 55 years old. As was well stated last evening by some of your neighbors, Connie does not have the right to choose to abide by the Covenants only when it's profitable for him to do so!

Defs.' SMF ¶ 80. The Plaintiff contends that a portion of this statement defamed him when the

O'Briens stated he did not have the right to choose to abide by the Covenants only when it is profitable for him to do so. Compl. ¶ 12. Yet, in principle, the O'Briens' statement is true. Officers and board members of housing associations must act in the best interests of their association and not in their personal interests. Defs.' SMF ¶ 83. More particularly, the O'Briens clearly referenced a portion of the Association's covenants that they believed limited the circumstances under which the Association could disapprove a contract for the purchase of property. Defs.' SMF ¶¶ 80-82. As such, the general principle articulated by the O'Briens is at least substantially true and thus not defamatory. See Imperial Apparel, Ltd., 227 Ill. 2d at 402.

Perhaps, the Plaintiff complains that the O'Briens suggested the Plaintiff had a personal interest in disapproving the O'Briens' contract for the Briarwood Property. Even so, the statement is substantially true. The Plaintiff clearly had a personal interest. He submitted a bid to WaMu for the Briarwood Property for his clients. Defs.' SMF ¶¶19-20. The bid failed, and the O'Briens won the bid. Id. ¶ 21. The Plaintiff secretly planned with his clients to subvert the O'Briens' purchase contract for the Briarwood Property. Id. ¶¶ 23-37, 56-62. The Plaintiff then advocated the invocation of the right of first refusal. Id. ¶¶ 43, 50-53, 89-95. And, the Plaintiff stood to profit from the sale of the Briarwood Property to his clients. Id. ¶ 97. Given these facts, the O'Briens' statement was true and could not be defamatory. See Imperial Apparel, Ltd., 227 Ill. 2d at 402. For these reasons, this Court must grant summary judgment in favor of O'Briens as to this statement. See Id.

B. Two Statements Constitute Protectable Opinion.

Two of the O'Briens' Protected Statements constitute protectable opinion. The Supreme Court recognizes that the First Amendment protects opinion. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). The determination of whether an alleged defamatory statement is a

statement of fact or opinion is a question of law. Moriarty v. Greene, 315 Ill. App. 3d 225, 234 (1st Dist. 2000). In making such a determination, Illinois courts follow the totality of the circumstances analysis developed in Ollman v. Evans, 750 F.2d 970, 979 n.16 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985). Id. at 234-35. Under Ollman, a court considers a statement from the perspective of an ordinary reader. Ollman, 750 F.2d at 979 n.16; Brennan v. Kadner, 351 Ill.App.3d 963, 969 (1st Dist. 2004). To determine whether the ordinary reader would view a statement as one of fact or opinion, courts examine four factors: (1) the precision of the statement; (2) verifiability of the statement; (3) literary context of the statement; and (4) public and social contexts of the statement. Moriarty, 315 Ill. App. 3d at 235. Given prior analysis with respect to statements exactly the same or similar, two of the Protected Statements constitute protectable opinion.

1. "[Plaintiff's] behavior is unethical, and immoral."

The Plaintiff alleges that the statement characterizing his behavior as unethical and immoral is actionable as defamation *per se*. Compl. ¶ 11. The Plaintiff is mistaken. For, the terms "unethical" and "immoral" constitute protected opinion that cannot be actionable as defamation *per se*. Indeed, Illinois has recognized that calling someone "unethical" does not constitute actionable defamation. Gardner v. Senior Living Sys., 314 Ill. App. 3d 114, 120 (1st Dist. 2000) ("Merely calling plaintiff 'unethical' here cannot be reasonably interpreted as stating actual verifiable facts and therefore fall under a constitutionally protected opinion."); Manjarres v. Nalco Co., No. 09-C-4689, 2010 U.S. Dist. LEXIS 21970, *11, (N.D. Ill Mar. 9, 2010) ("While broad terms like 'unethical' may imply general ideas, they do not imply the underlying specific facts necessary to support a claim for defamation."). For the same reasons, the broad term "immoral" must also constitute protected opinion as it cannot be interpreted as stating

actual verifiable facts. See id. Therefore, this statement constitutes protectable opinion, and the Court should grant summary judgment as to it in favor of the O'Briens. See Id.

2. "Allowing [Plaintiff] to interfere and kill this contract by the *arbitrary* exercise of the right of first refusal, because he lost the bidding sets a dangerous precedent!"

The Plaintiff alleges that the O'Briens stated "Plaintiff interfered with the Association's rights 'by the *arbitrary* exercise of the right of first refusal because he lost the bidding sets a dangerous precedent!'" and that such statement is defamatory. Compl. ¶ 13. In the August 13 Letter, the O'Briens actually stated that "[a]llowing [Plaintiff] to interfere and kill this contract by the *arbitrary* exercise of the right of first refusal, because he lost the bidding sets a dangerous precedent!" Defs.' SMF ¶ 84. Regardless, the statement does not constitute actionable defamation *per se*. Indeed, not surprisingly, the Plaintiff has not even bothered to articulate how the statement can be defamation *per se*. See generally Compl. Despite the absence of any explanation from the Plaintiff, we can deconstruct the statement to demonstrate the absence of any actionable content. Clearly, there exists no question that the Plaintiff interfered with the completion of the contract by advocating the right of first refusal.[3] Defs.' SMF ¶¶ 50-51, 53, 90-95. Additionally, the Plaintiff can hardly complain about the phrase "kill this contract." For, the Plaintiff clearly intended to "kill" or terminate the O'Briens' contract. Id. ¶¶ 23-26, 29-31, 32-37, 56-61. Also, the Plaintiff's efforts succeeded. Id. ¶ 92-96. Indeed, the Plaintiff succeeded in having his clients obtain the Briarwood Property. Id. ¶ 97. Given that the foregoing components of the statement are true, they cannot form any actionable aspect of the statement. See Imperial Apparel, Ltd., 227 Ill. 2d at 402. As such, the only remaining language includes "arbitrary exercise" and "dangerous precedent."

[3] Again, the O'Briens' statement regarding interference focused on their contract. It did not specify "Association's rights."

By the clear language of the statement, the "dangerous precedent" relates to what the O'Briens perceived as the "arbitrary exercise of the right of first refusal." The O'Briens believed (and continue to believe) that the arbitrary exercise of the right of first refusal would be a dangerous precedent. Defs.' SMF ¶¶ 85-86. This clearly amounts to an opinion with which even the Plaintiff would agree. Consequently, the Plaintiff most likely finds defamatory the O'Briens' characterization of his advocating the exercise right of first refusal as arbitrary. Based on a liberal reading of his Complaint, he believes such an allegation imputes a want of integrity and negatively affects his profession. Despite the Plaintiff's dislike of the statement, it constitutes protectable opinion. The entire alleged defamatory nature hinges on the word "arbitrary." Like "unethical" and "immoral," "arbitrary" constitutes an imprecise broad term. As discussed above, broad terms "cannot be reasonably interpreted as stating actual verifiable facts and therefore fall under a constitutionally protected opinion." Gardner, 314 Ill. App. 3d at 120. Therefore, this Court should grant summary judgment in favor of O'Briens as to this statement. See id.

C. "Recalcitrant" is Capable of Innocent Construction.

The O'Briens' description of Plaintiff as "recalcitrant" is not defamatory *per se* because it is capable of innocent construction. Where a statement is reasonably capable of an innocent construction, the statement cannot be actionable *per se* defamation. Green v. Rogers, 234 Ill. 2d 478, 499 (Ill. 2009). Under the "Innocent Construction Rule," a court must consider the statement in context and give the words therein, and any implications arising from them, their natural and obvious meaning. A statement's context is critical in determining its meaning, as a given statement may convey entirely different meanings when presented in different contexts. Stated differently, a statement "reasonably" capable of a non-defamatory interpretation, given its verbal or literary context, should be so interpreted. Id. Moreover, there is no balancing of

reasonable constructions. Id. Here, again, the operative term is "recalcitrant." "Recalcitrant" is synonymous with "uncooperative." In Marczak v. Drexel Nat'l Bank, 186 Ill. App. 3d 640, 645 (1st Dist. 1989), the court found "uncooperative" capable of innocent construction. Marczak, 186 Ill. App. 3d at 645. Similarly, "recalcitrant" is capable of innocent construction and could be interpreted to mean that Plaintiff did not get along with O'Briens; did not facilitate the O'Briens' desires; did not make it easy for the O'Briens to obtain the Briarwood Property; as well as any number of other non-defamatory meanings. Thus, this court should find that the "recalcitrant" description of Plaintiff is capable of innocent construction and not actionable. See Id.

D. Statement Not Made By the O'Briens

The Plaintiff alleges that the O'Briens stated "Plaintiff failed to comply with applicable association rules, regulations, and covenants." Compl. ¶ 9. They did not. Id., Ex. A. Thus, this Court should grant summary judgment in favor of the O'Briens as to this statement.

CONCLUSION

For the foregoing reasons and those in their Motion for Summary Judgment, the O'Briens respectfully move this Court to grant their Motion for Summary Judgment.

Dated: October 14, 2011
Chicago, Illinois

Respectfully submitted,
DEFENDANTS,
DENNIS and SUZANNE O'BRIEN

By: /s/Charles Lee Mudd Jr.
One of Their Attorneys

Charles Lee Mudd, Jr.
MUDD LAW OFFICES
3114 W. Irving Park Road, Suite 1W
Chicago, Illinois 60618
773.588.5410
773.588.5440 (Fax)
cmudd@muddlawoffices.com
DuPage County Attorney No. 29382

LEXIS CITED AUTHORITY

Anglin v. Sears Roebuck & Co.

No. 93 C 3438

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1998 U.S. Dist. LEXIS 12635

August 07, 1998, Decided
August 10, 1998, Docketed

DISPOSITION: [*1] Defendants' motion for summary judgement on Plaintiff's ERISA claim denied and Defendants' motion for summary judgment on Plaintiff's defamation per quod claim granted.

COUNSEL: For STEVEN K ANGLIN, plaintiff: Kathryn Ellen Korn, Attorney at Law, Chicago, IL.

For SEARS, ROEBUCK AND CO., defendant: Michael A. Stiegel, Paul Ely Starkman, Elliot Gilchrist Smith, Arnstein & Lehr, Chicago, IL.

For MARGARET EDIDIN, defendant: Michael A. Stiegel, Paul Ely Starkman, Elliot Gilchrist Smith, Arnstein & Lehr, Chicago, IL.

JUDGES: JOHN A. NORDBERG, United States District Judge.

OPINION BY: JOHN A. NORDBERG

OPINION

MEMORANDUM OPINION AND ORDER

Plaintiff Steven K. Anglin brought this action against Defendants Sears Roebuck and Company ("Sears") and Margaret Edidin alleging he was wrongfully terminated from his employment, in violation of § 510 of the Employee Retirement Income Security Act ("ERISA"), *29 U.S.C. § 1140*. [1] Plaintiff also alleges defamation per quod, stating that his supervisor, Ms. Edidin, uttered false statements about him with reckless disregard for the truth or falsity of such statements. Plaintiff further alleges that such statements [*2] were injurious to his good reputation. This Court has jurisdiction over these matters pursuant to *28 U.S.C. § 1331*, and *28 U.S.C. § 1367*.

1 Section 510 provides, in pertinent part:

> "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ."

PROCEDURAL BACKGROUND

Plaintiff filed suit against Sears in the Circuit Court of Cook County on March 12, 1993 based on the following causes of action: breach of express agreement, promissory estoppel, breach of an implied covenant of good faith and fair dealing, defamation per se, defamation per quod, and intentional interference with prospective business advantage. On June 9, 1993, Defendants filed a notice of removal to federal court based on Plaintiff's claim arising under ERISA. Plaintiff [*3] filed a motion for remand to state court, which this Court denied. Defendants then filed a motion to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted. On May 6, 1994, the Court dismissed certain counts of Plaintiff's complaint and granted Plaintiff leave to amend his complaint. Plaintiff's amended complaint stated claims for breach of express agreement, promissory estoppel, interference with ERISA

benefits, and defamation per quod. Defendants filed a motion for summary judgment on March 18, 1996 which the Court referred to Magistrate Judge Keys for a Report and Recommendation. Judge Keys recommended that summary judgment be granted for Plaintiff's defamation per quod claim, and denied for Plaintiff's ERISA claim.

STATEMENT OF FACTS

The parties do not object the Magistrate Judge's recitation of the facts. Therefore, the Court accepts and adopts them by reference to the attached R & R. *See Thomas v. Arn, 474 U.S. 140, 148* & n. 6, 149-153, *88 L. Ed. 2d 435, 106 S. Ct. 466,* (1985); *Hunger v. Leininger, 15 F.3d 664, 668 (7th Cir. 1994)*.

Standard of Review

When objections are made to a [*4] Report and Recommendation of a magistrate judge, the district court reviews the case de novo. *Federal Rule of Civil Procedure 72 (b)* provides, in relevant part:

> The district court judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district court judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Under *Fed. R. Civ. P. 56 (c),* summary judgment shall be granted if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Black v. Henry Pratt Co, 778 F.2d 1278, 1281 (7th Cir. 1985)*. The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. A genuine issue of material fact exists when "there is sufficient [*5] evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. In determining whether a genuine issue of material fact exists, the evidence is to be taken in the light most favorable to the nonmoving party. *See Adickes v. S.H. Kress & Co., 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)*. Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *See Howland v. Kilquist, 833 F.2d 639 (7th Cir. 1987)*.

Analysis

The Magistrate Judge recommends that the Court deny Defendants' motion for summary judgment on Plaintiff's ERISA claim, but grant Defendants' motion for summary judgment as to Plaintiff's defamation claim. Plaintiff objects to the ERISA claim, and Defendants object to the defamation claim. The Court considers these objections in turn.

A. Defendants' Objections Regarding Plaintiff's ERISA Claim

1. Failure to Exhaust Administrative [*6] Remedies

Defendants object to the Magistrate Judge's conclusion that Plaintiff's complaint is not barred by his failure to exhaust his administrative remedies. The Court agrees with the Magistrate Judge and concludes that Plaintiff's failure to exhaust administrative remedies under the Plan does not bar the instant complaint.

ERISA is silent as to whether exhaustion of administrative remedies is a prerequisite to bringing suit in federal court. However, the law of this circuit remains that the decision to require exhaustion prior to bringing a federal lawsuit is a matter within the discretion of the trial court. *See Powell v. A.T. & T. Communications, Inc., 938 F.2d 823, 825 (7th Cir. 1991)*. A district court may excuse a plaintiff's failure to exhaust administrative remedies if there has been a lack of meaningful access to the review procedures or if exhaustion of internal remedies would be futile. *See Robyns v. Reliance Standard Life Insurance Co., 130 F.3d 1231, 1236 (1997)*.

Viewing the evidence in the light most favorable to Plaintiff, the Magistrate Judge correctly concluded that Plaintiff did not have meaningful access to review procedures. [*7] Plaintiff testifies that Sears did not give him a copy of the Plan documents prior to filing suit. In

fact, Plaintiff states that he first saw a copy of the plan documents in 1994, more than two years after filing suit. (*Anglin Aff.* P*4.*) Contrary to Defendants apparent argument, Plaintiff's deposition testimony does not conflict with his affidavit. Plaintiff did not testify as to when he recieived a copy of the documents. His affidavit merely clarifies that he did not receive a copy of the plan until after he filed this action. Accordingly, the Court concludes that the instant complaint is not barred for Plaintiff's failure to exhaust administrative remedies.

2. Plaintiff's Prima Facie Case

In order to recover under section 510, an employee must show that the employer terminated him with the specific intent to interfere with his ERISA rights. *See Teumer v. General Motors Corp., 34 F.3d 542, 550 (7th Cir. 1994)*. Plaintiff may satisfy this burden by either presenting direct evidence of interference with his protected benefits, or by utilizing the burden-shifting analysis of *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*. [*8] Direct evidence is often difficult to produce, so a plaintiff must rely on circumstantial evidence to prove interference with ERISA rights, and apply the burden shifting analysis. *See Salus v. GTE Directories Service Corp., 104 F.3d 131, 135*.

Under this approach, a plaintiff establishes a prima facie case of interference by demonstrating that he (1) belongs to the protected class; (2) was qualified for his job position; and (3) was discharged or denied employment under circumstances that provide some basis for believing that the prohibited intent to retaliate was present. *See id.* Once the plaintiff establishes a prima facie case of interference, the burden shifts to the defendant to offer a legitimate, non-discriminatory reason for the challenged employment action. *See id.* If the defendant presents a legitimate reason, the burden then shifts back to the plaintiff to demonstrate that the proffered explanation is pretextual and that the "motivating factor behind the termination" was the specific intent to interfere with the plaintiff's ERISA rights. *See id.* (citing *Meredith v. Navistar Int'l Transp. Co., 935 F.2d 124, 127 (7th Cir. 1991))*. [*9]

a. Plaintiff belongs to the protected class.

Defendants object to the Magistrate Judge's conclusion that Plaintiff is a participant within the meaning of ERISA, contending that the Magistrate Judge misstated the Court's prior determination that Plaintiff is a participant under the Plan. However, the Court finds that the Magistrate Court was correct. In a Memorandum Opinion and Order dated October 27, 1993, the Court determined that Plaintiff is a participant within the meaning of ERISA. *Anglin v. Sears, Roebuck and Co., 1993 U.S. Dist. LEXIS 15104*, No. 93 C 3438, 1993 WL 437430 (N.D. Ill Oct. 27, 1993). The law of the case doctrine "establishes a presumption that a ruling made at one stage of a lawsuit will be adhered to throughout the suit." *Avitia v. Metropolitan Club of Chicago, INC., 49 F.3d 1219, 1227 (7th Cir. 1995)*. Defendants fail to overcome the presumption that the Court's previous ruling was correct.

b. Plaintiff was qualified for his job position.

The Court accepts the Magistrate Judge's determination that Plaintiff was qualified for his position. Plaintiff was employed by Sears for more than fifteen years. [*10] During his employment, Plaintiff was promoted more than ten times. (*Anglin Aff.* P *2.*) Plaintiff's immediate supervisor, Mr. Doukas, indicated that Plaintiff's last performance review score resulted in an overall rating of "meets expectations." (*Doukas Aff.* P *4*) Moreover, Mr. Doukas indicated that he strongly disagreed with the decision to terminate Plaintiff because of his "excellent performance of his job duties." *Id. at* PP *5,6.* Furthermore, Ms. Edidin stated in her deposition that "Plaintiff's technical abilities were great" and that he would have been eligible for a salary increase had he not been terminated. (*Edidin Dep. at 95-96.*) These factors, along with the fact that Defendants' stated reasons for termination were unrelated to Plaintiff's performance of job responsibilities, indicate that a reasonable jury could find that Plaintiff was qualified for the position.

Defendants contend that Plaintiff was not qualified for his position because his interpersonal skills interfered with his job performance at the time of his discharge. (Defendants' Memorandum in Support of Their Objections to the Magistrate's Report, at 8.) Defendants rely on the Seventh [*11] Circuit's holding in *Anderson v. Stauffer Chemical, 965 F.2d 397, 401 (1992)*, where the Court held that whether a plaintiff is qualified for his position depends on the employer's expectations at the time of discharge. On a motion for summary judgment, the moving party bears the burden to come forth with specific evidence to show that no genuine issue of material fact exists. *See Black, 778 F.2d at 1281*.

Defendants have not met their burden. Defendants have not come forth with any evidence to show that Plaintiff's interpersonal skills interfered with his job performance at the time of his discharge.

c. Intent to Interfere with ERISA Rights

The Court accepts the Magistrate Judge's conclusion that evidence exists to support the allegation that Defendants intentionally sought to interfere with Plaintiff's benefits. As the Magistrate Judge correctly found, Plaintiff has shown "circumstances that provide some basis for believing that the prohibited intent was present . . . ." *Dishinger v. Sun Process Converting, Inc., 870 F. Supp. 814, 817 n.2 (N.D. Ill. 1994)*. Defendants contend that the Magistrate Judge misapplied the law by [*12] not requiring Plaintiff to demonstrate that Defendants had the "specific intent" to interfere with Plaintiff's benefits. In support of their contention, Defendants cite to *Dewitt v. Penn-Del Directory Corp.*, without acknowledging that the Third Circuit explained that in most cases, smoking gun evidence of specific intent does not exist, and as a result, the evidentiary burden in these cases may also be satisfied by the introduction of circumstantial evidence. *106 F.3d 514, 522 (3rd Cir. 1997)*.

The Court concludes that Plaintiff has introduced such circumstantial evidence to create a genuine issue of material fact as to Defendants intent. First, Plaintiff's fifteen year employment was terminated on March 20, 1992, just two weeks prior to the implementation of the Reduction in Force Plan. Plaintiff's immediate supervisor stated in his affidavit that "Sears did not replace Mr. Anglin after his termination." (*Doukas Aff. at* P *7.*) Defendants response that Plaintiff's position was "out-sourced" hereby disputes this testimony. A jury could draw a reasonable inference from these facts that Plaintiff's position was, in fact, eliminated, and under the guidelines of [*13] the Plan, Plaintiff would have been eligible for benefits.

Second, Defendants failed to follow their own policy manual in handling Plaintiff's termination. The Sears' Personnel Policy Manual states that "wilful misconduct is to be documented by associates' signed statements admitting the act or by other compelling facts substantiating the occurrence." (*Sears' Personnel Policy Manual at 8-3.)* In support of their decision to terminate Plaintiff, Defendants listed four reasons, none of which were documented, and two of which (use of obscene language toward another employee, and yelling at his immediate supervisor) were denied by Plaintiff, the other employee, and the supervisor. (*Anglin Dep. at 167-168; Mologousis Dep. at 15; Doukas Aff. at* P *8.*) Moreover, Mr. Doukas stated "in my entire career with Sears, spanning twenty-nine years, I have not seen any other employee terminated for supposed willful misconduct without having been informed of the objections to their conduct and given an opportunity to correct their conduct." (*Doukas Aff.* P *13.*) Defendants never provided Plaintiff with an opportunity to correct his conduct, nor was Plaintiff ever informed of any [*14] objections to his conduct. (*See Anglin Aff. at 4-6, 10.*) In light of Defendants apparent failure to follow its own policies and customs, the Court concludes that a jury could draw a reasonable inference that Sears intended to interfere with Plaintiff's benefits.

Overall, Plaintiff has presented enough evidence to raise agenuine issue of material fact as to whether the prohibited intent to interfere with Plaintiff's benefits was present. As Defendants bear the burden to show that no genuine issue of material fact exists regarding their intent to interfere with Plaintiff's benefits, *see Black, 778 F.2d at 1281*, the Court concludes that summary judgment is not appropriate.

3. Defendants Legitimate Non-discriminatory Reason

The Court agrees with the Magistrate Judge that Defendants met their burden by providing a non-discriminatory, legitimate reason for Plaintiff's termination and hereby adopts that portion of the R & R.

4. Plaintiff's Proof that Defendants Reason is Pretextual

After finding that the defendants have articulated a legitimate, non-discriminatory reason for Plaintiff's's termination, the burden shifts back to the plaintiff to show that [*15] the proffered reasons for the challenged employment action are pretextual. *See Grottkau v. Sky Climber, Inc., 79 F.3d 70, 73*. Plaintiff can achieve this burden by showing either that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence." *La Montagne v. Am. Convenience Prod., 750 F.2d 1405, 1409 (7th Cir. 1984)*. Plaintiff may demonstrate that the employer's reasons are unworthy of credence through evidence showing: (1) that the

proffered reasons had no basis in fact; (2) that the proffered reasons did not actually motivate his discharge; or (3) that they were insufficient to motivate his discharge. *See Mechnig v. Sears Roebuck and Co., 864 F.2d 1359, 1364 (7th Cir. 1988)* (*citing Kier v. Commercial Union Ins. Co., 808 F.2d 1254, 1259 (7th Cir. 1987), cert. denied, 481 U.S. 1029, 95 L. Ed. 2d 528, 107 S. Ct. 1955 (1987)).*

The Court finds that a reasonable jury could infer that Defendants reasons for Plaintiff's termination are unworthy of credence. Defendants argue that Plaintiff was terminated for wilful misconduct which [*16] allegedly consisted of: use of inappropriate language on at least two occasions; a single use of the women's washroom; and misuse of company property. *(Amended Complaint, Ex. A.*) According to Sears' Personal Policy Manual, however, none of the cited reasons for Plaintiff's termination are explicitly listed as grounds for willful misconduct. Also, the cited reasons do not resemble the enumerated acts constituting willful misconduct. *(Sears' Personnel Policy Manual at 8-2.*) Furthermore, all three managers who decided to terminate Plaintiff testified that one of the cited reasons, use of the wrong washroom, would not be grounds for termination and that no other employee had ever been terminated for such an incident. (*Pl.'s 12(N) at* P*133*.) In addition, Plaintiff's supervisor testified that he had never seen another employee terminated for wilful misconduct without being informed of any objections to their conduct, and provided an opportunity to correct their conduct. (*Doukas Aff.* P*13*.) A reasonable jury could find that these factors create an inference that Defendants reasons are unworthy of credence.

Defendants contend that the four cited reasons for Plaintiff's [*17] termination together constitute willful misconduct. However, the Court concludes that a reasonable jury could find that two of Defendants cited reasons have no basis in fact. Defendants assert that Plaintiff used inappropriate language on at least two occasions; one incident with another employee, and the other with Plaintiff's supervisor. However, not only does Plaintiff deny these allegations in his deposition and affidavit, but the two associates allegedly involved in the incidents either had no recollection of them or denied them. (*Anglin Dep. at 167-168, Anglin Aff.* P*18, Doukas Aff.* P*8, Mologousis Dep. at 15.*) In light of this finding, the Court is unwilling to find that no genuine issue of material fact exists as to whether the remaining two reasons are sufficient grounds for Plaintiff's termination.

The Court further concludes that a reasonable jury could find that Defendants cited reason of Plaintiff's poor interpersonal skills is pretextual. An employer's reliance on subjective factors, such as interpersonal skills in making employment decisions, may reasonably be considered pretext for discrimination. *See Giacoletto v. Amax Zinc Company, Inc., 954 F.2d 424, 427 (7th Cir. 1992)*; [*18] *see also Perfetti v. The First National Bank of Chicago, 950 F.2d 449, 457-458 (7th Cir. 1991)*. The instant case is similar to *Giacoletto*, where the Seventh Circuit held that the employer's reliance on Giacoletto's poor interpersonal skills as a reason in support of their employment decision created an inference of pretext. *Giacoletto, 954 F.2d at 426*. In *Giacoletto*, the plaintiff's fourteen year employment was terminated as a result of three alleged incidents of rude and abrasive behavior toward others, and prior performance evaluations indicating poor interpersonal skills. *See id.* The Court concluded, however, that these cited reasons created an inference of pretext since "Giacoletto had been kept on as a supervisor for 14 years despite his abrasive personality and because of his ability to produce." *See id.*

Similarly, the Court concludes that a reasonable jury could find that this cited reason creates an inference of pretext. Sears kept Plaintiff on for fifteen years, and promoted him to several different positions despite his allegedly poor interpersonal skills and because of his great technical abilities. Plaintiff's last performance [*19] evaluation, which was rated overall as "meets expectations", indicated that his

> "performance meets the high standards expected of a Sears executive and is totally satisfactory and acceptable. Consistently dependable, does the job as it is supposed to be done, meets and sometimes exceeds performance requirements." *(Plaintiff's Ex. Y.*)

Overall, Plaintiff has met his burden by providing sufficient evidence to allow a reasonable jury to find that each of Defendants proffered reasons for Plaintiff's termination are pretextual. From such a finding, along with the timing of Plaintiff's termination and the implementation of the Plan, a jury could draw a reasonable inference that a motivating factor for

Plaintiff's discharge was a desire to deny benefits. Plaintiff has, therefore, established the existence of a genuine issue of material fact that must be resolved at trial. Accordingly, the Court denies Defendants' motion for summary judgment on Plaintiff's ERISA claim.

B. Plaintiff's Objections Regarding Defamation Per Quod Claim

In addition to Plaintiff's ERISA claim, Plaintiff brought action against defendant Edidin for defamation per quod. "An action for defamation [*20] per quod is established where words not defamatory on their face are rendered so by extrinsic facts or innuendo . . . ." *Schaffer v. Zekman, 196 Ill. App. 3d 727, 554 N.E.2d 988, 992, 143 Ill. Dec. 916 (Ill. App. Ct. 1990)*. Furthermore, to allege defamation per quod, a plaintiff must establish special damages by alleging specific facts which point to a particular loss or lost opportunity. *Id.* Plaintiff alleges that "defendant Edidin made statements to one or more officers of Sears that plaintiff had used foul language in addressing clerical employees and that plaintiff yelled at his supervisor . . . in a management meeting." (*Amended Complaint* P*28*.) Plaintiff further alleges that as a result of these statements, he incurred the following special damages: "lost salary, lost pension benefits, lost vacation benefits, lost seniority, lost opportunities for professional advancement and development, lost opportunities for employment with other divisions of Sears, and compensation for plaintiff's pain and suffering as a result of emotional distress." (*Id. at* P *37*.)

Defendants moved for summary judgment claiming that they acted within a qualified privilege [*21] when Ms. Edidin made the alleged statements to other Sears managers. "An otherwise defamatory statement is not actionable if made under a qualified privilege. Statements made within a legitimate business context may be protected by a qualified privilege, including a statement made from employer to employee." *Larson v. Decatur Memorial Hospital, 236 Ill. App. 3d 796, 602 N.E.2d 864, 867, 176 Ill. Dec. 918 (Ill. App. Ct. 1992)*.

Both parties concede that the alleged statements were made within a qualified privilege. Plaintiff, however, contends that Defendants abused their privilege, which therefore makes the privileged communications actionable. "To prove an abuse of a qualified privilege, the plaintiff must show a direct intention to injure another, or a reckless disregard of the defamed party's rights and of the consequences that may result to him." *Kuwik v. Starmark Star Marketing and Administration, Inc., 156 Ill. 2d 16, 619 N.E.2d 129, 135, 188 Ill. Dec. 765 (Ill. Sup. Ct. 1993)*. Abuse of a qualified privilege may consist of a reckless act which shows a disregard for the defamed party's rights, such as making statements knowing they were false [*22] or despite a high degree of awareness that the statements were false, and then failing to properly investigate the truth of the matter. *See 619 N.E.2d at 136*.

Plaintiff contends that defendant Edidin knowingly made false statements to Robert Ferkenhoff in order to induce him to approve Plaintiff's termination. Plaintiff further contends that defendant Edidin acted with reckless disregard by failing to investigate the truth of the statements. The Court, however, agrees with the Magistrate Judge's conclusion:

> "There is no indication that Ms. Edidin had knowledge that the statements were false or made them in reckless disregard of the truth. Rather, it appears that Ms. Edidin relied on reports from several other employees and also conducted her own investigation. Plaintiff has, therefore, failed to overcome the defense of privileged communication." (*Report and Recommendation*, dated March 26, 1997 at 15.)

Plaintiff objects to the Magistrate Judge's determination and argues that the question of abuse of a qualified privilege is an issue for the jury to decide. Plaintiff relies on *Kuwik v. Starmark Star Marketing and Administration, Inc.*, and *Dawson* [*23] *v. New York Life Insurance Co.*, which held that whether a qualified privilege has been abused is a question of fact for the jury to decide. Plaintiff, however, fails to realize that abuse of a qualified privilege cannot simply be asserted to defeat a motion for summary judgment. Plaintiff has the burden to provide sufficient evidence to create a genuine issue of material fact; absent such evidence, summary judgment is appropriate. Here, Plaintiff has failed to meet his burden.

Even assuming arguendo that Plaintiff met his burden to provide evidence in support of his contention that defendant Edidin abused the qualified privilege, summary judgment is still mandated because Plaintiff failed to adequately allege special damages. "A per quod

action requires allegations of specific facts establishing the plaintiff's special damages." *Anderson v. Vanden Dorpel, 172 Ill. 2d 399, 667 N.E.2d 1296, 1303, 217 Ill. Dec. 720 (Ill. Sup. Ct. 1996)*. Failure to allege special damages is fatal to a per quod defamation action. *See id.* Plaintiff must plead special damages with particularity under both Illinois substantive law as well as the Federal Rules of Civil Procedure. [*24] *See Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262 (7th Cir. 1983)* (stating that *Fed.R.Civ.P. 9 (g)* requires special damages to be pled with specificity); *Dubrovin v. Marshall Field's & Co. Employee's Credit Union, 180 Ill. App. 3d 992, 536 N.E.2d 800, 129 Ill. Dec. 750 (Ill. App. Ct. 1989)* (holding defamation per quod requires special damages to be pled with specificity). "Specificity requires plaintiff to allege the basis for the damages sought, the connection between the defamatory statement and the damage, or the specific nature of the damages. Allegations of damage to the reputation, emotional distress, and economic loss are insufficient to state a cause of action." *Mader v. Motorola, 1998 U.S. Dist. LEXIS 4464*, No. 92- C-8089, 1998 WL 164880, at *9 (N.D. Ill. 1998).

As the Magistrate Judge correctly concluded, Plaintiff failed to meet his burden. Plaintiff has not provided any evidence to show the connection between the alleged defamatory statements and his alleged damages. Plaintiff contends that his "loss of employment was the direct result of Edidin's defamatory words to Robert Ferkenhoff." ([*25] *See Plaintiff's Objections to Slander Per Quod Claim* at P2.) However, Defendants cited reason of willful misconduct for Plaintiff's termination was based on the following incidents: the use of inappropriate language on at least two occasions to Sears associates, use of the ladies washroom, and misuse of company property. (*See Memo: Steve Anglin's Termination.*) Because Plaintiff has not provided evidence to show that the alleged defamatory statements alone caused his damages, the Court concludes that Plaintiff has failed to establish a genuine issue of material fact and hereby grants Defendants' motion for summary judgment for Plaintiff's defamation claim.

Conclusion

For the foregoing reasons, this Court denies Defendants' motion for summary judgement on Plaintiff's ERISA claim, and grants Defendants' motion for summary judgment on Plaintiff's defamation per quod claim.

ENTER:

JOHN A. NORDBERG

United States District Judge

DATED: August 7, 1998

Manjarres v. Nalco Co.

No. 09 C 4689

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2010 U.S. Dist. LEXIS 21970*; *30 I.E.R. Cas. (BNA) 922

March 9, 2010, Decided
March 9, 2010, Filed

COUNSEL: [*1] For David Manjarres, Plaintiff: David Manjarres, Law Office of David Manjarres, Esq., Woodridge, IL.

For Nalco Company, Laurie Marsh, Stephen N. Landsman, Defendants: Matthew Charles Luzadder, Kelley Drye & Warren LLP, Chicago, IL.

For Nalco Company, Laurie Marsh, Stephen N. Landsman, Counter Claimant: Matthew Charles Luzadder, Kelley Drye & Warren LLP, Chicago, IL.

For David Manjarres, Counter Defendant: David Manjarres, Law Office of David Manjarres, Esq., Woodridge, IL.

JUDGES: David H. Coar, United States District Judge.

OPINION BY: David H. Coar

OPINION

MEMORANDUM OPINION AND ORDER

Plaintiff David Manjarres ("Manjarres" or "Plaintiff") filed a ten-count complaint against Defendants Nalco Company ("Nalco"), Stephen N. Landsman ("Landsman"), and Laurie Marsh ("Marsh") (collectively "Defendants") [1] on June 23, 2009. Count X alleges defamation against Landsman and Marsh. Currently before the Court is Defendants' motion to dismiss Count X (Defamation) pursuant to *Fed. R. Civ. P. 12(b)(6)*. For the reasons given below, Defendants' motion to dismiss is GRANTED.

1 The Complaint does not set out the relationship between Landsman or Marsh and Nalco. However, the motion to dismiss states that (at all relevant times), Landsman [*2] was Nalco's Vice President of General Counsel (and Plaintiff's supervisor), and Marsh was one of Plaintiff's "internal clients in Nalco's HR department."

FACTUAL BACKGROUND

The following facts are taken from Plaintiff's complaint and accepted as true for the purposes of this motion. From April 2005 until October 2008, Plaintiff worked as an attorney for Defendant Nalco. (Compl. PP 1-2.) Plaintiff alleges that, at various times during his employment, including at least during 2007 and 2008, Defendants Marsh and Landsman made defamatory statements to staff employees that caused Plaintiff mental anguish, injured his professional reputation, and impaired his ability to earn a living. (*Id.* at PP 6-7.) Plaintiff alleges that Defendants' statements included comments that Plaintiff "is unprofessional," "is incompetent," "is unethical," and that "we've had other attorney's go crazy, maybe that is what is happening to him," and that neither Marsh nor Landsman had a legitimate business reason for making such statements to staff employees. *Id.*

LEGAL STANDARD

On a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, the court accepts all well-pleaded allegations in the plaintiff's [*3] complaint as true and draws all possible inferences in favor of the plaintiff. *Fed. R. Civ. P. 12(b)(6)*; *Tamayo v. Blagojevich, 526 F.3d 1074, 1081 (7th Cir. 2008)*. Under *Federal Rule of Civil Procedure 8(a)(2)*, a complaint must contain a "short and plain statement of the claim showing that the

pleader is entitled to relief." *Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (internal quotation marks omitted). Accordingly, to survive a motion to dismiss, a complaint must simply "state a claim that is plausible on its face." *Bell Atlantic v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is plausible on its face if it demonstrates "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal, 129 S.Ct. at 1949*. The plaintiff's factual allegations need not be "detailed," but they must include more than "labels and conclusions" in order to "give the defendant fair notice of what . . . the claim is and the grounds upon which it rests." *Twombly, 550 U.S. at 555* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))* (internal quotation marks omitted).

ANALYSIS

Defendants contend that Plaintiff's claim should be dismissed because the allegedly defamatory statements are statements of opinion [*4] protected by the *first amendment*. To state a claim for defamation under Illinois law, "a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages." *Solaia Tech., LLC v. Specialty Publ'g Co., 221 Ill. 2d 558, 852 N.E.2d 825, 839, 304 Ill. Dec. 369 (Ill. 2006)* (citing *Krasinski v. United Parcel Serv., Inc., 124 Ill. 2d 483, 530 N.E.2d 468, 125 Ill. Dec. 310 (Ill. 1988))*. Statements are considered defamatory *per se* when the words are "so obviously and inevitably hurtful to the plaintiff that damage to his reputation may be presumed." *Mittelman v. Witous, 135 Ill. 2d 220, 552 N.E.2d 973, 982, 142 Ill. Dec. 232 (Ill. 1989)* (internal citations omitted). Accordingly, where these types of words are at issue, a plaintiff "need not plead or prove actual damage to her reputation to recover." *Bryson v. News Am. Publ'ns, Inc., 174 Ill. 2d 77, 672 N.E.2d 1207, 1214, 220 Ill. Dec. 195 (1996)* (citing *Owen v. Carr, 113 Ill. 2d 273, 497 N.E.2d 1145, 1147, 100 Ill. Dec. 783 (1986))*. Illinois recognizes five categories of statements that are considered defamatory *per se:* (1) words that impute a person has committed a crime; (2) words that impute a person is infected with a loathsome communicable disease; (3) words [*5] that impute a person is unable to perform or lacks integrity in performing her or his employment duties; (4) words that impute a person lacks ability or otherwise prejudices that person in her or his profession; and (5) words that impute a person has engaged in adultery or fornication. *Van Horne v. Muller, 185 Ill. 2d 299, 705 N.E.2d 898, 903, 235 Ill. Dec. 715 (Ill. 1998)* (citing *Bryson, 672 N.E.2d at 1214-15*).

Even if it is defamatory *per se*, a statement "still may enjoy constitutional protection as an expression of opinion." *Solaia, 852 N.E.2d at 839*. Such statements are not actionable, and the court may make this determination as a matter of law. *Hopewell v. Vitullo, 299 Ill. App. 3d 513, 701 N.E.2d 99, 102, 233 Ill. Dec. 456 (Ill. App. Ct. 1998)* (citing *Doherty v. Kahn, 289 Ill. App. 3d 544, 682 N.E.2d 163, 172, 224 Ill. Dec. 602 (Ill. App. Ct. 1997))*. The test is "restrictive: a defamatory statement is constitutionally protected only if it cannot be reasonably interpreted as stating actual fact." *Solaia, 852 N.E.2d at 840* (citing *Kolegas v. Heftel Broad. Corp., 154 Ill. 2d 1, 607 N.E.2d 201, 208, 180 Ill. Dec. 307 (Ill. 1992))*. Further, "mixed expressions of opinion and fact may also be actionable." *Barakat, M.D. v. Matz, M.D., 271 Ill. App. 3d 662, 648 N.E.2d 1033, 1041, 208 Ill. Dec. 111 (Ill. App. Ct. 1995)* (citing *Mittelman, 552 N.E.2d at 983*). "There is no artificial [*6] distinction between opinion and fact: a false assertion of fact can be defamatory even when couched within apparent opinion or rhetorical hyperbole." *Solaia, 852 N.E.2d at 840*. However, because "all opinions imply facts," the "question of whether a statement is actionable is one of degree . . . The [more vague] and . . . generalized the opinion[,] the more likely the opinion is nonactionable as a matter of law." *Gerrard v. Garda, No. 08-cv-1146, 2009 U.S. Dist. LEXIS 6736, 2009 WL 269028, at *3 (C.D. Ill. Jan. 30, 2009)* (citing *Hopewell, 701 N.E.2d at 105*).

Courts consider several factors "to determine whether a statement reasonably presents or implies the existence of facts about the plaintiff." *Hopewell, 701 N.E.2d at 103*. In *Hopewell*, the Illinois Appellate Court explained:

> First, we consider whether the language of the statement has a precise and readily understood meaning, while bearing in mind that the *first amendment* protects overly loose, figurative, rhetorical, or hyperbolic language, which negates the impression that the statement actually presents facts. Second, we consider whether the general tenor of the context in

> which the statement appears negates the impression that the statement has factual content. [*7] Lastly, we consider whether the statement is susceptible of being objectively verified as true or false.

Id. (internal citations omitted). While courts assess the totality of the circumstances to determine whether a statement constitutes opinion, "the emphasis is on whether the statement is capable of objective verification." *Rose v. Hollinger Int'l, Inc., 383 Ill. App. 3d 8, 889 N.E.2d 644, 648, 321 Ill. Dec. 379 (Ill. App. Ct. 2008)* (internal citations omitted). In making this determination, courts consider whether the statements were made in a "specific factual context." *Id. at 649* (citing *Schivarelli v. CBS, Inc., 333 Ill. App. 3d 755, 776 N.E.2d 693, 698, 267 Ill. Dec. 321 (Ill. App. Ct. 2002))*. Without specific, underlying facts, statements are nonactionable opinion. *Piersall v. SportsVision of Chicago, 230 Ill. App. 3d 503, 595 N.E.2d 103, 106-7, 172 Ill. Dec. 40 (Ill. App. Ct. 1992)* ("there are no specific facts at the root of [plaintiff's] statement, complete or incomplete, capable of being objectively verified as true or false").

Plaintiff alleges that Defendants Marsh and Landsman made defamatory statements to Nalco employees, including that Plaintiff "is unprofessional," "is incompetent," "is unethical," and that "we've had other attorney's go crazy, maybe that is what is happening to him." [*8] Plaintiff argues that these statements are defamatory *per se*, and Defendants do not dispute this characterization. Instead, Defendants argue that the statements are constitutionally protected, nonactionable opinions. The Court considers each allegedly defamatory statement in turn.

I. Alleged Statements that Plaintiff was "Unprofessional" and "Incompetent"

Defendants argue that the alleged statements that Plaintiff was "unprofessional" and "incompetent" are nonactionable opinions. The Court agrees. Plaintiff fails to provide the factual context necessary to render these statements susceptible of objective verification; the alleged statements contain no specific facts suggesting a verifiable basis and offer no references to personal experiences with Plaintiff. Moreover, Plaintiff provides no additional statements that shed light on the meaning of Defendants' alleged comments. *See Installation Servs., Inc. v. Crown Castle Broad. USA Corp., Nos. 06 C 9, 04 C 6906, 2006 U.S. Dist. LEXIS 52758, 2006 WL 2024220, at *4-5 (N.D. Ill. July 13, 2006)* ("By itself, Kapp's statement that ISI was 'not qualified or competent' is too vague to be capable of verification. And ISI has offered no other statements that shed light on the [*9] phrase's meaning. . . . [T]he phrase cannot form the basis of a defamation action"). Courts have held such vague statements capable of verification only when a specific factual basis or context is also provided. *See Bogosian v. Bd. of Educ. of Cmty. Unit Sch. Dist. 200, 134 F.Supp.2d 952, 957 (N.D. Ill. 2001)* ("Standing alone, [the phrase 'unprofessional'] could be construed as a statement of opinion, but the verifiable factual basis for the opinion is clear from the balance of Ms. Gould's statements."); *Barakat, 271 Ill. App. 3d 662, 648 N.E.2d 1033 at 1042, 208 Ill. Dec. 111* (defendants' statements that he "had patients from [plaintiff] before," that plaintiff's "opinion wasn't any good," and that plaintiff was not "any good as a doctor" were at least a mixed expression of fact and opinion because they "imply an underlying factual basis which could be verified, i.e., previous patients from plaintiff which were examined by defendant").

Further, without more context, the statements that plaintiff was "unprofessional" and "incompetent" are too vague to have a readily understood meaning. *See Hopewell, 701 N.E.2d at 103*. The meaning of such general terms easily could differ among Plaintiff's colleagues. Without any details, the [*10] Court can only speculate as to the specific meaning intended. Courts have repeatedly held similar statements nonactionable. In *Hopewell*, the Illinois Appellate Court held that the statement "fired because of incompetence" was nonactionable because:

> Regardless of the fact that "incompetent" is an easily understood term, its broad scope renders it lacking the necessary detail for it to have a precise and readily understood meaning. There are numerous reasons why one might conclude that another is incompetent; one person's idea of when one reaches the threshold of incompetence will vary from the next person's. Without the context and content of the statement to limit the scope of "incompetent," we cannot say that there is a precise meaning relating to the alleged defamatory statement.

Id. at 104; *see also Brown v. GC Am., Inc., No. 05 C 3810, 2005 U.S. Dist. LEXIS 28065, 2005 WL 3077608, at *7-8 (N.D. Ill. Nov. 15, 2005)* (finding comments that plaintiff "was incompetent" and "had no ability to teach the continuing education courses he was teaching" lacked a readily understood meaning and were nonactionable opinion); *Green v. Trinity Int'l Univ., 344 Ill. App. 3d 1079, 801 N.E.2d 1208, 1220, 280 Ill. Dec. 263 (Ill. App. Ct. 2003)* ("[A]ny statements that plaintiff [*11] acted rudely, spent too much class time on material unrelated to his course, and was 'unprofessionally candid' constitute non-actionable opinion. What is considered rude or unprofessional differs from person to person.").

II. Alleged Statement that Plaintiff was "Unethical"

The same analysis establishes that the statement that Plaintiff was "unethical" constitutes nonactionable opinion. Again, Plaintiff fails to provide any specific facts that could render the statement capable of verification. There are no details, no particular incidents, and no underlying basis by which to verify the allegation; only the statement itself is provided. While broad terms like "unethical" may imply general ideas, they do not imply the underlying specific facts necessary to support a claim for defamation. *Gardner v. Senior Living Sys., Inc., 314 Ill. App. 3d 114, 731 N.E.2d 350, 355, 246 Ill. Dec. 822 (Ill. App. Ct. 2000)* (statement that plaintiff was "unethical" was constitutionally protected opinion because it could not be "reasonably interpreted as stating actual verifiable facts"); *compare American Hardware Mfrs. Ass'n v. Reed Elsevier, No. 03 CV 9421, 2010 U.S. Dist. LEXIS 57, 2010 WL 55657, at *8 (N.D. Ill. Jan. 4, 2010)* (statements including that plaintiff "simply [*12] cannot compete at this level so it has resorted to illegal and unethical activity" were "not presented as verifiable statements of fact" and were therefore nonactionable); *Flentye v. Kathrein, 485 F.Supp.2d 903, 920 (N.D. Ill. 2007)* (allowing claim to proceed but noting "the only statement that appears to be clearly opinion is that the plaintiff 'lacks an ethical compass'"); *with Dubinsky v. United Airlines Master Executive Council, 303 Ill. App. 3d 317, 708 N.E.2d 441, 450-51, 236 Ill. Dec. 855 (Ill. App. Ct. 1999)* (newsletter's statement that plaintiff "arranged to 'pay up on a secret, illegal and wildly unethical success fee'" contained specific factual assertions and was not protected opinion); *Dry Enters., Inc. v. Sunjut AS, No. 07 C 1657, 2008 U.S. Dist. LEXIS 25908, 2008 WL 904902, at *6-7 (N.D. Ill. March 31, 2008)* (statement that "Dry and Hazneci were not acting 'in accordance with our partnership and concepts of ethics,' taken alone, is not defamatory because it is an opinion," but is actionable in the context of an e-mail describing violation of the partnership agreement).

Without citing to any authority, Plaintiff argues that the professional codes and ethical obligations of attorneys render Defendants' alleged statement capable of objective [*13] verification. Even if this were true, and professional codes generally provided a yardstick with which to measure behavior, Plaintiff still has not provided the necessary factual basis to allow for objective verification of the alleged statement here. In *Barakat,* an Illinois Appellate Court held that a doctor's defamatory statements about another doctor were capable of objective verification because the plaintiff provided a specific factual basis, namely that the defendant had examined plaintiff's patients previously. *648 N.E.2d at 1042*. The existence of medical standards of care was neither central nor necessary for the determination. A means of objectively verifying a statement is only helpful if the statement is grounded in facts that render it capable of verification. As discussed above, the statement that Plaintiff was "unethical" is not grounded in any facts, and Plaintiff's reference to attorneys' general ethical codes cannot cure this deficiency.

III. Alleged Statement that Plaintiff was "Crazy"

Finally, the Court finds that Defendants' alleged statement, "we've had other attorneys go crazy, maybe that is what is happening to him" is not an actionable statement of medical fact. [*14] In *Haywood v. Lucent Technologies, Inc.,* a Northern District of Illinois judge held that the allegedly defamatory statement that Plaintiff was "unstable" was not objectively verifiable and therefore not actionable. *169 F.Supp.2d 890, 915-16 (N.D. Ill. 2001)*. The court explained, "[a]lthough the statement of [plaintiff]'s instability could conceivably be verified by some psychological evidence, neither party has produced any evidence to suggest that it is verifiable, so the statement is nonactionable opinion." *Id.* Here, as in *Haywood,* Plaintiff's complaint is devoid of additional facts or statements that suggest "crazy" referenced a medical diagnosis capable of verification rather than Defendants' opinion. Moreover, Plaintiff provides no context to suggest that this statement is anything more than "rhetorical hyperbole" or "mere name calling." *Pease v. Int'l Union of Operating Eng'rs Local 150, 208*

Ill. App. 3d 863, 567 N.E.2d 614, 619, 153 Ill. Dec. 656 (Ill. App. Ct 1991) (finding statements that "He's dealing with half a deck, . . . I think he's crazy" were not actionable).

In sum, the Court finds none of Defendants' allegedly defamatory statements actionable. In cases where courts have found statements actionable, the plaintiff [*15] has provided far greater detail regarding either the content or the context of the statements. *See Moriarty v. Greene, 315 Ill. App. 3d 225, 732 N.E.2d 730, 739, 247 Ill. Dec. 675 (Ill. App. Ct. 2000)* (statement that plaintiff "readily admitted that she sees her job as doing whatever the natural parents instruct her to do" was actionable because whether or not she admitted something could be objectively verified); *see also Solaia, 852 N.E.2d at 841* (finding statement that plaintiff's patent was "essentially worthless" was actionable because although it "has no precise meaning in the abstract," it had a "very precise meaning in the context of the letter" in which the phrase appeared). For this reason, the cases on which Plaintiff relies are each distinguishable. In *Quality Granite Constr. Co. v. Hurst-Rosche Eng'rs, Inc.*, the statements at issue referenced specific shortcomings in the plaintiff's work, including the plaintiff's "failure to complete the project in a timely manner, substandard workmanship, reluctance to complete punch list items and inability to correctly interpret the contract documents, plans and specifications as bid." *261 Ill. App. 3d 21, 632 N.E.2d 1139, 1142-43, 198 Ill. Dec. 528 (Ill. App. Ct. 1994)*. And in *Barakat*, as discussed above, the [*16] defendant's prior examination of the plaintiff's patients rendered his statements about the plaintiff's competence capable of verification. *648 N.E.2d at 1042*. The more detailed, factually verifiable statements in these cases are not analogous to the short, vague statements in the present case. Because the allegedly defamatory statements here do not include facts sufficient to render them objectively verifiable, the Court finds that these statements constitute nonactionable opinion.

Finally, Plaintiff's general allegation that additional statements were made does not save his defamation claim from dismissal. Plaintiff argues that, because the statements alleged in the complaint are merely representative and not an exhaustive list, the Court should permit him to perform discovery. (Pl. Br. 11-12.) However, "claims of defamation are subject to specific pleading requirements." *Dry Enters., 2008 U.S. Dist. LEXIS 25908, 2008 WL 904902, at *4*. "Generally, a defamation plaintiff fails to satisfy the requirements of notice pleading unless he specifically states the words alleged to be actionable." *Harris v. City of W. Chicago, No. 01 C 7527, 2002 U.S. Dist. LEXIS 16579, 2002 WL 31001888, at *8 (N.D. Ill. Sept. 3, 2002)* (citing *Seaphus v. Lilly, 691 F.Supp. 127, 134 (N.D. Ill. 1988))*. [*17] "The reason a plaintiff must, under notice pleading requirements, plead the specific words alleged to be actionable is that knowledge of the exact language used is necessary to form responsive pleadings." *Id.* (citing *Woodard v. Am. Family Mut. Ins. Co., 950 F.Supp. 1382, 1388 (N.D. Ill. 1997))*. Plaintiff's allegation that additional defamatory statements were made "at various times in at least 2007 and 2008" does not provide the detail necessary to conform to these pleading standards. (Compl. P 6.) Accordingly, this general allegation does not save Plaintiff's defamation claim from dismissal.

CONCLUSION

For the reasons stated above, Defendants' motion to dismiss is GRANTED.

Enter:

/s/ David H. Coar

David H. Coar

United States District Judge

Dated: March 9, 2010