SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ERIC W. PAYNE,	:	
Plaintiff,	:	
v.	:	**2012 CA 006163 B**
	:	**Judge Cordero**
THE DISTRICT OF COLUMBIA, *et al.*,	:	**Next Event: Initial Sched. Conf.**
	:	**Date: Dec. 18, 2012, 9:30 a.m.**
Defendants.	:	
	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' SPECIAL MOTION TO DISMISS PURSUANT TO D.C. CODE § 16-5502(a) OR, IN THE ALTERNATIVE, MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

The Court should dismiss this action with prejudice pursuant to the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5502(a) ("the Anti-SLAPP Act" or "the Act") or, alternatively, under Sup. Ct. R. Civ. P. Rule 12(b)(6) for failure to state a claim on which relief can be granted.

This case is inextricably connected to a wrongful termination case that plaintiff filed in the United States District Court for the District of Columbia against the same defendants (the "D.D.C. Case") on April 30, 2010. As discussed below, having exhausted discovery in the D.D.C. case, unable to prove his claims, and facing a motion for summary judgment by defendants, plaintiff filed this improper and meritless action to garner publicity and attack the defendants' publicly stated position in the D.D.C. Case. Hence, this is precisely the type of case that the Anti-SLAPP Act is designed to address.

Because plaintiff cannot show that he is likely to prevail on the merits of his claims, this proceeding must be dismissed with prejudice under the Anti-SLAPP Act. Likewise, plaintiff cannot meet the traditional standard of a Rule 12(b)(6) motion. Thus, no matter which standard the Court applies, plaintiff's suit must be dismissed.

FACTUAL BACKGROUND

Plaintiff is the former Director of Contracts for the District of Columbia Office of the Chief Financial Officer ("OCFO"). He was moved to a non-managerial position and eventually terminated by the OCFO because of serious concerns regarding his performance and his failures in dealing with his subordinates. Unable to accept this turn of events, plaintiff attempted to tie his termination to controversy about rebidding the D.C. Lottery contract that he supervised during his tenure. To this end, plaintiff immediately began speaking to the press about his termination. Indeed, plaintiff spoke to the Washington Post on January 9, 2009, the day he was terminated, and he gave an interview to a reporter from the Washington Examiner a few days later. *See* chart entitled "Plaintiff Eric Payne's Communications with Press Prior to Filing Suit", attached as Exhibit A. Between his termination and filing of the D.D.C. Case, plaintiff was quoted in local press outlets, including the Washington Post, and Washington Examiner, at least four times.[1] *Id.*

Plaintiff filed the D.D.C. Case on April 30, 2010, espousing various legal theories to support his claim that his termination was improper.[2] As in this action, plaintiff named

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[1] These contacts are shown by quotes in on-line publications located by counsel for the District. There may be other instances that the District could not locate, or where the press did not directly quote plaintiff or did not publish an article after speaking to plaintiff.

[2] In the D.D.C. Case complaint plaintiff originally alleged constitutional defamation, violation of D.C. Code § 2-308.16 (the False Claims Act), violation of D.C. Code § 1-615.51, *et seq.* (the Whistleblower Protection Act), and wrongful termination against public policy. *See* Complaint (in the instant case), ¶ 8 (although the Complaint curiously does not reveal to the Court that the D.D.C. Case also included an allegation for violation of the False Claims Act as filed). Plaintiff later amended the D.D.C. Case complaint to add a claim for intentional infliction of emotional distress. *See* D.D.C. Amended Complaint, attached as Exhibit B. This Court may take judicial notice of plaintiff's prior complaint. *See S.S. v. D.M.*, 597 A.2d 870, 880 (D.C. 1991) (holding that

the District of Columbia and Dr. Natwar Gandhi, its Chief Financial Officer, as defendants. As part of his scorched-earth litigation strategy, instead of waiting the due justice of the District Court, plaintiff continued to litigate his wrongful termination claims in the press. From April 30, 2010, to July 30, 2012, when he filed this action, plaintiff or his attorneys have been quoted in the local press at least twelve times. *See* Exhibit A. In these articles, Payne and his counsel have tried to tie his termination to a large public contract award that he oversaw while at the OCFO. They have likewise used the press to criticize the defendants' litigation strategy. Thus, plaintiff has transformed what could have been a limited employment dispute into a matter of public interest.

This present action plainly was taken as part of plaintiff's media strategy, rather than an actual attempt to correct a legal wrong. Indeed, defendants first learned about this action from the media. Plaintiff filed this case on the day he was to take the deposition of the OCFO's Chief Information Officer, David Umansky, in connection with the D.D.C. Case. Immediately before his deposition, Mr. Umansky received an email from a reporter from the Washington Post seeking a comment on this lawsuit.[3] Plaintiff himself had sent the reporter an email with the subject line "New Filing Alert - Natwar Gandhi."

"[i]n general, a judge may take judicial notice of the contents of court records" and specifically, "in appropriate cases, a judge may take judicial notice of the contents of court records in a related prior proceeding.")

[3] The D.D.C. case already includes allegations of constitutional defamation based on statements by Mr. Umansky to the press about plaintiff's termination. *See* Complaint, ¶ 8; *and also* Exhibit B. As such, plaintiff's gamesmanship regarding the timing of the filing of this additional defamation suit, on the cusp of Mr. Umansky's deposition in the D.D.C. case, could not be more evident.

Although plaintiff and his counsel were sitting in a conference room with defense counsel, they refused to provide a copy of the instant Complaint. Thus, defendants had to obtain a copy from the Court. Having alerted the press to his new action and received the attention he sought, plaintiff then made no effort to serve either defendant for over a month, until September 5, 2012, even though defense counsel had offered to accept service on behalf of Dr. Gandhi.

ALLEGATIONS IN THE COMPLAINT

In this action, plaintiff seeks damages in connection with statements that the District's CFO, Dr. Gandhi, made to the press, under four separate legal theories: I) Defamation; II) False Light; III) Intentional Infliction of Emotional Distress ("IIED"), and IV) Constitutional Defamation.[4] The first several paragraphs of the Complaint recount plaintiff's version of his supposedly meteoric rise within the OCFO until he was "unceremoniously terminated" on January 9, 2009. Compl. ¶¶ 1-8. Thereafter, plaintiff recounts deposition testimony and interrogatory answers by Dr. Gandhi in the course of defending the D.D.C. Case. *Id.* ¶¶ 9-10. In this testimony, Dr. Gandhi denied that he made the decision to terminate plaintiff, which he attributes to plaintiff's direct supervisors.

Next, the Complaint recounts the specific statements that Dr. Gandhi allegedly made to the press that underlie plaintiff's instant claims. In the first, an email sent to a Washington Post columnist, Gandhi states that "Payne was 'terminated [from his position

[4] Plaintiff filed an Amended Complaint on November 2, 2012. The only substantive change in this new filing was the addition of a claim for constitutional defamation. Throughout this brief the term "Complaint" will be used to refer to the Amended Complaint.

of the Director of Contracts] because of his poor performance as manager of the OCFO Contracts Office.'" *Id.* ¶ 11 (alteration in the original). The Complaint next takes issue with oral statements that Gandhi allegedly made to a Washington Post that "he (Gandhi) personally, decided to terminate Payne" and that "Payne was 'a very poor manager.'" *Id.* ¶ 13. The Complaint avers that these statements are "blatantly inconsistent" with Gandhi's testimony in the D.D.C. Case, where he said that the decision to terminate plaintiff rested with plaintiff's direct supervisors.

Although this "blatant inconsistency" is central to plaintiff's media campaign, it is entirely irrelevant to this action. As discussed in detail below, the crux of this suit is plaintiff's claim that the CFO's statements about why he was fired – because he was a "poor manager" – somehow injured his reputation and, consequently, caused his damages. Plaintiff's purported injury and the damages he claims to have suffered are the same, regardless of whether or not Dr. Gandhi was directly involved in the decision to terminate his employment.

Who made the actual decision to fire plaintiff is also utterly irrelevant for the purposes of this motion. What is relevant is that the statements made by Dr. Gandhi describe the defendants' position in a case pending judicial review. Consequently, they are protected under the Anti-SLAPP Act. *See* D.C. Code § 16-5501(1)(A)(i). Moreover, the substance of these statements – that plaintiff was terminated for cause – is not actionable as defamation, IIED or under any other legal theory, and plaintiff cannot hope to succeed on the merits of his claims.

ARGUMENT

I. THE D.C. ANTI-SLAPP ACT MANDATES THAT THIS ACTION BE DISMISSED BECAUSE DR. GANDHI'S STATEMENTS ARE PROTECTED, AND PLAINTIFF CANNOT SHOW HE IS LIKELY TO SUCCEED ON THE MERITS.

The D.C. Anti-SLAPP Act mandates that baseless lawsuits attempting to suppress speech on matters of public interest must be expeditiously dismissed with prejudice.[5] *See* D.C. Code § 16-5502; *see also Lehan v. Fox Television Stations, Inc.*, No. 11-4592 at *3-4 (Super. Ct. Nov. 30, 2011) (granting motion under the Act to dismiss libel claims, and finding that plaintiff failed to show "likelihood of success") (attached hereto as Exhibit C). Here, Mr. Payne has filed this suit not to remedy true damage from Dr. Gandhi's comments, but instead to chill the OCFO's statements to the press about his previously-filed wrongful termination suit – publicity that Mr. Payne courted even before filing the D.D.C. Case and has continued to seek for the last several years. *See* Exhibit A. Under the facts here, and pertinent decisional law, Mr. Payne's case must be dismissed because it is meritless on its face.

A. STANDARD TO DISMISS UNDER THE D.C. ANTI-SLAPP ACT

The express purpose of the Anti-SLAPP Act is to ensure the prompt dismissal of meritless lawsuits filed against individuals based on their statements on matters of public interest. D.C. Code § 16-5501 *et seq*.[6]

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[5] These "Strategic Lawsuits Against Public Participation" are sometimes referred to hereafter as "SLAPPs".

[6] In the Act, the Council intentionally followed "the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaged in protected actions." Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 18-893, "Anti-SLAPP Act of 2010," Nov. 19, 2010 at 4 (attached hereto as Exhibit D).

This lawsuit is precisely such a case. The Act applies to this action because Dr. Gandhi's supposedly actionable statements are "acts in furtherance of the right of advocacy on issues of public interest," as those terms are defined in the statute. Under the Act, this is all that defendants are required to demonstrate and, upon this showing, the Court is required to dismiss the complaint with prejudice. *See* D.C. Code § 16-5502(b). Plaintiff can avoid this outcome only by demonstrating to this Court that he is "likely to succeed on the merits" of his claims. *Id.* Plaintiff is unable to meet his burden with respect to any of his claims because he has failed to state any cause of action on which any relief could be granted. As a result, the Act requires that the Court dismiss his claims, promptly and with prejudice.

B. DEFENDANTS' ALLEGED ACTIONS ARE PROTECTED ADVOCACY ON MATTERS OF PUBLIC INTEREST.

The Anti-SLAPP Act's application to the facts of this case is straightforward. The D.D.C. Case, the operation of the OCFO, and the plaintiff's termination, are all matters of public interest. Indeed, not only are these issues under consideration by a judicial body as anticipated by the statute, but plaintiff's own actions have made his situation a matter of public interest even apart from the D.D.C. Case. *See* D.C. Code § 16-5501(1)(A)(i) and (ii). Thus, Dr. Gandhi's alleged statements to the press are protected advocacy on that topic.

The applicable portion of the Anti-SLAPP Act provides:

> (a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.[7]

D.C. Code § 16-5502.

An "act in furtherance of the right of advocacy on issues of public interest" is "any written or oral statement made":

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

D.C. Code § 16-5501(1)(A)(i) and (ii). Further, "'Claim' includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief" and "'Issue of public interest' means "an issue related to . . . the District government;[or] a public figure." D.C. Code § 16-5501(2) and (3).

Here, there is no question that the allegedly defamatory statements identified in this action were made about the claims at issue in the D.D.C. Case. Each statement described the reason for the termination *at issue* in the D.D.C. Case, as well as the person who made the decision. The D.D.C. Case was and continues to be under consideration by a judicial body – the U.S. District Court for the District of Columbia. Thus, Dr.

[7] Here, defendants have requested leave of Court to file their motion to dismiss and special motion to dismiss pursuant to the Anti-SLAPP Act at the same time, on a date certain more than 45 days after the claim, due to the procedural circumstances of the case. After the Court granted defendant's initial motion, plaintiff amended his Complaint. Defendants filed motion seeking leave to file this motion on November 14, 2012, in order to address plaintiff's new constitutional defamation claim. The Court has not ruled on this motion.

Gandhi's alleged statements are squarely within the plain language of the Act. Indeed, cases interpreting the exact same language in California's Anti-SLAPP statute have uniformly found that statements about civil litigation are protected. *See Healy v. Tuscany Hills Landscape & Recreation Corp*., 39 Cal. Rptr. 3d 547, 549 (Ct. App. 2006) (definition includes statements about civil litigation); *Neville v. Chudacoff*, 73 Cal. Rptr. 3d 383, 391 (Ct. App. 2008) (same) (collecting cases).

Moreover, the Anti-SLAPP Act applies protects government entities such as the District. As the California Supreme Court has explained, the Anti-SLAPP Act protections apply:

> "to statements and writings of governmental entities and public officials on matters of public interest and concern that would fall within the scope of the statute if such statements were made by a private individual or entity. … Just as SLAPPs filed against individuals have a 'chilling' effect on their participation in government decision making, SLAPPs filed against public officials, who often serve for little or no compensation, may likely have a similarly 'chilling' effect on their willingness to participate in governmental processes."

*Vargas v. City of Salina*s, 205 P.3d 207, 216-17 (Cal.2009).

Finally, Mr. Payne's claims in the D.D.C. Case hinge on his termination from a position with the District government and he has attempted to link it to a matter of broader public interest – the D.C. Council's decision not to approve a major city contract. Indeed, plaintiff treats his termination as a matter of public interest by exploiting the press as part of his litigation strategy. *See* Exhibit A.[8] Thus, Dr. Gandhi's statements

[8] This Court can take judicial notice of outside evidence in considering a special motion to dismiss under the Anti-SLAPP Act. *See, e.g., Farah v. Esquire Magazine, Inc.,* 863 F. Supp. 2d 29, 37 (D.D.C. 2012) (considering press articles and on-line publications in granting Anti-SLAPP motion and stating that "[h]aving become such well-known proponents of one position on the issue, [the party opposing the Anti-SLAPP motion] cannot complain that the very intensity of their advocacy also became part of the

qualify as protected advocacy under the Anti-SLAPP Act, regardless of the D.C.C. Case. Again, under California's identical statute, statements about the reason for discharging an employee can be protected advocacy in the public interest. *See Hailstone v. Martinez,* 87 Cal. Rptr. 3d 347, 350 (Ct. App. 2008) (statements about reasons for union employee's suspension were advocacy on a matter of public interest even though only other union employees were concerned about these events). Here of course, the controversy plaintiff has created around his termination involves a matter of interest to the public at large – the award of a large public contract – and thus falls even more squarely within the Anti-SLAPP Act than *Martinez*.

Having shown that this action is premised on statements about plaintiff's pending federal case, and that he has turned his termination into a matter of interest to the public, defendants have satisfied their *prima facie* burden under the Anti-SLAPP act.

The Act further provides:

> (b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

D.C. Code § 16-5502. Because Defendants have established their prima facie case, the only way plaintiff can avoid a dismissal with prejudice is to show that he is likely to succeed on the merits of his claims. Plaintiff cannot meet this heavy burden, and this action should be dismissed with prejudice.

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public debate. Those who speak with loud voices cannot be surprised if they become part of the story.").

C. PLAINTIFF CANNOT SHOW HE IS LIKELY TO SUCCEED ON HIS CLAIMS, AND SO THE ANTI-SLAPP ACT REQUIRES THAT THEY BE DISMISSED.

As explained further below, plaintiff's claims cannot survive even a Rule 12(b)(6) motion to dismiss. However, it bears noting that the separate and distinct standard to prevail against a special motion to dismiss under the Anti-SLAPP Act is often even more burdensome for plaintiff, since it requires showing that he is "likely to succeed on the merits," as opposed to merely setting forth sufficient factual matter that, taken as true "state[s] a claim to relief that is plausible on its face." *Compare* D.C. Code § 16-5502(b) *and Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Plaintiff cannot meet the high burden required to defeat an Anti-SLAPP motion. The statement that plaintiff was terminated for cause is not actionable, especially when reviewed in the context of the undisputable facts. Plaintiff has consistently and repeatedly used the press to put out his story, and the press, correspondingly, has relentlessly sought comment from the OCFO about the issue. Here, and in response to plaintiff's constant very public drumbeat as to why he was terminated, Dr. Gandhi simply tried to disseminate OCFO's relatively mild and unsurprising position – that Mr. Payne was terminated for cause, including that he was a poor manager and unpleasant to people. In response, after courting the press, Mr. Payne attempts to shut down the public discussion of his pending D.D.C. Case with this purely punitive lawsuit. In this context, Dr. Gandhi's statements are not defamatory and certainly do not violate Mr. Payne's constitutional rights; they merely are an attempt to inform the public about plaintiff's termination, which – at Mr. Payne's insistence – had become a matter of public interest.

For these reasons, which are discussed in further detail below, plaintiff cannot show he is likely to succeed on the merits of his common law or constitutional claims. Consequently, this lawsuit must be dismissed, with prejudice, under the Anti-SLAPP Act.

II. THE COMPLAINT FAILS TO STATE ANY CAUSE OF ACTION ON WHICH RELIEF COULD BE GRANTED AND MUST, THEREFORE, BE DISMISSED.

To survive this motion, plaintiff must show that he is likely to succeed on the merits of his claims. He cannot do so. Indeed, plaintiff's claims would not survive a traditional motion to dismiss under Sup. Ct. R. Civ. P. 12(b)(6). Thus, even if the Court does not find that this case involves a matter of public interest under the Anti-SLAPP Act, it should dismiss the complaint for failure to state a claim on which relief can be granted.

As noted above, Plaintiff seeks damages in connection with Dr. Gandhi's statements to the press that Mr. Payne was terminated for cause under four separate legal theories. None of his claims, however, is plausible on its face. Plaintiff cannot prevail on his common law defamation and false light claims because Dr. Gandhi's statements were privileged and these statements were not defamatory nor did they put plaintiff in a false light. Similarly, plaintiff has failed to allege the type of outrageous behavior necessary to show intentional infliction of emotional distress. Finally, plaintiff has failed to plead, and certainly cannot show, the requisite losses to support a constitutional defamation claim.

A. STANDARD OF REVIEW FOR A MOTION TO DISMISS.

Every complaint must set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." Sup. Ct. R. Civ. P. 8(a)(2). The D.C. Court of Appeals has expressly adopted the United States Supreme Court's interpretation of this

Rule. *See Potomac Development Corp. v. District of Columbia*, 28 A.3d 531, 543-44 (D.C. 2011). This pleading standard "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (*quoting Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Id.* (*quoting Twombly*, 550 U.S. at 557) (alteration marks omitted).

To survive a Rule 12(b)(6) motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (*quoting Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (*citing Twombly*, 550 U.S. at 556). This facial plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (*quoting Twombly*, 550 U.S. at 557) (internal quotation marks and citation omitted).

Although the factual allegations in the complaint must be taken as true, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasain v. Allain*, 478 U.S. 265, 286 (1986), *cited in Twombly*, 550 U.S. at 555; *see also Iqbal*, 129 S. Ct. at 1949 ("the tenet that a court must accept as true all of the allegations

contained in a complaint is inapplicable to legal conclusions"). "[W]here the well pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'shown' – 'that the pleader is entitled to relief.'" *Iqbal*, 129 S. Ct. at 1950 (*quoting* Fed. R. Civ. P. 8(a)(2)) (alteration marks omitted). Furthermore, "[w]here the documents involved were referenced in the complaint and are central to appellant's claim ... the trial court could consider them in connection with the motion to dismiss without converting the motion to one for summary judgment." *Caglioti v. District Hosp. Partners, LP*, 933 A.2d 800, 807 (D.C. 2007). As discussed in detail below, plaintiff claims do not meet this generous standard and should be dismissed.

A. PLAINTIFF CANNOT SHOW ANY LIKELIHOOD OF SUCCESS ON THE MERITS OF HIS COMMON LAW CLAIMS, WHICH ARE NOT PLAUSIBLE ON THEIR FACE.

1) Plaintiff Cannot Prevail on His Defamation or His False Light Claim Because Dr. Gandhi's Statements Were Privileged.

Plaintiff attempts to bring claims for defamation, false light, and intentional infliction of emotional distress based on Dr. Gandhi's statements that plaintiff was fired for cause. To state a cause of action for defamation, a plaintiff must allege four elements: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm. *Oparaugo v. Watts,* 884 A.2d 63, 76 (D.C. 2005). These elements are similar to those of an invasion of privacy-false light claim, which "requires a showing of: (1) publicity (2) about a false statement,

representation or imputation (3) understood to be of and concerning the plaintiff, and (4) which places the plaintiff in a false light that would be offensive to a reasonable person." *Kitt v. Capital Concerts, Inc.,* 742 A.2d 856, 859 (D.C. 1999). Where, as here, both the defamation and false light claim rest on the same allegations, both claims are reviewed under the more stringent defamation analysis. *See Harrison v. Washington Post Co.*, 391 A.2d 781, 784 n.8 (D.C. 1978).[9]

Consequently, to succeed on either claim, plaintiff must show that the allegedly defamatory statement was "published without privilege." *Oparaugo*, 884 A.2d at 76. He cannot make this showing because the statements Dr. Gandhi made about his termination were privileged. Indeed, the law is clear that a public official is immune from defamation when his statements were made within the outer perimeter of his duties. *Barr v. Matteo*, 360 U.S. 564, 575 (1959); *see also Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst.*, 566 F.2d 289, 291 (D.C. Cir. 1977) (citing *Barr*, 360 U.S. at 575) ("The federal common law rule of absolute immunity of officials sued for defamation furthers the goal of effective administration of government in the public interest.").

This doctrine of absolute immunity has been adopted by the D.C. Court of Appeals and applied to officials within the D.C. government. *See Moss v. Stockard*, 580 A.2d 1011, 1018 (D.C. 1990) (discussing *Dist. of Columbia v. Thompson*, 570 A.2d 277, 294-97 (D.C. 1990), *vacated in part on reh'g*, 593 A.2d 621 (D.C. 1991)) (declining to restrict the scope of absolute privilege to only D.C. officials in the higher ranks of

[9] "[A] plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion." *Moldea v. New York Times Co.,* 15 F.3d 1137, 1151 (D.C. Cir. 1994).

government); s*ee also Holman v. Williams*, 436 F. Supp. 2d 68, 81 (D.D.C. 2006) (applying *Barr*'s "outer perimeter" analysis for absolute immunity to a wrongful termination claim against the mayor). Under *Moss*, an official claiming absolute immunity must show (1) that the conduct in question fell within the official's "outer perimeter" of official duties, and (2) the conduct is discretionary, not ministerial. *Id.* at 1020. Whether certain actions are within the "outer perimeter" of an official's duties is not determined by whether the actions were prescribed by statute or directed by a supervisor, but merely whether "they are done by an officer *in relation* to matters committed by law to his control or supervision . . . ." *Id.* at 1020 (emphasis in original) (*quoting Cooper v. O'Connor*, 99 F.2d 135, 139 (D.C. Cir. 1938)).

Making statements to the press about matters pertaining to the Office of the Chief Financial Officer clearly falls within the "outer perimeter" of Dr. Gandhi's official duties. In fact, in the D.D.C. Case, the Court previously found that "[t]he decision to fire Mr. Payne clearly was 'within the outer perimeter' of Dr. Gandhi's duties" and that Dr. Gandhi was immune to liability in tort for claims connected with Mr. Payne's termination. *Payne v. Dist. of Columbia*, 773 F. Supp. 2d 89, 103 (D.D.C. 2011) (*quoting Holman v. Williams*, 436 F. Supp. 2d 68, 81(D.D.C. 2005)).[10] Decisions to speak to the press are treated like any other decision to take official action for the purposes of absolute

[10] Mr. Payne is barred from re-litigating this issue under the doctrine of issue preclusion. *See Restatement (Second) of Judgments* § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."). Even if issue preclusion did not apply, the fact that an issue has been decided by another court continues to be a persuasive authority with respect to the District's Rule 12(b)(6) motion to dismiss, and also means that the plaintiff would not be "likely to succeed" in proving otherwise for the purpose of the D.C. Anti-SLAPP Act. *See* D.C. Code § 16-5502.

immunity. *See District of Columbia v. Jones,* 919 A.2d 604, 607-12 (D.C. 2007) (holding that the mayor had absolute immunity for statements to the press about terminated employee). In *Jones*, the court held that "informing the public" about the mayor's employees was within the "outer perimeter" of the mayor's official duties. *Id.* at 608. Following the same reasoning, because Mr. Payne was an employee of the Office of the Chief Financial Officer, Dr. Gandhi's official duties included informing the public about Mr. Payne and the circumstances of his departure, particularly after Mr. Payne had so vigorously inserted his own self-serving narrative directly into the public discourse. *See id.* Alternatively, Dr. Gandhi's statements concern the *decision to fire* Mr. Payne, which in itself was within Dr. Gandhi's official duties.[11] *Payne*, 773 F. Supp. 2d at 103. Therefore, as in *Moss*, the statements here were made "in relation to" Dr. Gandhi's official duties and are thus protected by absolute immunity for that reason as well. 580 A.2d at 1020.

Dr. Gandhi's decision to speak to members of the press was discretionary, not ministerial. In making this determination under the criteria set forth in *Thompson*, beyond asking whether a particular action involved making a choice (indicating it was discretionary), a court must also weigh certain policy considerations including "'(1) the nature of the plaintiff's injury, (2) the availability of alternative remedies, (3) the ability of the courts to judge fault without unduly invading the executive's function, and (4) the

[11] This logic applies whether Dr. Gandhi made the direct decision to fire Mr. Payne, or whether he merely advised Mr. Payne's supervisors, and those supervisors then made the decision to fire Mr. Payne. Dr. Gandhi's duties include both direct supervision and indirect supervision since Dr. Gandhi is the head of the entire Office of the Chief Financial Officer.

importance of protecting particular kinds of official acts.'" 570 A.2d at 297 (*quoting W.P. Keeton*, *Prosser & Keeton on Torts*, § 132, at 1062 (5th ed. 1984)).

First, as in *Jones*, the injury here is merely an alleged harm to Mr. Payne's reputation; therefore, under *Jones*, the first factor weighs in favor of absolute immunity. 919 A.2d at 609.

Second, Mr. Payne clearly has an alternative remedy, as he is seeking recovery for the same alleged underlying harm – his supposed wrongful termination – in the D.D.C. Case.

Third, as in *Jones*, discovery here would involve a serious intrusion into the inner-workings of an executive office, making it unduly invasive. *Id.* And even if this Court were inclined to invade the province of the executive, it would only end up rehashing here in Superior Court the numerous discovery battles already fully litigated over several years in the D.D.C. Case.[12]

Finally, the *Jones* court declared that "society has a strong interest in protecting the ability and willingness of officials to keep the public informed about their own conduct and the conduct of persons under their supervision." 919 A.2d at 610. As in *Jones*, this case involves a government official informing the media about employee matters within his office; accordingly, the fourth factor weighs strongly in favor of absolute immunity.

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[12] In the D.D.C. Case, for example, the parties have engaged in extensive motions practice about whether Mr. Payne could depose Mayor Gray, Councilmember Graham, and Councilmember Evans. The parties have likewise engaged in an extended dispute about whether or not the OCFO can protect the privacy of individuals who report to its Office of Internal Oversight. No purpose would be served by giving Mr. Payne another forum to rehash such arguments when the U.S. District Court has already given him the full opportunity to present his position on the exact same issues that impact the claims he attempts to bring here and to obtain redress.

Because Dr. Gandhi's statements to the press fell within the "outer perimeter" of his official duties and because the decision to make the statements was discretionary, not ministerial, his statements are absolutely privileged. *Moss*, 580 A.2d at 1020. Thus, not only has plaintiff failed to state a claim for defamation and false light under Rule 12(b)(6), he certainly failed to meet the alternative standard of a likelihood of success on the merits as required under the Anti-SLAPP Act. On this basis alone, his complaint should be dismissed with prejudice.

2) Plaintiff Cannot Show that Dr. Gandhi's Statements Were Defamatory.

Even if the Court were to find that Dr. Gandhi's statements were not privileged, plaintiff could not prevail on the merits of his defamation claim. To do so, he must show that "the communications of which the plaintiff complains were reasonably susceptible of a defamatory meaning." *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 875 (D.C. 1998). To qualify as defamatory, a "remark must be more than unpleasant or offensive; the language must make the plaintiffs appear 'odious, infamous, or ridiculous.'" *Howard Univ. v. Best*, 484 A.2d 958, 989 (*quoting Johnson v. Johnson Publishing Co.*, 271 A.2d 696, 697 (D.C. 1970)). Moreover, "the plaintiff has the burden of proving the defamatory nature of the publication, and the publication must be considered as a whole, in the sense in which it would be understood by the readers to whom it was addressed." *Id*. (*citing Levy v. American Mutual Liability Ins. Co.* 196 A.2d at 476, *and Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 655 (D.C. Cir. 1966) (*en banc*).

Here, plaintiff simply cannot show that the statements Dr. Gandhi made regarding the reasons for plaintiff's termination are defamatory. According to plaintiff, the

defamatory statements are that Dr. Gandhi said plaintiff was fired for "poor performance" and was a "very poor manager." Compl. ¶¶ 11 & 13. These statements simply do not make plaintiff appear "odious, infamous, or ridiculous." Indeed, it would be nearly impossible, and equally improbable, for plaintiff to demonstrate that the statements made by Dr. Gandhi to the press meet the standard for defamation when the reasons for his termination already have been extensively discussed in the very public filings and other proceedings in District Court and, importantly, plaintiff himself had made his termination a matter of public record by repeatedly discussing it in the press.

When the facts are viewed in their full context, as required under *Best*, any reader would be aware that the statements made by Dr. Gandhi were in response to Mr. Payne's allegations of misconduct by the OCFO in the D.D.C. Case. Therefore, rather than an attack on Mr. Payne's character, readers would invariably view Dr. Gandhi's statements, at the very most, as proof of the common situation where parties have had a falling out, there are hurt feelings on both sides, and both believe the other is at fault. No reasonable reader would interpret the statement that the OCFO terminated Mr. Payne from his management position because he was a poor manager as making him uniquely odious, infamous, or ridiculous. To the contrary, the termination of a manager for poor management (or any employee for cause) is a consummately banal and expected situation, especially in today's competitive market. If this Court rules that Mr. Payne has been defamed on the facts presented, then every termination for cause could become an

actionable defamation claim provided the employer published any facts about the termination to the press.[13]

Moreover, similar claims for defamation relating to a person's work performance have been held to not rise to the level of "odious, infamous, or ridiculous." *See, e.g.*, *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 602 (D.C. 2000) (holding that a statement that individuals "lacked seriousness as businessmen" did not satisfy the *Best* standard); *Levant v. Whitley*, 755 A.2d 1036, 1046 (D.C. 2000) (holding that an article criticizing an employee's performance-related suspension and accusing her of "bringing shame to the [o]ffice" did not rise to the level of defamation under *Best*).

Dr. Gandhi's statements about Mr. Payne do not even rise to the level of these statements that were held to fail the *Best* standard. Consequently, applying this legal precedent, plaintiff's inability to meet this element of an actionable defamation claim also shows that he is not likely to succeed on the merits of his suit.[14]

3) Plaintiff Cannot Show that Dr. Gandhi's Statements Placed Him in a False Light.

When an alleged defamatory statement fails, as here, to rise to the level of "odious, infamous, or ridiculous," a court should reject a false light argument for the

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[13] Similarly, Mr. Payne illogically argues that a plaintiff could be defamed by his employer's comment on his termination in spite of the fact that – as here – the employee began discussing his own termination in the press the day after he was fired.

[14] Plaintiff also asserts that Defendant Gandhi commented falsely on who made the decision to terminate plaintiff. *See* Compl., ¶¶ 9-11. While defendants do not agree with this conclusion, even if true, it is immaterial to a defamation or false light claim. A statement as to *who* made the decision to terminate plaintiff cannot be described as even offensive.

same reason.[15] *Klayman v. Segal*, 783 A.2d 607, 619 (D.C. 2001). Nevertheless, even upon an independent analysis of the false light claim, plaintiff is unlikely to prevail.

To state a claim for false light, a type of invasion of privacy, a plaintiff must show "(1) publicity (2) about a false statement, representation or imputation (3) understood to be of and concerning the plaintiff, and (4) which places the plaintiff in a false light that would be offensive to a reasonable person." *Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 859 (D.C. 1999) (*citing Restatement (Second) of Torts* § 652E (1977)). When the publicity at issue relates to a matter of public interest, however, the plaintiff must prove actual malice. *Logan v. Dist. of Columbia*, 447 F. Supp. 1328, 1334 (D.D.C. 1978) (*citing Time, Inc. v. Hill*, 385 U.S. 374, 386-91 (1967)).

First, Mr. Payne cannot show that Dr. Gandhi's statements are false.[16] Mr. Gandhi's statement of Mr. Payne's merits as a manager is an opinion that cannot be shown to be true or false sufficient to support a claim of false light. *See e.g., Rosen v. American Israel Public Affairs Committee, Inc.*, 41 A.3d 1250, 1259-1260 (D.C. 2012) (holding under defamation standard that statement by employer that employee was fired for failing to comport with the expected standards of employees was non-actionable opinion). As such plaintiff's false light claim immediately fails.

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[15] Moreover, plaintiff may plead defamation and false light in the alternative, but may not recover on both claims. *Moldea v. New York Times Co.*, 15 F.3d 1137, 1151, modified, 22 F.3d 310 (D.C. Cir. 1994).

[16] As mentioned above, although misconstrued by plaintiff, he makes much of the fact that Dr. Gandhi appears to contradict himself on whether or not he was responsible for firing Mr. Payne. *See* Compl., ¶¶ 9-11. But whether or not one or more of Dr. Gandhi's statements about his responsibility for firing plaintiff are false – and they are not – "who" did the actual firing here is irrelevant. Nothing about being fired by one or another of an employee's superiors is actionable as offensive.

Further, Mr. Payne has not alleged, and cannot show, that Dr. Gandhi's statements would be offensive to a reasonable person. According to the Restatement, a statement is offensive to a person "only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity." *Restatement (Second) of Torts* § 652E (1977). Here, Mr. Payne's argument fails for several reasons.

First, Mr. Payne was already aware of the reasons for his termination; therefore, any subsequent repetition of these reasons by Dr. Gandhi would be highly unlikely to cause offense.

Second, by filing the D.D.C. Case, and, even before that, by discussing his termination with the press, Mr. Payne willingly accepted the possibility that the public would become aware of the official reasons for his termination, including Dr. Gandhi's opinion of his work performance. In short, it is disingenuous for Mr. Payne to speak with the press, presenting one side of his story, hear the other side of the story already known to Mr. Payne told through the same press outlets, and then become "seriously offended" and "aggrieved." Mr. Payne cannot have it both ways. Having opened up the subject of his termination both in court and in the press, he cannot control though meritless lawsuits public discourse on the subject.

Finally, while it may be disappointing to the normal person to be fired for cause, such an occurrence is common enough that no reasonable person could feel "seriously offended and aggrieved" by that fact. For these reasons, Mr. Payne cannot meet the fourth element of false light.

Moreover, Mr. Payne has not alleged, and cannot show, that Dr. Gandhi acted with actual malice, which would involve recklessness or knowing falsity. *Logan*, 447 F. Supp. at 1334. Indeed, since the statements are matters of opinion it is nonsensical even to attempt to show that Dr. Gandhi "knew" such an opinion was false. In addition, these statements were a matter of public concern because of Mr. Payne's allegations regarding a large public contract in the D.D.C. Case allegations about a large public contract which has generated significant media attention. Far from stating a knowing falsehood rising to actual malice, Dr. Gandhi was merely informing a reporter of the OCFO's position on Mr. Payne's termination – a position that already had been made clear in Defendants' pleadings in the D.D.C. Case. Accordingly, plaintiff's false light claim is entirely without merit and should be dismissed under Rule 12(b)(6). Further, plaintiff's inability to prove the elements of false light or to prove actual malice shows that he is not likely to succeed on the merits of his suit for the purposes of the Anti-SLAPP Act.

4) Plaintiff Cannot Show the Type of Outrageous Behavior Necessary to Succeed on the Merits of His Claim for Intentional Infliction of Emotional Distress.

Courts have noted that claims arising from purportedly defamatory statements "cannot be brought in the guise of an IIED claim, which would divorce it from the well-developed law of defamation with its attendant privileges and defenses." *Soto-Lebron v. Fed. Express Corp*., 538 F.3d 45 (1st Cir. 2008) (collecting cases). Regardless, as with the question of Dr. Gandhi's immunity, the question of whether plaintiff has pleaded a claim for intentional inflict of emotional distress under similar facts has already been addressed by the U.S. District Court. There, the Court noted the extreme nature of the conduct that must be alleged to prevail and that "[e]specially in the employment context,

the standard is exacting." *Payne,* 773 F. Supp. 2d at 101 (internal quotations omitted). The Court went on to rule that plaintiff could not meet this burden. *Id.*

In that *Payne* case, as here, plaintiff's claims were premised on public statements about his termination. Specifically, plaintiff claimed that defendants' statements caused him severe emotional distress. *See generally id*. As part of his emotional distress claim, plaintiff also alleged that the District had improperly investigated him prior to his termination. *Id*. at 101. Assuming those allegations to be true, the District Court still found that "defendants' behavior does not amount to the 'outrageous,' 'extreme,' and 'utterly intolerable' behavior required to state an IIED claim." *Id*. (internal citations omitted).

Here, plaintiff's claim is far less egregious than the one rejected previously in that it relies on only two statements noting plaintiff's poor performance. Compl. ¶ 25 (noting that "Gandhi made false statements regarding Payne's performance at OCFO"). This falls far short of the exacting standard necessary to sustain an intentional infliction of emotional distress claim. Thus, plaintiff's claim for intentional infliction of emotional distress cannot survive a motion to dismiss, let alone meet the standard of showing a "likelihood of success" necessary to defeat a special Anti-SLAPP motion to dismiss.

B. PLAINTIFF CANNOT PROVE CONSTITUTIONAL DEFAMATION BECAUSE HE CAN SHOW NEITHER A LOSS OF EMPLOYMENT NOR LEGAL STATUS.

Plaintiff cannot succeed on the merits of his constitutional defamation claim because he cannot show the appropriate type of damages. To prevail on this claim, plaintiff must prove that an adverse employment action created a disability or stigma that seriously threatens to damage the employee's reputation or to foreclose the employee

from taking advantage of future employment opportunities." *Grant v. District of Columbia*, 908 A.2d 1173, 1181 (D.C. 2006) (quoting *O'Donnell v. Barry*, 148 F.3d 1126, 1140 (D.C. Cir. 1998)) The burden is on the plaintiff who seeks to make out a claim of interference with the right to follow a chosen trade or profession that is based exclusively on reputational harm to show that the harm occurred in conjunction with, or followed from, some tangible change in status. *Mosrie v. Barry*, 718 F.2d 1151, 1157 (D.C. Cir. 1993).

Plaintiff claims that Dr. Gandhi's alleged remarks harmed his reputation and employment prospects. Compl., ¶¶ 30-32. But "[r]eputation per se is not a protected liberty interest [under the 5th Amendment], and, without more, defamation or stigmatization by the government does not give rise to any right to procedural due process, no matter how serious the harm to the subject's good name or the impairment of future employment prospects flowing from such reputational harm." *Grant*, 908 A.2d at 1180. To properly plead a constitutional defamation claim, loss of reputation "must be accompanied by "a discharge from government employment or at least a demotion in rank and pay," or conjoined with an official personnel action to "formally deprive[]" the employee of a legal right or "so severely impair[]" the employee's "ability to take advantage of a legal right" as practically to extinguish it." *Id.* at 1180-1181 (*quoting Mosrie v. Barry*, 718 F.2d 1151, 1161 (1983) (rejecting constitutional defamation claim based on loss of employment opportunities outside the government because "… unfavorable publicity about a person is not … a change in legal status imposed by the government officials who generated the publicity"). In addition, defamation uttered *after* an employee leaves government service cannot be the basis for a due process claim, even

where the defamation "undoubtedly damage[d] the reputation of [the employee], and impair[ed] his future employment prospects." *See Siegert v. Gilley*, 500 U.S. 226, 234 (1991) (affirming denial of constitutional defamation claim where allegedly defamatory letter was written several weeks after employee's resignation).

As pleaded, plaintiff's constitutional defamation claim does not meet the required legal standard. First, there is no loss of employment *accompanying these remarks*[17] by Dr. Gandhi. To the contrary, these remarks were allegedly made more than three years after plaintiff's termination. Such remarks are insufficient to support a claim of constitutional defamation as a matter of law under *Siegert* and *Grant*.

Second, there is no formal deprivation of any right of employment occasioned by Dr. Gandhi's remarks because plaintiff's period of unemployment began when he was terminated in 2009. Plaintiff attempts to gloss over this fatal defect by merely alluding to his status by saying that "[Dr.] Gandhi was fully apprised about the effects of [the D.D.C. Case] on Mr. Payne's ability to obtain employment in the region and thus Plaintiff's financial and economic vulnerability." Compl. ¶ 15. In the D.D.C. Case however he was more candid and specifically alleged that "[s]ince his *termination*, Plaintiff has been unable to secure permanent employment in his chosen profession of law and government procurement." *See* Exhibit B, at ¶ 70 (emphasis supplied).[18] Thus, he cannot show any

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[17] At the very least, plaintiff's attempt to bring a new claim of constitutional defamation in this Court, based on remarks about his termination, when he already has a constitutional defamation claim in the D.D.C. case, based on essentially equivalent remarks, is impermissible claim splitting and forum shopping that should not be sanctioned by this Court. *See Giles v. Ware*, 615, A.2d 533, 544 (D.C. 1992) (outlining the problems inherent in claim splitting, but ultimately concluding that defendant had waived any objection).

[18] This Court may take judicial notice of matters that are in the public record. *Drake v. McNair*, 993 A.2d 607, 615-16 (D.C. 2010) (holding that "a trial court may

causal connection between Dr. Gandhi's recent remarks and his current long-standing lack of employment.

Unfavorable publicity about a person is not a deprivation sufficient to support a claim for constitutional defamation. *Grant*, 908 A.2d. at 1180-1181. Plaintiff's entire claim is based on remarks made years after his termination that had no official or legal effect on his ability to obtain employment. These remarks are legally insufficient "no matter how serious the harm to the subject's good name or the impairment of future employment prospects flowing from such reputational harm." *Id.* Plaintiff's constitutional defamation claim is simply not plausible and he cannot show any likelihood of success on its merits and so it should be dismissed.[19]

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consider public documents without converting a motion to dismiss . . . to a motion for summary judgment" and that documents were properly considered by the trial court because they were public records).

[19] Where a plaintiff has failed to state a cognizable constitutional violation, "the more complicated analysis involving the sometimes nuanced issues involved with qualified immunity becomes unnecessary." *Koutny v. Martin,* 530 F. Supp. 2d 84, 89 (D.D.C. 2007) (internal citations omitted). However, if this Court were to perform this analysis, Dr. Gandhi would be entitled to qualified immunity. *See, e.g., Guttman v. Khalsa*, 669 F.3d 1101, 1125 (10th Cir. 2012) (dismissing doctor's constitutional defamation claim for failure to show violation of a clearly-established constitutional right); *DiBlasio v. Novello*, 413 Fed.Appx. 352, 355 (2d Cir. 2011) (same); *Bartoli v. Attorney Registration & Disciplinary Com'm. of Illinois*, Not Published In F.3d, 1999 WL 775767, at *4 (7th Cir. 1999) (holding qualified immunity applicable to constitutional defamation claim where state bar disciplinary action allegedly interfered with reputation and employment opportunities); *Siegert v. Gilley*, 500 U.S. 226, 234 (1991) (upholding grant of qualified immunity to former supervisor who wrote allegedly defamatory recommendation letter because plaintiff failed to show a violation of a clearly established constitutional right).

CONCLUSION

This lawsuit is precisely the type of abuse of court proceedings that the Anti-SLAPP Act is designed to address. Defendants have met their burden to show that plaintiff's claims arise from defendants' activities in furtherance of the right of advocacy on issues of public interest. Plaintiff cannot show that he is likely to succeed on the merits of his claims; Indeed, he cannot even show that he would be able to survive a Rule 12(b)(6) motion to dismiss. For these reasons, pursuant to the Anti-SLAPP Act, or Rule 12(b)(6) (or both), the Court must dismiss this action with prejudice.

DATE: November 14, 2012.

Respectfully submitted,

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