STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: August 14, 2014]

DAVID N. THATCHER, SR.	:	
VS.	:	**C.A. No. PC 07-2239**
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, KURT SHATZ,[1] PERSONALLY AND IN HIS CAPACITY AS CHIEF OF THE OFFICE OF CRIMINAL INVESTIGATION, MATTHEW PATTERSON AND PATRICIA PATTERSON	:	

DECISION

MCGUIRL, J. Before this Court is Department of Environmental Management (DEM) and Kurt Schatz, personally and in his capacity as Chief of the Office of Criminal Investigation's (Chief Schatz) (collectively Defendants) motion for summary judgment. Defendants seek summary judgment on Count I, David N. Thatcher, Sr.'s (Plaintiff) slander complaint. Jurisdiction is pursuant to Super. R. Civ. P. 56. For the reasons set forth below, this Court denies the motion for summary judgment on Count I.

I

Facts and Travel[2]

Plaintiff worked as a criminal investigator at the Office of Criminal Investigation (OCI) at DEM from 1991 until his retirement in 2011. (Def.'s Ex. B in PC 06-3480, Thatcher Dep., 14:24-15:13, 19:15-21.) On May 1, 2006, Plaintiff informed Chief Schatz of possible ethics

[1] The case caption sets forth Defendant Kurt Schatz's name as "Shatz," as reflected in the original Complaint. The following Decision uses the correct spelling—Kurt Schatz.

[2] The facts herein are the same as those provided in PC-06-3480, which was consolidated with this case for purposes of discovery only.

violations stemming from a personal relationship Chief Schatz had had with Darlene Bunning-Chapdelaine (Ms. Chapdelaine). (Def.'s Ex. F in PC 06-3480, Pl.'s Answers to Interrogs. #8.) Ms. Chapdelaine worked as a consultant for Patriot Companies and coordinated its efforts to apply to DEM for a permit to operate a new facility that would recycle construction and demolition debris. (Def.'s Ex. B in PC 06-3480, Thatcher Dep., 48:1-10.) Ms. Chapdelaine also helped the Patriot Companies resolve administrative enforcement actions for violations of environmental regulations issued by DEM. Id. In addition to this alleged relationship, Plaintiff was also concerned about perceived relationships between the principals of the Patriot Companies and Matthew Patterson (Deputy Chief Patterson), the deputy chief of OCI, given the rumors that he intended to begin working for the Patriot Companies. (Pl.'s Ex. W in PC 06-3480, Thatcher Aff.)

On May 2, 2006, Chief Schatz requested that Plaintiff prepare a memorandum detailing his allegations. According to the memorandum written by Plaintiff, Principal Environmental Scientist James Ashton (Mr. Ashton), from DEM's Office of Compliance and Inspection Solid Waste Section, informed Plaintiff on April 26, 2006 of a telephone call he had received from Deputy Chief Patterson. (Defs.' Ex. B, Pl.'s Mem. to Chief Schatz at 1.) Allegedly, Deputy Chief Patterson had inquired into why DEM had conducted an inspection at a Patriot Companies facility in Johnston. Plaintiff stated in the memorandum that "Mr. Ashton gave [Plaintiff] the impression that this telephone call from retired Deputy Chief Patterson was inappropriate" because of rumors that Deputy Chief Patterson would soon be employed by Patriot Disposal. Id. at 2. Soon after the alleged phone call, Deputy Chief Patterson began working for the Patriot Hauling Company on June 12, 2006. The memorandum stated that "there was a shared sense of

uneasiness that existed within this office regarding the 'perceived' relationship that may exist between the principals of the Patriot Companies and retired Deputy Chief Patterson." Id. at 3.

This memorandum also expressed concerns about an alleged relationship between Ms. Chapdelaine and Chief Schatz. Id. at 4. The memorandum mentioned "allegations of regularity of contact that existed between [Chief Schatz and Ms. Chapdelaine], i.e., telephone calls, exchange of emails, visits to the OCI . . . speculation of afternoon trips to meet with Ms. [Chapdelaine], appearance of an article (2005) in a major waste industry magazine that gave the appearance of your support of the Patriot companies . . . " Id.

On May 5, 2006, Chief Schatz wrote a memorandum to DEM Director Michael Sullivan (Director Sullivan) explaining his concern regarding Plaintiff's continued employment as a criminal investigator. (Pl.'s Ex. S in PC 06-3480, Mem. from Chief Schatz to Director Sullivan.) Chief Schatz stated that, to his knowledge, Deputy Chief Patterson had always acted with "utmost professionalism" and that no evidence had been found to support Plaintiff's allegations. According to this memorandum, the sources that Plaintiff relied on in his memorandum denied knowledge of unethical or suspicious behavior. Chief Schatz also wrote: "I do not pretend to be a psychiatrist, but based on my experience and his behavior in the last few days, I have a responsibility to advise you that I believe that [Plaintiff] is making very poor decisions and using poor judgment in the performances of his duties." Id. As a result, Chief Schatz recommended that Plaintiff be temporarily removed from his position.

Following this recommendation, DEM notified Plaintiff that he would be required to undergo a mandatory fitness for return to duty evaluation in order to return to work. (Pl.'s Ex. I in PC 05-3480, Letter from DEM Human Resources to Plaintiff, May 19, 2006.) On June 29, 2006, Plaintiff filed a Complaint against DEM and W. Michael Sullivan, in his capacity as

Director, alleging violations of the Rhode Island Whistleblower Act (Count I) and the Law Enforcement Officers' Bill of Rights (Count II). Subsequently, on August 1, 2006, Plaintiff was evaluated by a doctor who found him fit for duty, and Plaintiff returned to work on August 21, 2006. (Pl.'s Ex. K in PC 06-3480, Letters from Life Watch Employee Assistance Program to DEM and Psychological Fitness For Duty Evaluation.)

On May 1, 2007, Plaintiff filed the Complaint in the instant case against DEM, Chief Schatz, Deputy Chief Patterson and Patricia Patterson (Sheriff Patterson) alleging slander (Count I). Specifically, Plaintiff claimed that Chief Schatz disseminated information that Plaintiff was mentally imbalanced, and that Deputy Chief Patterson and his wife, Sheriff Patterson, made false accusations that Plaintiff allegedly threatened them in revenge for his coming forward with his concerns about Chief Schatz and Deputy Chief Patterson's possible unethical activities on the job.

On January 21, 2010, the instant case was consolidated with PC-06-3480 for discovery purposes only. DEM and Chief Schatz then filed a motion for summary judgment on Count I on September 12, 2013.

II

Standard of Review

Summary judgment must be granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Super. R. Civ. P. 56. This Court is mindful, however, that "[s]ummary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously." Pichardo v. Stevens, 55 A.3d 762, 765-66 (R.I. 2012) (quoting Estate of Giuliano v. Giuliano, 949 A.2d 386, 390 (R.I. 2008)); DePasquale v. Venus Pizza, Inc., 727 A.2d 683, 685 (R.I. 1999). "'[T]he nonmoving party bears the burden of

proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions.'" Mruk v. Mortg. Elec. Registration Sys., Inc., 82 A.3d 527, 532 (R.I. 2013) (quoting Daniels v. Fluette, 64 A.3d 302, 304 (R.I. 2013)). The hearing justice "'must review the pleadings, affidavits, admissions, answers to interrogatories, and other appropriate evidence from a perspective most favorable to the party opposing the motion.'" Estate of Giuliano, 949 A.2d at 391 (quoting Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981)). The hearing justice may not weigh the evidence or pass upon credibility issues. Liberty Mut. Ins. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008); Doe v. Gelineau, 732 A.2d 43, 47-48 (R.I. 1999).

III

Analysis

Defendants ask this Court to grant summary judgment on Count I, alleging that Chief Schatz slandered Plaintiff in his May 5, 2006 memorandum.[3] Defendants argue that Chief Schatz's memorandum is a statement of his opinion, not fact, which Defendant claims is not actionable in a defamation case. Defendants further maintain that Chief Schatz has a qualified privilege as to the statements in his memorandum to Director Sullivan. Finally, Defendants contend that there was no publication of Chief Schatz's memorandum to a third party.

To prove defamation, a plaintiff must show (1) the utterance of a false or defamatory statement by the defendant; (2) an unprivileged communication to a third party; (3) fault that amounts at least to negligence; and (4) damages. Alves v. Hometown Newspapers, Inc., 857 A.2d 743, 751 (R.I. 2004); Cullen v. Auclair, 809 A.2d 1107, 1110 (R.I. 2002). If a public

[3] The Complaint also alleges that Deputy Chief Patterson and Sheriff Patterson allegedly made false accusations about Plaintiff. Defendants do not challenge this claim and limit their motion to the slander allegations with respect to Chief Schatz. Therefore, this Court will not address the slander allegations regarding Deputy Chief Patterson and Sheriff Patterson.

official brings a defamation action relating to his or her official conduct, he or she must prove that the statement was made with "actual malice," which is defined as "'knowledge that it was false or with reckless disregard of whether it was false or not.'" Cullen, 809 A.2d at 1110 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)). Actual malice must be proven by clear and convincing evidence. Id.

A public official is one who

> "has or appears to the public to have, substantial responsibility for or control over the conduct of governmental affairs, and his or her position has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees."

Leddy v. Narragansett Television, L.P., 843 A.2d 481, 486 (R.I. 2004) (quoting Hall v. Rogers, 490 A.2d 502, 504 (R.I. 1985)) (internal quotations omitted). In Gertz v. Robert Welch, Inc., the United States Supreme Court envisioned two types of public officials. Gertz, 418 U.S. 323, 351 (1974). First, one "may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." Id. Second, a person may become a public figure by "voluntarily inject[ing] himself or [drawing himself] into a particular public controversy . . . ." Id. at 351. It is also well-established that public officials include police and law enforcement officers. Leddy, 843 A.2d at 486; Hall, 490 A.2d at 504. Here, the parties do not dispute that Plaintiff is a public official.[4] Therefore, for purposes of this motion, this Court concludes that Plaintiff is a public official. See Leddy, 843 A.2d at 486.

[4] In his brief, Plaintiff states: "While [Plaintiff] does not necessarily concede that he is a public official, for purposes of his objection to this summary judgment motion Plaintiff is not arguing this point." (Pl.'s Obj. to Defs.' Mot. for Summ. J. at 19.) At the same time, Plaintiff also notes in his brief that the great weight of authority suggests that police or law enforcement officers are considered "public officials." As a general rule, parties must spell out their arguments "squarely and distinctly." Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 990 (1st Cir. 1988). Judges will not entertain arguments raised in a perfunctory and underdeveloped

As for the first prong, a false or defamatory communication is one that "injuriously affects a man[']s reputation, or which tends to degrade him in society or bring him into public hatred and contempt." Burke v. Gregg, 55 A.3d 212, 218 (R.I. 2012) (internal quotations omitted). Generally, both statements of fact and opinions may be defamatory. Restatement (Second) Torts § 565-66 (1977). If the defamation action brought by a public official involves a statement of fact, the plaintiff must prove it was made with reckless or knowing falsity. Cullen, 809 A.2d at 1110.

An opinion, however, is only actionable if "'it implies the allegation of undisclosed defamatory facts as the basis for the opinion.'" Healy v. New England Newspapers, Inc., 555 A.2d 321, 324 (R.I. 1989) (quoting Belliveau v. Rerick, 504 A.2d 1360, 1364 (R.I. 1986)). In defamation cases involving opinions or ideas, the "reckless or knowing falsity" standard is inapplicable. Cullen, 809 A.2d at 1110. Rather, an opinion by a public official, whether justified or unjustified, is privileged as a matter of law if it is based on disclosed or publicly known, non-defamatory facts. Cullen, 809 A.2d at 1110 (quoting Beattie v. Fleet Nat'l Bank, 746 A.2d 717, 721 (R.I. 2000)); see Hawkins v. Oden, 459 A.2d 481, 484 (R.I. 1983) (quoting Orr v. Argus-Press Co., 586 F.2d 1108, 1114 (6th Cir. 1978) ("'It is now established as a matter of constitutional law that a statement of opinion about matters which are publicly known is not defamatory.'"). "[S]uch opinions are not actionable however dishonest the speaker may be in publishing that opinion." Cullen, 809 A.2d at 1111. "The rationale for this exception is that '[w]hen the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to

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manner. McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991). Therefore, for purposes of this motion, this Court will assume that Plaintiff is a public figure.

construe the statement as *insinuating* the existence of additional, undisclosed [defamatory] facts.'" Id. (emphasis in the original).

Here, the parties agree that Chief Schatz's memorandum is an opinion. However, there is a question of fact about whether the opinion is based on true or defamatory facts. See Healy, 555 A.2d at 324. Specifically, Plaintiff contends that Chief Schatz's statement in his memorandum, written on May 5, 2006—that "no evidence at this time has been found to support [Plaintiff's] allegations"—was false. Plaintiff has provided evidence, however, that on May 3, 2006, Jo-Anne Scorpio, an office manager at DEM, stated in a memorandum to Chief Schatz: "Approximately one week before [Deputy Chief Patterson's] last day of work at OCI, [Deputy Chief Patterson] briefly told me that he was going to work for Patriot beginning in June 2006." (Pl.'s Ex. D in PC 06-3480, Interoffice Mem., May 3, 2006.) The memorandum further states: "I had also found out that same week that [Deputy Chief Patterson] had also informed [Plaintiff] and [Mr.] Ashton about his employment at Patriot." Id. Deputy Chief Patterson also stated in his deposition that he told employees at DEM that he would begin working for the Patriot Companies. (Pl.'s Ex. X in PC 06-3480, Patterson Dep., 19:7-16.) Therefore, it is possible that Chief Schatz was aware that there was evidence to support Plaintiff's allegations and that his statement was based on defamatory facts. See Belliveau, 504 A.2d at 1364.

There is also a question of fact about whether the statement—". . . I believe that [Plaintiff] is making poor decisions and using poor judgment in the performance of his duties"—was based on a true or defamatory fact. See Healy, 555 A.2d at 324. In his answers to interrogatories, Plaintiff stated that he felt it was his "professional duty and moral obligation" to meet with Chief Schatz and tell him what Plaintiff perceived to be unethical conduct in the workplace. (Defs.' Ex. I, Pl.'s Answers to Interrogs. #13, at 15.) Plaintiff also submitted

evidence corroborating his statements. Specifically, Deputy Chief Patterson stated in his deposition that he told employees at DEM that he was going to work for the Patriot Companies. (Pl.'s Ex. X in PC 06-3480, Patterson Dep., 19:7-17.) In that deposition, he also stated that he looked into complaints against companies for which he ended up working. Id. at 21:2-6. Moreover, Deputy Chief Patterson affirmed that he spoke with Larry Mouradjian, DEM's Associate Director, about an alleged relationship between Chief Schatz and Ms. Chapdelaine and that Joseph Vinagro, the owner of the Patriot Companies, told Deputy Chief Patterson that he felt Chief Schatz and Ms. Chapdelaine were having inappropriate sexual relations. Id. at 27:15-19, 28:10-14. Finally, Plaintiff submitted emails between Chief Schatz and Ms. Chapdelaine as evidence of a possibly inappropriate relationship. (Pl.'s Ex. F in PC 06-3480). Therefore, whether Plaintiff's using poor judgment was based on a true or false statement is a question of fact that this Court may not decide at the summary judgment stage. Liberty Mut. Ins. Co., 947 A.2d at 872.

Additionally, the defamatory statement must be an unprivileged publication to a third party. Alves, 857 A.2d at 751. Privileged communications fall into two general categories: absolute privilege and qualified privilege. W. Page Keeton, et al., Prosser & Keeton on Torts §§ 114-115 (5th ed. 1984). Absolute privilege "has been confined to a very few situations where there is an obvious policy in favor of permitting complete freedom of expression, without inquiry as to the defendant's motives." Id. § 114 at 816. Here, the parties do not dispute that the memorandum is not absolutely privileged. Therefore, this Court will only consider whether the memorandum is protected under the doctrine of qualified privilege.

The Rhode Island Supreme Court has stated that:

> "A qualified privilege allows a person to avoid liability for a false and defamatory statement if the publication is such that the

> publisher acting in good faith correctly or reasonably believes that he has a legal, moral or social duty to speak out, or that to speak out is necessary to protect either his own interests, or those of third person[s], or certain interests of the public."

Ims v. Town of Portsmouth, 32 A.3d 914, 930 (R.I. 2011) (quoting Ponticelli v. Mine Safety Appliance Co., 104 R.I. 549, 551, 247 A.2d 303, 305-06 (1968)). For the qualified privilege to apply, there must be a "reciprocity of duty" between the publisher of the statement and the recipient, "such that the latter has an interest in receiving the information that corresponds to that of the publisher in communicating it." Avilla v. Newport Grand Jai Alai LLC, 935 A.2d 91, 96 (R.I. 2007) (citing Mills v. C.H.I.L.D., 837 A.2d 714, 720 (R.I. 2003)). If the allegedly defamatory statement is made because of malice, such as personal spite or ill will, the qualified privilege may be lost. Ims, 32 A.3d at 930 (citing Kevorkian v. Glass, 913 A.2d 1043, 1048 n.4 (R.I. 2007)); Avilla, 935 A.2d at 96. The Rhode Island Supreme Court has held that "the determination of the primary motivation of a defendant [is] a question of fact, not to be dealt with on summary judgment." Avilla, 935 A.2d at 96.

Here, there is a question of fact about whether Defendants were motivated by personal spite or ill will when writing the memorandum. See id. In his interrogatories, Plaintiff states that he met with Chief Schatz to discuss his memorandum and that Chief Schatz "became increasingly agitated . . . and began directing his questioning to the portion of the memo that related to his perceived relationship with Ms. Darlene Chapdelaine." (Defs.' Ex. I, Pl.'s Answers to Interrogs. #13, at 17.) Those answers to interrogatories also say that Chief Schatz "stated in not some [sic] many words that [Plaintiff] should be careful and that people like [him] coming forward often become the targets of their very own complaints." Id. at 19. Plaintiff perceived this comment as a warning and a threat "as Chief Schatz has exhibited traits of being very vindictive in the past." Id. Therefore, there is a question of fact about whether the allegedly

defamatory statement was made because of personal spite or ill will and whether the qualified privilege was lost. See Ims, 32 A.3d at 930.

Finally, the statement must be published to a third party. Alves, 857 A.2d at 751. "Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed." Restatement (Second) Torts § 577 (1977). The communication must also be made to a third person because "[t]he law of defamation primarily protects only the interest in reputation. Therefore, unless the defamatory matter is communicated to a third person there has been no loss of reputation, since reputation is the estimation in which one's character is held by his neighbors or associates." Id. The third person may be the defendant's agent, employee, or officer. Keeton et al., supra, § 113 at 798. Furthermore, "since it is the defamatory meaning which must be communicated, it must be shown that the utterance was understood in that sense." Id. Here, there was clearly a communication to a third party. Specifically, Chief Schatz sent his memorandum to Director Sullivan.

Defendants argue that sending a memorandum up one's chain of command is not a publication. They rely on Georgia case law that states that there is no publication and therefore no cause of action for slander "when the communication is intracorporate, or between members of unincorporated groups or associations, and is heard by one who, because of his/her duty or authority has reason to receive the information . . . ." Kurtz v. Williams, 371 S.E.2d 878, 880 (Ga. App. 1988). Rhode Island has not adopted this exception, nor is this Court bound by the Georgia case. Kedy v. A.W. Chesterton Co., 946 A.2d 1171, 1182 (R.I. 2008) (explaining that even if a Rhode Island court looks to federal courts or other states for guidance, it does not subject itself to the authority of the other jurisdictions). Rather, the general rule is that the false statement must be communicated to someone other than the person defamed. Keeton et al.,

supra, § 113 at 797. Therefore, Plaintiff can establish this prong of his defamation claim. See Alves, 857 A.2d at 751.

IV

Conclusion

This Court denies Defendants DEM and Chief Schatz's motion for summary judgment on Count I because there exist genuine issues of material fact regarding whether Plaintiff reasonably believed there would be a violation of law, whether the opinion in the memorandum was based on a true or defamatory statement, and whether Defendants' actions were motivated by personal spite or ill will. The parties shall present an appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	David N. Thatcher, Sr. v. Department of Environmental Management, et al.
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COURT:	Providence County Superior Court
DATE DECISION FILED:	PC 07-2239
JUSTICE/MAGISTRATE:	McGuirl, J.
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