SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ERIC W. PAYNE,	)	
	)	
Plaintiff,	)	2012 CA 006163 B
	)	Hon. Laura A. Cordero
v.	)	
	)	
DISTRICT OF COLUMBIA, *et al.*,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S OPPOSITION TO 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)

Comes now Plaintiff, Eric W. Payne ("Payne"), by and through undersigned counsel and respectfully opposes 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). Arguments and points and authorities related thereto are stated more fully below.

INTRODUCTION

Defendants' motion seeks to dismiss Plaintiff's amended complaint for common-law defamation, false light, intentional infliction of emotional distress and constitutional defamation claims. The relationship at issue involves Defendant Natwar Gandhi ("Gandhi"), the Chief Financial Officer ("CFO") of the Office of the Chief Financial Officer ("OCFO") and Eric Payne, a former contract procurement Director who was terminated by the OCFO on January 9, 2009. Simultaneously pending in the United States District Court are Payne's claims for wrongful termination and constitutional defamation, in which cross motions for summary judgment have been filed and await rulings. Plaintiff's action here is significantly independent and distinct from the claims in his federal case. There are no common law defamation, false

light, nor intentional infliction of emotional distress claims in that case. Further, the immediate claims are based upon Gandhi's patently false communication(s) to reporters about Payne, made outside of the federal lawsuit. Reference is made herein to Gandhi's statements in Payne's federal lawsuit anecdotally and has been included in this litigation to bolster Plaintiff's claim that Gandhi's recent statement(s) about him contradict his prior sworn testimony. Invariably, these statements are relevant to that case, but in no way constitute the gravamen of Plaintiff's underlying common law claims.

Notably, Payne was fired six (6) months after being stripped of his management duties (approximately two (2) weeks after the D.C. Council belatedly disapproved the 2008 lottery contract award), and after making several protected disclosures to certain authorities. Defendants and Gandhi now publicly claim that Payne was a poor performer and poor manager, among other things. Each of these false statements constitutes an independently actionable defamatory remark and communication which harms Plaintiff. The mere fact that Payne has a pending law suit in federal court should not impede his instant claims. Further, the Anti-SLAPP law was not intended to punish victims of the government's wrongdoing, nor was it enacted to chill a plaintiff's first amendment right to freedom of expression or to allow government officials to unqualifiedly say anything, even if untrue, in the public domain about former employees' performance.

ARGUMENT

I. THE D.C. ANTI-SLAPP ACT DOES NOT APPLY TO THIS CASE.

Faced with potential abuses of the judicial process, the D.C. Council enacted the D.C. Anti-SLAPP Act, structured to mirror an equivalent California statute, in order to "to provide for the early dismissal of meritless suits aimed at chilling the valid exercise of the constitutional

rights of freedom of speech and petition for the redress of grievances." *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F.Supp.2d 1127, 1128 (N.D.Cal. 1999). The California legislature, and subsequently the D.C. Council, explicitly enacted the statute to respond to what it saw as:

> "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process."

Cal. Civ. Proc. Code § 425.16(a).

Certainly, the instant suit is not the type of action that the D.C. Council had in mind when it enacted the Anti-SLAPP law. SLAPP suits are often brought for "purely political purposes" in order to obtain "an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff." *Rogers v. Home Shopping Network, Inc.*, 57 F.Supp.2d 973, 974 (C.D.Cal. 1999) (citation omitted). As one court observed:

> "[O]ne of the common characteristics of a SLAPP suit is its lack of merit. But lack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective. *As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit its ability to combat the plaintiff in the political arena is substantially diminished....* Thus, while SLAPP suits 'masquerade as ordinary lawsuits' the conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by *large private interests* to deter common citizens from exercising their political or legal right or to punish them for doing so. Because winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against *meritless actions*, (suits for malicious prosecution and abuse of process, requests for sanctions) are inadequate to counter SLAPPs."

Blumenthal v. Drudge, 2001 WL 587860 at *3-4 (D.D.C. Feb. 13, 2001) (citing *Wilcox v. Superior Court*, 27 Cal. Rptr. 2d 446, 449-50 (Cal.Ct.App. 1994)) (emphasis added).

The instant matter is not one which was anticipated in the conception of the Anti-SLAPP law. Here, a private, unemployed citizen, wrongfully terminated by the D.C. government, with significantly less resources than that government, has asserted meritorious claims against the above-captioned Defendants based upon a series of communications made about Plaintiff to several media sources, private employers and business/civic organizations. Plaintiff, who has been unemployed for nearly four (4) years as a result of Defendants' actions, is hardly attempting to tie up Defendants' resources, nor is it very likely that any private citizen could even attempt to achieve such an outlandish goal against a municipal entity with a yearly operating budget of $9.4B.[1] Despite Defendants' contentions, Plaintiff is also not attempting to deter or punish Defendant Gandhi for exercising any of his political or legal rights. Rather, applicable law protects former government employees from being made the target of negative and derogatory public statements. Apparently, for personal and vindictive reasons, Defendants have besmirched Plaintiff's reputation in the public domain and, as such, these derogatory communications have actionable implications. Meritless claims, these are not. Nor should Payne be precluded from the protection of the Court regarding Gandhi's communications, as described herein.

As the legislative intent behind the law explains, the D.C. Council did not enact the Anti-SLAPP Act to protect high-ranking government officials from the repercussions associated with purposefully and maliciously lying about a private citizen in the public media and we urge that it not be employed by this Court in such a manner.[2] Further, Plaintiff's claims have merit, and as

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[1] The Gross Operating budget for D.C. for Fiscal Year 2013 (10/1/12 - 9/30/13) is $9.4B. *See http://budget.dc.gov/budget-overview - FY 2013 Budget Overview.*

[2] If anything, allowing the government to use the D.C. Anti-SLAPP Act in such a manner will chill the First Amendment rights of the average, private citizen, which is counter to the goals of the D.C. Council in enacting the law. Under the set of facts currently before this Court, allowing the government to use the D.C. Anti-SLAPP Act in such a manner would create an

such, Defendants' Special Motion to Dismiss Pursuant to D.C. Code § 16-5502(a) should be denied.

II. THE APPLICABLE LEGAL STANDARD OF REVIEW.

A motion to dismiss for failure to state a claim is solely used for testing the legal sufficiency of the complaint and not whether Plaintiff will prevail ultimately on the claim. *See Atkins v. Industrial Telecomm. Ass'n*, 660 A.2d 885, 887 (D.C. 1995) (citations omitted). A motion brought pursuant to Rule 12(b)(6) requires the court to construe the complaint "in the light most favorable to the plaintiff and must accept as true all allegations of fact set forth in the complaint." *Larijani v. Georgetown University*, 791 A .2d 41, 43 (D.C. 2002) (quoting *McBryde v. Amoco Oil Co.*, 404 A.2d 200, 202 (D.C. 1979)). Super. Ct. Civ. R. 8(a)(2) requires "a plaintiff to file only a short and plain statement of the claim showing that the pleader is entitled to relief." *D'Ambriosio v. Colonnade Council*, 717 A.2d 356, 361 (D.C. 1998) (citations omitted). In addition, Super. Ct. Civ. R. 8(a) requires only that defendants be provided "with fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Edmund J. Flynn Company v. LaVay*, 431 A.2d 543, 549 n. 5 (D.C. 1981) (citations omitted). As demonstrated below, each of Plaintiff's claims in the complaint is sufficiently pleaded, and, therefore, Defendant's 12(b)(6) motion to dismiss should be denied.

Even if this Court applies the D.C. Anti-SLAPP Act to the instant matter, Plaintiff can show that he is likely to succeed on the merits of his claims. *See* D.C. Code § 16-5502(b). To establish the requisite probability of prevailing, a plaintiff need only have "stated and substantiated a legally sufficient claim." *Navellier v. Sletten*, 124 Cal. Rptr. 2d 530 (Ct. App. 2002) (citations omitted). "Put another way, the plaintiff must demonstrate that the complaint is

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unjust result in direct opposition to what the D.C. Council intended when it enacted the D.C. Anti-SLAPP Act.

both legally sufficient, to wit, supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Id.* (internal quotations omitted). A plaintiff need only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP. *Soukup v. Law Offices of Herbert Hafif*, 46 Cal. Rptr. 3d 638 (Ct. App. 2006).

III. PLAINTIFF HAS PROPERLY ASSERTED HIS CLAIMS AND CAN ESTABLISH A PROBABILITY OF PREVAILING ON THE MERITS OF THESE CLAIMS.

A. Plaintiff Has Properly Asserted Defamation and False Light Claims and Can Establish a Probability of Prevailing on the Merits of These Claims.

Defendants defamed Payne and placed him in a false light when Defendant Gandhi knowingly made false and malicious statements to various media outlets, private persons and civic/business organizations about Payne and the basis for his termination. 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. *See Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005). To state a cause of action for false light, a plaintiff must allege four similar elements: (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. *See Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 859 (D.C. 1999). Due to the great deal of overlap between the causes of action for defamation and false light, publicity that is actionable in a defamation

claim generally will be actionable in false light as well. *See Moldea v. New York Times Co.*, 15 F.3d 1137, 1151 (D.C. Cir. 1994).

1. Defendants Published Defamatory Statements Without Privilege.

"A public official of the District of Columbia acting 'within the outer perimeter of his duties' enjoys absolute immunity from liability for common law torts, so long as the function being performed is discretionary rather than purely ministerial." *Holman v. Williams*, 436 F.Supp.2d 68, 80 (D.D.C. 2006) (citing *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution*, 566 F. 2d 289, 292 (D.C. Cir. 1977)). D.C. Courts have stated that an act is ministerial if it "connotes the execution of policy as distinct from its formulation." *Thomas v. Johnson*, 295 F.Supp. 1025, 1030 (D.D.C. 1968) (citing *Elgin v. District of Columbia*, 119 U.S. App. D.C. 116, 337 F.2d 152, 154-55 (D.C. Cir. 1964)); *Biscoe v. Arlington County*, 738 F.2d 1352, 1362 (D.C. Cir. 1984). Moreover, ministerial acts "involve day-to-day operational matters, not planning and policy." *Id.* at 1363. In contrast with ministerial is the term discretionary, which encompasses "policy-formulating [and] judgment-making processes." *Id.* at 1363 (citing *Thomas*, 295 F.Supp at 1031). In *Holman*, the Court concluded that the mayor's acts were ministerial and rejected Defendant's absolute immunity contention. The Court should do the same here.

Even if the Court determines that Defendant Gandhi's statements are entitled to a qualified privilege, Gandhi acted with malice in making said statements to various media outlets, private persons and civic/business organizations, as pled in the complaint. To be clear, his statements create an interesting implication. For his statements to be true, his prior sworn testimony given under oath in a parallel, but distinct, federal lawsuit must be false. It is noteworthy that those sworn statements, while not the gravamen of the immediate case, are

relevant as to Gandhi's credibility. If the record implicates Gandhi beyond credibility challenges, perjury charges are certainly within the realm of possibility. In that foreseeable instance, neither absolute nor qualified privilege should apply. *See* Pl. Am. Comp. at ¶¶ 18-19. Additionally, given known, invariably undisputed facts regarding his asserted sworn testimony about Payne, Gandhi's new comments about Plaintiff, which are the focus of the immediate lawsuit, meet a sufficient showing of "actual malice." Indeed, Plaintiff is not required to prove his case at this stage, as if in a trial, he need only show that Gandhi published defamatory statements with knowledge that they were false or with reckless disregard of whether they were false or not. *See Beeton v. District of Columbia*, 779 A.2d 918, 924 (D.C. 2001) (citing *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964)). For purpose of a motion to dismiss, inferences are required to be made in Plaintiff's favor, and said inferences tip the scale in Plaintiff's favor as per Defendants' motion.

It is instructive to this court that *Payne v. District of Columbia, et al.*, is presently pending in the United States District Court for the District of Columbia. That case involves Eric Payne's Whistleblower Protection Act claim against the District of Columbia and is based upon his protected disclosures to the Office of Inspector General and others. Of particular note, on November 30, 2011, Gandhi testified repeatedly in a deposition in that case, under oath, that it was "not [his] decision to fire Mr. Payne," and, further, that there never came a time when he thought that Payne should be fired. Pl. Am. Comp. at ¶9. He also testified in his supplemental answers to Plaintiff's interrogatories, dated June 1, 2012, and signed by Gandhi six (6) months after his deposition, that he was not involved in the decision to fire Payne. *Id.* at ¶ 10.

Despite repeatedly testifying that he did not participate in Payne's demotion or termination, Gandhi told Washington Post reporter, Mike DeBonis ("DeBonis"), a very different story. *Id.* at ¶ 14.

> "Nobody has ever asked me, fire that guy — nobody, no mayor, no council member. *It was my decision*," *Gandhi said. "Look, you can be walking on water here, but you cannot be nasty to people. You cannot be rude to outsiders. People get this notion in their head that they are procurement people, they can do what they like. I cannot have it that way." He added, "We should have basically gotten rid of him earlier than we did, because the problems were noticed.*"[3] (Emphasis added)

Gandhi's statements suggest that Payne was such a problem employee that he, and not Payne's immediate supervisors, decided to personally terminate him. In that connection, Plaintiff Payne has alleged that Gandhi's statements are untruths. Payne was terminated in January of 2009, six (6) months after he was stripped of any supervisory functions and, tellingly, very shortly after then Council Chair Vincent Gray led the D.C. Council to repudiate the ill-fated 2008 lottery contract. There is not any known evidence regarding complaints lodged about Payne's demeanor or style of communication, and if so, it does not obviate the allegations in plaintiff's complaint. In fact, a careful review of Payne's performance records show that no such concerns were raised during his tenure with the OCFO. Now, following his improper dismissal, OCFO is attempting to disparage Payne by creating a pre-textual and false rationale for his termination and to further destroy him as a person and his career. See Pl. Amended Complaint at ¶¶ 9-15

Plaintiff urges this court to consider two (2) critical underlying questions in its review of Defendants' motion: Did Gandhi actually terminate Payne? And why was Payne terminated? Gandhi's sworn statements, which are parenthetical to the alleged defamatory statements in this

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[3] Washington Post article, *Gandhi lashes out at fired deputy now suing him*, dated July 3, 2012, by Mike DeBonis.

case, reveal a problematic factual tension as far as the animus in which Gandhi may have made statements to DeBonis, particularly given his prior expressions about Payne's termination and the circumstances leading thereto. These contrasted statements should give this court great pause and difficulty, particularly if Plaintiff is allowed to further prove his claims. Equally significant is Gandhi's statement that he terminated Payne for poor performance in the face of currently high-visibility and public scrutiny that is now being given to OCFO and the lottery contract, which Payne awarded in 2008. That contract was voted down by the D.C. Council and a new lottery contract was awarded after Payne was stripped of his power as a contracting officer.

As increasing public scrutiny is directed toward Gandhi and the lottery contract process, Gandhi is quick to point the finger at Payne, in a thinly-veiled attempt to elevate himself by denigrating Payne. In this respect, this Court cannot extrapolate, as Defendants urge, a micro, trial-like determination in advance of discovery, absent an evidentiary record. Attention is directed to the pleadings and the extent to which Plaintiff has sufficiently pled *prima facie* claims. In this connection, what know is that Payne received high evaluation scores, as well as financial bonuses, for the years 2004 through 2007, and there was no mention of Payne's lacking management skills or his management style in any of his reviews prior to being stripped of his managerial and supervisory duties. In fact, Payne was selected as the seventh Director of Contracts in three (3) years, only after OCFO agreed to elevate the position from a Grade 15 to a Grade 16 and accrete to the position additional duties. Presumably, this is not something OCFO would have done for a difficult or underperforming employee. Defendants' elaborate personnel and performance evaluation thus implicated here and at no time corroborates Gandhi's derogatory communication(s) about Payne, to wit, that he was "a very poor manager" or "nasty" to third parties.

Plaintiff's complaint asserts a significant *prima facie claim. Further,* Defendant Gandhi's false and defamatory published statements were published in a malicious context against a backdrop of previously sworn, contradictory testimony. There is no demonstrated privilege to otherwise bar Plaintiff's actions. As such, Plaintiff has properly stated claims for defamation and false light, which are likely to prevail on their merits.

2. Defendants Published Defamatory Statements to a Third Party.

Defendants defamed Payne and placed him in a false light when Defendant Gandhi knowingly made false and malicious statements to various media outlets private persons and civic/business organizations, and such statements "were reasonably susceptible of a defamatory meaning." *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 875 (D.C. 1998). The record indisputably shows that Gandhi communicated statements about Plaintiff to third parties.

3. Defendant's statements were odious and offensive.

"In the District of Columbia, a statement is defamatory if it tends to injure the plaintiff in his or her trade, profession or community standing or lower him in the estimation of the community." *Beeton v. District of Columbia,* 779 A.2d 918, 923 (D.C.2001) (internal quotation marks omitted). The Court "will not dismiss a complaint under Rule 12(b)(6) which alleges defamation if 'the communications of which the plaintiff complains were reasonably susceptible of a defamatory meaning.'" *Clawson v. St. Louis Post-Dispatch, L.L.C.,* 906 A.2d 308, 313 (D.C.2006) (quoting *Klayman v. Segal,* 783 A.2d 607, 612-13 (D.C.2001)). However, "an allegedly defamatory remark must be more than unpleasant or offensive; the language must make the plaintiff appear 'odious, infamous, or ridiculous.'" *Howard Univ. v. Best,* 484 A.2d 958, 989 (D.C.1984) (quoting *Johnson v. Johnson Publ'g Co.,* 271 A.2d 696, 697 (D.C.1970)).

And in the Court's assessment of the statement's defamatory nature, "the publication must be considered as a whole, in the sense it would be understood by the readers to whom it was addressed." *Best,* 484 A.2d at 989.

Plaintiff submits that Defendant's statements indeed make Payne look "odious, infamous, or ridiculous." Moreover, at this stage in the litigation this Court need not find that the statements *actually* portrayed plaintiff in an "odious, infamous, or ridiculous" light. Rather, the Court need only find the statements "reasonably susceptible of a defamatory meaning," in order to find that plaintiff has stated a claim. *Clawson,* 906 A.2d at 313. To that extent, when viewing the alleged defamatory statements as a whole, the court, drawing inferences in Plaintiff's favor, sees Gandhi, the head of OCFO stating publicly that Payne was an incompetent manager, poor performer, poor communicator with vendors and rude to its staff; accordingly, Gandhi states that he, rather than Payne's immediate supervisors, found it necessary to personally terminate Payne in January 2009. Gandhi's public statements demean Payne's competency, management skills, communication skills, and suggest that there were complaints made about Payne of which he became aware and acted on in his termination decision. Gandhi essentially states that Payne's overall performance was contemptible and justified his termination. Moreover, he communicated this point of view in lieu of a typical "no comment" statement about a terminated employee after having testified to the contrary under oath in a related lawsuit. He also did so knowing that his comments about Payne would be shared with the public in general, thousands of readers throughout the world. Based thereupon, this court should agree that Gandhi's statements are "reasonably susceptible of a defamatory meaning" for purpose of Defendants' motion to dismiss.

B. Plaintiff Has Properly Asserted an Intentional Infliction of Emotional Distress Claim and Can Establish a Probability of Prevailing on the Merits of This Claim.

In purposefully and maliciously making false statements to various media outlets concerning Payne, Defendants' conduct was so extreme and outrageous as to constitute intentional infliction of emotional distress ("IIED"). To establish a *prima facie* case of intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct on the part of the defendants which (2) either intentionally or recklessly (3) caused the plaintiff severe emotional distress. *See Larijani v. Georgetown Univ.*, 791 A.2d 41, 44 (D.C. 2002) (citations omitted). "Liability will not be imposed for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Homan v. Goyal*, 711 A.2d 812, 818 (D.C. 1998) (internal quotations and citations omitted) (*amended by*, 720 A.2d 1152 (D.C. 1998)). But it is properly imposed where the conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Larijani*, 791 A.2d at 44 (internal quotations and citations omitted).[4]

As an initial matter, Plaintiff's federal claims arise from his termination. In contrast, this lawsuit comes nearly four (4) years after his termination, during a period in which Payne's reputation is already at issue and his professional opportunities stigmatized to the point that he remains unemployed and significantly financially victimized. Four (4) years later, related in part to increasing scrutiny of OCFO's improper contractual practices, Gandhi interjects a venomous

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[4] Despite Defendants' contention, courts in this jurisdiction will consider intentional infliction of emotion distress claims that stem from defamatory statements. *See Carter v. Hahn*, 821 A.2d 890 (D.C. 2003). In support of their position, Defendants' offer only one citation, to *Soto-Lebron v. Fed. Express Corp.*, 538 F.3d 45 (1st Cir. 2008), which is a federal case applying Puerto Rican law and has little precedential value in this jurisdiction.

attack on Payne to the media which he knows will further harm and aggravate Payne's existing victimization. To be clear, the prior U.S. District Court's ruling as to IIED was based upon the distinct set of facts presented in that case, and which differ greatly from the IIED claim in this case. Thus, the ruling there is inapplicable to the instant matter. Simply stated, Plaintiff asserts that Gandhi's false statements have defamed him, placed him in a false light and exacerbated his victimization and economic harm. In light of Gandhi's devalued credibility, his defamatory, published statements should be viewed as intentional and malicious, since he had to have known that his statements to the media, and certainly to Mike DeBonis, contradicted his previous sworn testimony. A high-ranking public official intentionally and maliciously making public, false and defamatory statements about a former government employee is extreme and outrageous conduct. As a result of said outrageous conduct, Payne's life has been devastated. He has lost his job, his reputation, any source of income, and, most recently, he and his family were evicted from their home of over ten (10) years. Gandhi's statement exacerbates previously existing wounds. As such, Plaintiff has properly stated a claim for intentional infliction of emotion distress, and has established a probability of prevailing on the merits of this claim.

C. Plaintiff Has Properly Asserted a Constitutional Defamation Claim and Can Establish a Probability of Prevailing on the Merits of This Claim.

Defendants also argue that Plaintiff's constitutional defamation claim should be dismissed because it neither states a false and defamatory statement, nor the deprivation of a liberty interest. It is axiomatic that Plaintiff's liberty interest claim may proceed under the defamation theory of "stigma or disability." The basis of such a claim is not the defamatory nature of the official speech, but "the combination of an adverse employment action and 'a stigma or other disability that foreclose[s] [the plaintiff's] freedom to take advantage of other employment opportunities.'" *O'Donnell v. Barry,* 148 F.3d 1126, 1140 (D.C. Cir. 1998)

(quoting *Bd. of Regents v. Roth,* 408 U.S. 564, 573 (1972)). Such a stigma or disability may be found where the official action either (1) automatically bars plaintiff from a specific set of positions within the government, or (2) generally blocks him from pursuing employment in his chosen field of interest. *See Kartseva v. State Dep't,* 37 F.3d 1524, 1529 (D.C. Cir. 1995); *M.K. v. Tenet,* 196 F.Supp.2d 8, 16 (D.D.C. 2001) (citing *O'Donnell,* 148 F.3d at 1140-42, and *Siegert v. Gilley,* 500 U.S. 226, 233 (1991)). Here, Gandhi once again, by his action, is effectively further and more egregiously blocking Plaintiff from gaining employment in his chosen field of work.

As the D.C. Circuit has explained, a constitutional defamation claim requires that the government either have formally deprived one of a legal right or have so severely impaired one's ability to take advantage of a legal right, such as a right to be considered for government contracts or employment or a right to seek non-government employment, that the government can be said to have "foreclosed" one's ability to take advantage of it and thus extinguished the right. *See Mosrie v. Barry,* 718 F.2d 1151, 1161 (D.C. Cir. 1983). The nature of the allegedly defamatory statements is not necessarily central to a "stigma or disability" claim, because such a claim turns on an action that itself "has the effect of seriously affecting, if not destroying, a plaintiff's ability to pursue his chosen profession, or 'substantially reducing the value of his human capital[.]' " *O'Donnell,* 148 F.3d at 1141 (quoting *Kartseva,* 37 F.3d at 1529 and *Taylor v. Resolution Trust Corp.,* 56 F.3d 1497, 1506 (D.C Cir. 1995)) (modifications omitted). The due process clause is implicated by such action because "[t]he Constitution protects an individual's 'right to follow a chosen trade or profession' without governmental interference." *Id.* (quoting *Kartseva,* 37 F.3d at 1529). 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 flowed from, some tangible change in status." *O'Donnell*, 148 F.3d at 1141.

It is undisputed that Plaintiff, an attorney, is highly experienced in the area of government procurement. Further, his complaint clearly alleges that Gandhi's recent statements to the media have harmed his and impugned his marketability. *See id.* at ¶¶ 30-32. Additionally, Payne sufficiently pleads Gandhi's comments have further affected ability to secure employment in his chosen area of law and government procurement. *Id.*

At this stage of the case, Plaintiff urges this Court to reject Defendant's analysis and to adopt the Court's ruling and reasoning articulated in *Holman*, *supra.* at footnote 15 where the Court determined: "The 'broad preclusion from employment' in his chosen career that plaintiff alleges is sufficient at this early stage of the litigation to state a claim for deprivation of a liberty interest under a 'stigma or disability' theory. Accordingly, defendant's motion to dismiss Count I for failure to state a claim will be denied." The Court then, at footnote ten, cited *Alexis v. District of Columbia*, 44 F.Supp.2d 331, 342 (D.D.C. 1999), and acknowledged that the plaintiff would need more at the summary judgment stage to sustain his case. The same logic and reasoning should apply here.

CONCLUSION

For the foregoing reasons, Payne respectfully requests that 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) be denied.

Date: December 17, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered electronically on this 17th day of December 2012 to the following:

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_____/s/_____
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