STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	

ORDER

This matter is before the Court on Defendant Tietex International, Ltd.'s ("Tietex") Renewed Motion for Summary Judgment. After consideration of the record, argument of counsel, memoranda, and submissions made, the Court finds that Defendant's Renewed Motion for Summary Judgment should be and is therefore GRANTED.

I. RELEVANT PROCEDURAL HISTORY

Plaintiff Gary G. Harris ("Harris") originally filed a lawsuit against Tietex in this Court on August 15, 2008—C.A. No. 2008-CP-42-4316 ("First Action"). Harris' First Action included a claim for violation of the Age Discrimination in Employment Act ("ADEA"), and various state law claims.[1] Tietex removed the First Action to the United States District Court for the District of South Carolina based on Harris's ADEA claim. After engaging in discovery in the First Action, Tietex moved for summary judgment on all of Harris' claims. On October 28, 2010, the Federal Court granted Tietex's motion on Harris' ADEA claims but chose not to address Harris'

[1] Harris' state law claims in the First Action included (1) breach of contract, (2) breach of contract accompanied by a fraudulent act, and (3) defamation (consisting of four separate allegations of defamation). All of Harris's claims in the First Action arose from allegations regarding his employment with Tietex and his separation therefrom.

remaining state law claims, dismissing them without prejudice. The Fourth Circuit Court of Appeals affirmed the District Court's decision.

Harris filed a *pro se* Complaint in the present action ("Second Action") on October 21, 2011. Harris' *pro se* Complaint asserted claims against Tietex for defamation and unspecified discrimination, relying on the same general facts alleged in the First Action.

On March 8, 2012, Harris' newly-employed counsel entered his appearance. On August 10, 2012, the Court granted Harris' motion to amend his Complaint. On September 5, 2012, Harris filed his Amended Complaint in the Second Action alleging identical claims to those alleged in the First Action (except his ADEA claim) and adding a new claim for intentional infliction of emotional distress ("outrage") based on the same facts.[2] As in the First Action, all of Harris' claims in the Second Action arose from allegations regarding his employment with Tietex and his separation therefrom.

On May 3, 2013, Tietex moved for summary judgment in the second action asserting that (1) Tietex was entitled to summary judgment on the merits because Harris failed to identify a genuine dispute of material fact as to any of his claims; (2) Harris' claims were barred as a matter of law based on the conclusive findings by the Federal Court in the First Action; and (3) Harris' outrage and three new defamation claims were barred by the statutes of limitation and the doctrine of r*es judicata*. Harris opposed Tietex's motion, arguing in his brief and during the hearing that summary judgment was premature based on his inability to fully conduct discovery at that time.

On September 23, 2013, the Court denied Tietex's motion for summary judgment. The September 23, 2013, Order focused on Tietex's collateral estoppel argument did not rule on the

[2] Harris' *pro se* Complaint also added two new defamation claims that were not included in the First Action, and Harris identified a third new defamation claim during his deposition in the Second Action.

merits or address Tietex's arguments that Harris' outrage and new defamation claims were barred by the statute of limitations and *res judicata*. The September 23, 2013, Order also permitted Harris to engage in additional discovery, specifically including the depositions of two Tietex executives. Other than a site visit to Tietex's facility, Harris did not engage in any discovery after the September 23, 2013, Order was entered.

On January 27, 2014, Tietex filed its Renewed Motion for Summary Judgment and supporting memorandum. On February 6, 2014, the Court heard Tietex's Renewed Motion for Summary Judgment. On the record during the February 6, 2014 hearing, Harris voluntarily withdrew his claims for (1) breach of contract, (2) breach of contract accompanied by fraudulent act, and (3) outrage, leaving only his defamation claims before the Court.

Having considered the record, argument of counsel, memoranda, and submissions made, the Court finds this case to be ripe for summary judgment.

II. FINDINGS OF FACT[3]

Harris began working at Tietex on July 13, 1994, as a Senior Research Chemist. (Harris Dep. 1 at 58-60, Exs. 6-7; Harris Dep. 2 at 140, Ex. 7.) Harris' normal working hours were 8:00 a.m. to 5:00 p.m., but he claims he was often at work by 6:00 or 6:30 a.m. and stayed later than 5:00 p.m. (Harris Dep. 1 at 74-75.) On occasion, Harris stayed until 8:00, 9:00, or 10:00 at night. (*Id.* at 77.) Harris admits that he was told by his supervisor, Wade Wallace, not to work in the plant for safety reasons when it was not operating. (*Id.* at 124.) Wallace told Harris he could work in the plant anytime the plant was operational, and he could come into the facility to do office work when the plant was down. (*Id.* at 123-24.) Harris admittedly ignored these directives due to his own opinion that it was safe for him to work with chemicals when the plant

[3] The undisputed facts the Federal Court adopted in granting Tietex's motion for summary judgment in the First Action are essentially identical to the Findings of Fact set forth herein.

was not operating. (*Id.* at 75-76, 124.) While his erratic hours had been acceptable to his previous supervisor, they were not acceptable to Wallace, and Harris admits this was a new directive under Wallace's supervision. (*Id.* at 125.) Harris admits he was the only employee who did lab work after hours. (*Id.* at 126-27.)

There are four sections in the technical building at Tietex: an office area; wet lab; physical testing; and an extension of the wet lab for chemists' work, with a burn room. (*Id.* at 86.) Harris' former supervisor, Jake Butts, had difficulty keeping track of Harris due to Harris' erratic work hours, so Butts relocated his office from the plant to the office areas of the technical building (the lab—where Harris' office was situated) in order to more closely supervise Harris. (*Id.* at 83, 86.)

Soon after Butts relocated his office, Harris claimed he noticed a mold smell and had symptoms of congestion, sinus headache, and flu. (*Id.* at 87.) Harris does not recall anyone else complaining about the alleged smell. (*Id.* at 88.) Harris claimed that the smell originated from Butts' clothing and the furniture Butts moved into his relocated office. (*Id.* at 93-94.) After some time and several visits to doctors, Harris contended that the smell was the source of his illness due to a mold allergy. (*Id.* at 88-89.) Harris reported his belief to Butts. (*Id.*)

Based on Harris' allegation that mold in the lab was making him ill, Tietex hired a hygienist to perform testing. (*Id.* at 89.) The hygienist reported there was no mold contamination in the lab and the air in the lab was cleaner than the outside air. (*Id.* at 91.) Although Harris claims the testing was flawed, he admits he has no evidence of that. (*Id.* at 89-92.) Harris does not know who performed the testing or what kind of testing was performed. (*Id.*) Harris admits he has no first-hand knowledge of how the testing was conducted. (*Id.* at 90-91.) Harris' only specific complaint about the testing was that it tested all four sections of the lab rather than focusing solely on the office area. (*Id.* at 92.)

At some time in late 2006, Harris established a second office in the main plant. (*Id.* at 87-88.) Harris continued to do work in the lab until February 2007. (*Id.* at 87.) Effective February 1, 2007, Harris was removed from Butts' supervision and placed under the supervision of Wallace, in part due to Harris' continued complaints about the odor associated with Butts. (*Id.* at 101.)

Between February 2 and 5, Harris and Wallace discussed by e-mail whether Harris would be able to continue working in the lab because of Harris' continued complaints about the mold smell. (*Id.* at 94, Ex. 12.) Wallace agreed that Tietex would do whatever was necessary to shield Harris from any further exposure to an environment that might negatively impact his health. (*Id.* at 95, Ex. 12.) Wallace instructed Harris to wear a mask when he worked in the lab. (*Id.* at Ex. 12.) However, Harris decided the mask would not give him enough protection. (*Id.*) Wallace then told Harris not to enter the lab under any circumstances. (*Id.* at 101, Ex. 12.) Thereafter, Harris asked if he could work in the lab if he signed a waiver. (*Id.* at 122-23, Ex. 17.) Tietex rejected the waiver stating that a waiver was "unacceptable from an HR/liability perspective since [Tietex] would be allowing [Harris] to come in contact with an environment that might negatively affect [his] health." (*Id.*)

Tietex purchased equipment to accommodate Harris' needs outside of the lab. (*Id.* at 112-13, Ex. 14.) Tietex provided Harris with an alternative work area because Tietex wanted to protect Harris' health. (*Id.* at Ex. 12.) Harris has no contradictory evidence. (*Id.* at 123.)

On February 7, 2007, Harris told Wallace he was overwhelmed by personal and emotional problems that had occurred in his personal life over the past year, and he was having difficulty functioning. (*Id.* at Ex. 13.) Harris admits (1) his wife was ill during this time period, (*Id.* at 106); (2) dealing with his wife's illness left him stressed with major sleep disturbances, (*id.* at 106-07, 111, Exs. 14, 44); and (3) he was a "wreck" because of his wife's illness (*id.* at

107 & Ex. 44). Wallace told Harris that Tietex "would support him if he felt he needed to utilize EAP," but Harris stated that was not necessary. (*Id.* at 111, Ex. 13.)

On February 22, 2007, Harris left voice mail messages for Wallace and Tietex's Owner, Martin Wildeman, at 3:00 a.m. complaining about his inability to sleep and about unspecified work-related issues. (*Id.* at 81, Ex. 14.) Harris expressed concern about being moved from the lab and that he was "still not set up to easily do his bench work." (*Id.* at Ex. 14.) Harris asked for a lab pad coater and a vented hood. (*Id.*) Wallace stated that it would take time to locate, acquire, and install the equipment; however, Harris could use the equipment in the beam/dye area, and/or coordinate to use Robert Culbreth (a chemical technician) to perform work for him in the lab in the meantime. (*Id.* at 111-13, Ex. 14.) Harris believes Tietex was motivated to keep him out of the laboratory to avoid liability for any health problems he might experience rather than out of a real concern for his health." (*Id.* at 123.) Harris never asserted Tietex was motivated to keep him out of the lab because of any unlawful reason. (*Id.*)

Harris admits he complained about being required to stay involved with environmental reporting and stated he was concerned about completing an environmental report that was due on March 1, given his other projects. (*Id.* at 113, Ex. 15.) Wallace saw no reason that Harris' projects would interfere with his ability to get the report done on time and made this clear to Harris. (*Id.*) Harris admits it was reasonable for Wallace to expect him to complete the environmental report on time. (*Id.* at 113.)

Wallace also asked Harris to come to him directly with issues before going to Wildeman. (*Id.* at Ex. 14; Wallace Dep. 2 at Ex. 1 ¶ 23.) Harris admits that, at times, he went directly to Wildeman rather than using the chain of command. (Harris Dep. 1 at 116.) Harris admits it was inappropriate for him to complain to Wildeman about having to do the environmental reporting. (*Id.* at 115.)

On March 5, 2007, Wallace discussed several issues with Harris regarding his performance and documented the discussion at Harris' request in a memorandum to Human Resources Director David Wilson, with a copy to Vice President of Manufacturing (Mark Isbell) and Harris. (*Id.* at 117-18, Ex. 16.) Wallace noted that Harris made emotional and overly vocal accusations and statements without supporting research or data, was not honoring the chain of command, harbored grudges over past grievances and toward the management in general, and complained about ownership of environmental reporting duties. (*Id.* at Ex. 16.) The memorandum concluded with the statement, "As we discussed these issues are not sustainable and it is mandatory that Harris make significant progress towards resolving these issues within the next 30 days." (*Id.* at 120-21, Ex. 16.)

At the time, Harris did not protest any of the points in the March 5, 2007, memorandum or claim that Wallace's observations were not true. (*Id.* at 122.) Harris admits he was experiencing emotional stress (*id.* at 106-07, 111 & Exs. 14, 44), circumvented Wallace by going directly to Wildeman (*id.* at 116), and complained about environmental reporting tasks (*id.* at 113). Harris does not deny he harbored grudges, and admits he had unresolved issues that existed before he began reporting to Wallace and had discussed those issues with Wallace. (*Id.* at 119-20.)

On June 18, 2007, Wallace had another discussion with Harris regarding his subpar performance. Wallace documented the discussion in a memorandum to Harris, with a copy to Wilson and Isbell. (*Id.* at 128, Ex. 18.) The discussion focused on two projects for which Harris was responsible. (*Id.* at 130, Ex. 18.) The first was the development and qualification of a Tietex coating compound ("C237 Project"). (*Id.* at 129, Ex. 18.) The second was the development of a finish formula and process ("T602 Project"). (*Id.* at 129-30.)

Harris had been working on the C237 Project for about six months. (*Id.* at 131, Ex. 18.) Harris had predicted the C237 Project would result in significant cost savings for Tietex. (*Id.* at 131-32, Ex. 18.) Harris claimed he had a successful trial before he began reporting to Wallace. (*Id.* at 132.) Despite Harris' characterization of the compound he created as a success, it was unacceptable to Tietex because it was much more complicated to produce commercially than Harris had initially promised. (*Id.* at Ex. 16.) In February, Wallace began working separately on a parallel C237 Project because it appeared Harris would fail to achieve the cost savings he had predicted. (*Id.* at 134, Exs. 16, 18.)

Because of the expense, a plant production trial is only done if laboratory production is successful. (Wallace Dep. 2 at Ex. 1 ¶ 28.) Harris told Wallace the lab samples for the T602 project were promising, and Harris recommended a production trial. (Harris Dep. 1 at 135.) According to Harris, the first plant production trial showed mixed results with some samples that were "not good," but others that were "comparable," depending on the amount of finish. (*Id.* at 136.) However, Harris told Wallace that, based on the results, another plant production trial was warranted. (*Id.* at 137, Ex. 18.) On Harris' recommendation, a second plant production trial was performed, which was unsuccessful. (*Id.* at 137, 295, Ex. 18.) A third trial was similarly unsuccessful. (*Id.* at 137-38, 295, Ex. 18.) When the second and third trials failed, Wallace reviewed the results of the first plant production trial himself. (*Id.* at Ex. 18; Wallace Dep. 2 at Ex. 1 ¶ 29-31.) Wallace saw "that the results of the first trial had not been as [Harris] portrayed them, so the second and third trials were unwarranted based on the results of the first." (*Id.*)

Wallace's June 18, 2007 memorandum cited Harris for his poor analytical practices and instructed him to improve his performance within 30 days. (Harris Dep. 1 at 141, Ex. 18.) Harris considered this his final written warning. (*Id.* at 139, Ex. 18.)

Despite being told and understanding that his job was in jeopardy if his performance failed to improve, Harris made insufficient effort to complete the C237 project. (*Id.* at Ex. 19.) Instead, Harris began taking multiple days of vacation immediately after being given the warning on June 18. (*Id.* at 145-48.) These vacation days were frequently taken on short notice. (*Id.* at 145-46, Ex. 20.) Sometimes, Harris waited until the day before to notify Wallace. (*Id.*) Other than the environmental reporting, Wallace did not see that Harris improved on any of the issues cited in the March 5, 2007 memorandum. (*Id.* at Ex. 19.) Gate records and management observation showed that Harris continued to ignore the directive not to work in the chemical lab areas at nights or on the weekends. (*Id.* at Ex. 19.) The same records showed inconsistent work hours and erratic patterns of entry and exit to and from the facility. (*Id.*) Harris' co-workers complained that he did not return calls or e-mails consistently, disrupting their work patterns. (*Id.* at Ex. 19.)

Harris was scheduled to fly to Indiana on June 14 to visit a customer and return on June 15. (*Id.* at 148-149, Ex. 19.) After flying the first leg of his trip, Harris turned around and came home because he had a headache. (*Id.*) Harris never told Wallace he had not met with the customer in Indiana. (*Id.* at Ex. 19.)

On the evening of Monday, July 2, after work, Harris left a voicemail message for Wallace telling him he had an ant infestation at his house. (*Id.* at 151-52.) Harris said he would take care of the ants first thing the following morning and then go to Hexion, a chemical facility, to work on a project. (*Id.*) Since Harris left this message after work hours, Wallace did not hear the message until the morning of Tuesday, July 3, 2007. (*Id.* at 151-52, Ex. 19; Wallace Dep. 2 at Ex. 1 ¶ 38.)

Harris purchased pesticide chemicals at Lowe's on the morning of July 3, at approximately 7:30 a.m. (Harris Dep. 1 at 251.) Harris called Wallace and left a voicemail

message around 9:00 a.m., saying he had resolved the ant problem and was going to work at Hexion. (Wallace Dep. 1 at Ex. 1 ¶ 39.) Harris did not arrive at Hexion until 1:30 p.m. (Harris Dep. 1 at 154 & Ex. 21.) Harris could not enter Hexion because he could not contact anyone he knew there to gain entry. (*Id.* at 152-53, 155-56.) Harris left without performing any work. (*Id.*) There are no witnesses to establish how long Harris was allegedly at Hexion. (*Id.* at 157.) Harris is vague about how long he was at Hexion trying to get in—he estimates he was there between thirty and ninety minutes. (*Id.* at 157-58.)

Harris claims that after leaving Hexion, he drove around for 30 to 45 minutes looking for Chemurgy, another chemical facility. (*Id.* at 159-60.) When Harris located Chemurgy, no one was there, so he did not stay. (*Id.*)

Harris did not call Wallace to tell him about being unable to get in at Hexion or about his intent to go to Chemurgy. (*Id.* at 160.) Harris admits it would have been reasonable for him to call Wallace and tell him his plans had changed. (*Id.* at 165.) Harris understood he needed to let Wallace know his whereabouts, to let him know when he was away from the plant, and to keep his cell phone on so he could be reached. (*Id.* at 117.) Harris acknowledges it was reasonable for his supervisor to expect to be informed of his whereabouts "at all times." (*Id.* at 117.)

The purpose of Harris' intended visit to Hexion was to procure sulfuric acid. (*Id.* at 160-61.) Harris contends he told a Hexion employee to get the acid together so Harris could pick it up "at the guard house or something." (*Id.* at 160.) Harris never accomplished this task. (*Id.*)

During the afternoon of July 3, George Henderson, a Hexion employee, brought the sulfuric acid Harris needed to Tietex. (*Id.* at 160.) Wallace was confused, as Harris was supposed to be at Hexion. Wallace called Henderson and asked if he had seen Harris that day, but Henderson had not. (Wallace Dep. 2 at Ex. 1 ¶ 42-43.) Henderson said he had a voicemail from Harris saying he needed some sulfuric acid urgently because he was planning to do some

work on July 4. (*Id.*) Wallace was troubled because Harris was not where he said he would be and it appeared Harris planned to work with chemicals in the lab on a day the plant was supposed to be closed. (*Id.*)

Harris admits Wallace had no idea what Harris was doing on July 3, or even if Harris was working. (Harris Dep. 1 at 164-65.) Harris claims Wallace called him on his cell phone between 4:30 p.m. and 5:00 p.m. and asked where he had been. (*Id.* at 162.) Harris told Wallace he had been at Hexion. (*Id.*) Wallace told Harris that Henderson had been to Tietex and said that Harris had not been at Hexion that day. (Wallace Dep. 2 at Ex. 1 ¶ 44.) Harris then admitted he had gone to Hexion, but had been unable to get in or find anyone, so he left. (*Id.*) Harris could not give Wallace an adequate explanation of his whereabouts for the day. (Harris Dep. 1 at 158-59; Ex. 19; Wallace Dep. 2 at Ex. 1 ¶ 44, 47-48.)

Wallace told Harris he was suspended until Wallace returned from vacation. (Harris Dep. 1 at 165.) During the phone call, Harris and Wallace were disconnected, and Wallace could not reach Harris again by telephone. (*Id.* at 165-66; Wallace Dep. 2 at Ex. 1 ¶ 45.) Wallace believed Harris had hung up on him, although Harris denies it. (*Id.*) Wallace talked to Wilson about what transpired, and a voicemail message was left for Harris reiterating that he was suspended with pay and should not return to work until contacted by Tietex. (Wallace Dep. 2 at Ex. 1 ¶ 45.)

Wallace conducted an investigation of the events of July 3 when he returned from vacation. (*Id.* at ¶ 47.) Wallace could not verify Harris' whereabouts for most of the hours between 9:00 a.m. and 4:00 p.m. on July 3. (*Id.*; Harris Dep. 1 at Ex. 19.) Wallace recommended the termination of Harris' employment, and the decision to do so was made by Wallace, Wilson, Wildeman, Cunningham, and Isbell. (Wallace Dep. 2 at Ex. 1 ¶ 49.) Harris was told he was not being terminated for one specific deficiency, but for many shortcomings that

"added up," including the issues Wallace had addressed with him in the March 5, 2007 memorandum. (Harris Dep. 1 at 142, Ex. 16.) These issues were also documented in a memorandum dated July 18, 2007. (*Id.* at Ex. 19.) Harris' employment was terminated on July 19, 2007. (*Id.* at 167, Ex. 22.) Harris admits his employment was terminated for unsatisfactory performance. (*Id.*)

III. SUMMARY JUDGMENT STANDARD

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 541, 730 S.E.2d 340, 347 (Ct. App. 2012) (citations omitted). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. An issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." *D.R. Horton*, 398 S.C. at 541, 730 S.E.2d at 347.

The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). The moving party may discharge this responsibility "by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim." *D.R. Horton*, 398 S.C. at 542, 730 S.E.2d at 347. "Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or

denials of his pleadings." *Id.* (citing *inter alia* Rule 56(e), SCRCP). "[T]he nonmoving party must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.'" *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (quoting *Baughman*, 306 S.C. at 107, 410 S.E.2d at 545).

"Where a verdict is not '*reasonably possible* under the facts presented, summary judgment is proper.'" *Id.* (quoting *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000)) (emphasis in original). While a party opposing summary judgment "'is only required to submit a mere scintilla of evidence'" to withstand the motion, *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 250, 734 S.E.2d 161, 163 (2012) (quoting *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)), Harris has failed to present any evidence demonstrating the presence of a genuine issue for trial. Accordingly, "[t]his case illustrates well the utility of summary judgment in disposing of a meritless claim." *Cox & Floyd Grading, Inc. v. Kajima ConsDep. Svcs., Inc.*, 356 S.C. 512, 517, 589 S.E.2d 789, 792 (Ct. App. 2003).

IV. ANALYSIS

A. Defamation.

Harris must "prove the following four elements to state a claim for defamation: '(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.'" *Fountain v. First Reliance Bank*, 398 S.C. 434, 441, 730 S.E.2d 305, 309 (2012) (quoting *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006)).

The truth of an alleged defamatory statement "is a complete defense to an action based on defamation and evidence establishing a statement is substantially true is a sufficient defense."

Haulbrooks v. Overton, 295 S.C. 380, 383, 368 S.E.2d 676, 679 (Ct. App. 1988) (citing *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 221 S.E.2d 770 (1976)). "It is not necessary to establish the literal truth of the precise statement made." Restatement (Second) of Torts § 581A (1977).

"One who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (citing *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999)). "'The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.'" *Id.* (quoting *Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 32, 315 (Ct. App. 1987)). "There is a basis for applying a qualified privilege to situations in which an employee's job performance is properly evaluated." *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989); *see also Bell v. Bank of Abbeville*, 211 S.C. 167, 44 S.E.2d 328 (1947) (attaching a qualified privilege to communications between an employer and employee during the employer's inquiry into the employee's alleged misconduct).

"Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded." *Swinton Creek Nursery*, 334 S.C. at 484-85, 514 S.E.2d at 134. To prove actual malice, Harris must show that Tietex was activated by ill will, intending to causelessly and wantonly injure Harris, or that the statements were published with such recklessness as to show a conscious disregard for Harris' rights. *Id.* at 485, 514 S.E.2d at 134.

Whether an occasion gives rise to a qualified privilege is a question of law for the court. *Id.* "'While abuse of privilege is ordinarily an issue for the jury, . . . in the absence of a controversy as to the facts . . . it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.'" *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (quoting *Woodward v. S.C. Farm Bureau Ins. Co.*, 297 S.C. 29, 32-33, 292 S.E.2d 599, 601 (1981)) (emphasis in original); *see also* Restatement (Second) of Torts § 619, cmt. b (court decides if privilege has been abused where only one conclusion can reasonably be drawn).

While Harris' Amended Complaint includes only one cause of action for defamation, he has identified seven separate allegedly defamatory statements or incidents on which he is attempting to rely. (Harris Dep. 2 at 27-30.) Separate allegations of defamation are analyzed as independent claims. *See, e.g.*, *George v. Fabri*, 345 S.C. 440, 456-61, 548 S.E.2d 868, 876-79 (2001) (analyzing defamation allegations separately in affirming grant of summary judgment); *McBride v. School Dist. of Greenville County*, 389 S.C. 546, 559-63, 698 S.E.2d 845, 851-54 (Ct. App. 2010) (analyzing alleged defamatory statements individually).

The first four of Harris' claims are internal Tietex e-mails and memoranda discussing Harris' work performance. Even interpreting the facts in the light most favorable to Harris, the record shows that each of these communications was substantially true. This is an absolute defense to defamation, rendering summary judgment proper on these claims. *Haulbrooks*, 295 S.C. at 383, 368 S.E.2d at 679 (citing *Ross*, 266 S.C. 75, 221 S.E.2d 770). As internal, performance-related communications, these four communications also give rise to a qualified privilege. *See Wright*, 298 S.C. at 474, 381 S.E.2d at 506; *see also Bell*, 211 S.C. 167, 44 S.E.2d 328. Harris has not produced any evidence to support a finding of actual malice or other abuse of the qualified privilege. The qualified privilege thus stands as a matter of law, and Tietex is

entitled to summary judgment. *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (citing *Woodward*, 297 S.C. at 32-33, 292 S.E.2d at 601).

The statements on which Harris relies in support of his fifth, sixth, and seventh defamation claims are less clear. Given the ill-defined nature of the alleged defamatory statements and the lack of evidence to support these claims, Harris has failed to create a triable issue of fact.

Harris has failed to produce evidence sufficient to overcome Tietex's motion for summary judgment on any of his seven defamation claims. The Court will now examine each of Harris' seven defamation claims more fully.

1. February 9, 2007 E-mail from Wallace to Wilson.

Harris' first defamation claim is based on a February 9, 2007 e-mail that his supervisor Wade Wallace sent to Human Resources Director David Wilson with a copy to Wallace's supervisor, Mark Isbell. (Harris Dep. 2 at 27-28, Ex. 13.) In this internal e-mail between managerial employees at Tietex, Wallace summarized a discussion he had with Harris two days earlier regarding personal and emotional problems Harris was experiencing that were impacting his performance. (Harris Dep. 2 at Ex. 13.) Harris claims this e-mail was defamatory because he alleges that it was false and that it "showed a definite disregard for [his] stability mentally and that kind of thing." (*Id.* at 27.)

This defamation claim fails because the content of the February 9 e-mail was substantially true. Harris admitted as much on more than one occasion—during his unemployment hearing (*id.* at 38), and during his deposition in the First Action (*id.* at 34-37).

The February 9 e-mail also gives rise to a qualified privilege, and Harris has not presented any evidence showing that Wallace acted with actual malice. In fact, Harris admitted

he has no evidence of malice on Wallace's part, stating he did not think Wallace was trying to "get rid of him" and has no idea about Wallace's motivation. (Harris Dep. 1 at 196, 337-38.)

The sole allegations of malice in Amended Complaint surround a contention that Tietex engaged in a conspiratorial campaign to "put forward false and defamatory reasons for the termination of [Harris] to achieve ulterior objectives"—namely, the alleged objective "to replace [Harris] with a much younger woman with whom Mr. Isbell [allegedly] had an ongoing personal relationship." (Am. Compl. at ¶¶ 14-15, 23-25.) This is merely an attempt to re-litigate the issues underlying his age discrimination claim in the First Action. Among other findings in its Orders in the First Action, the Federal Court specifically concluded (1) Tietex did not discriminate against Harris based on his age, (2) Harris was not meeting Tietex's legitimate expectations at the time of his termination, and (3) Tietex did not replace Harris with a younger employee. As such, all allegations in the Amended Complaint that could support a finding of malice are precluded under the doctrine of collateral estoppel.

The undisputed facts also demonstrate Wallace did not exceed the scope of the privilege. Wallace's e-mail recounted his conversation with Harris to his own supervisor and Tietex's Human Resources Manager—both of whom Harris admits "had legitimate business need to know about and discuss" the issues in the e-mail. (Harris Dep. 2 at 55-56.)

2. *March 5, 2007 Memorandum from Wallace to Wilson.*

Harris' second defamation claim focuses on the March 5, 2007, memorandum Wallace sent to Wilson with copies to Isbell and Harris. (Harris Dep. 2 at 28, Ex. 16.) Like the February 9 e-mail, this memorandum documented a performance-related discussion Wallace had with Harris. (*Id.* at Ex. 16.) Harris admits that Wallace only generated the March 5 memorandum because Harris requested that he do so. (*Id.* at 60.)

This memorandum is not actionable as defamation because Harris has admitted that each of the points Wallace made in the memorandum was substantially true. (Harris Dep. 1 at 106-07, 111, 113, 116, 119-20.) As with the February 9 e-mail, this memorandum is also entitled to a qualified privilege. Harris has not produced any evidence to show that Wallace acted with actual malice in drafting the memorandum (particularly since Harris himself specifically requested that Wallace prepare it) or that Wallace exceeded the scope of the privilege.

3. *June 18, 2007 Memorandum from Wallace to Harris.*

Harris' third defamation claim relates to the June 18, 2007 memorandum Wallace provided to Harris, with copies to Wilson and Isbell, which Harris has described as his "final written warning." (Harris Dep. 2 at 28, Ex. 18.) The June 18 memorandum focuses exclusively on Harris' performance issues with respect to the C237 and T602 projects.

Harris' own testimony precludes a finding that the June 18 memorandum was false and defamatory, as he admits the statements in the memorandum are substantially true.[4] Harris admits he had been working on the C237 project for six month and projected significant savings for Tietex. (Harris Dep. 1 at 131-32, Ex. 18.) Although Harris claims he had a successful trial before reporting to Wallace, he admits the direction of the project shifted. (Harris Dep. 1 at 132.) Tietex was convinced Harris' compound was too complicated to produce commercially, and, therefore, unacceptable. (Harris Dep. 1 at Ex. 18.) Harris admits that Wallace began working separately on a parallel C237 project in February. (Harris Dep. 1 at 134, Ex. 18.) Harris admits his compound was never used by Tietex. (Harris Dep. 1 at 134.) Harris admits the first trial of the T602 project was not completely successful, with mixed results, but he

[4] In the First Action, the Federal Court concluded that Harris failed to meet Tietex's legitimate expectations on the C237 and T602 projects for the very reasons summarized in Wallace's June 18 memorandum. Thus, beyond the undisputed facts showing the substantial truth of the June 18 memorandum, the doctrine of collateral estoppel prevents Harris from asserting in this action that he performed up to Tietex's legitimate expectations on the C237 and T602 projects.

recommended a production trial anyway. (Harris Dep. 1 at 135-37, Ex. 18.) Harris admits the two subsequent trials, run on his recommendation, were unsuccessful. (Harris Dep. 1 at 137-38, Ex. 18.) The June 18 memorandum is substantially true, according to Harris' own testimony.

As an internal memorandum addressing employee performance, the June 18 memorandum was subject to a qualified privilege. Harris has produced no evidence of actual malice or other abuse of the privilege, as Wallace prepared and distributed the June 18 memorandum to a small group of Tietex managers who needed to be aware of the issues discussed therein.

4. *July 18, 2007 Memorandum from Wallace to Harris.*

The final specific statement on which Harris relies in making his defamation claims is the July 18, 2007 memorandum from Wallace to Wilson (with a copy to Isbell) in which Wallace summarized Harris' performance issues and recommended the termination of Harris' employment. (Harris Dep. 2 at 28-29, Ex. 19.) This claim fails for reasons similar to Harris' first three defamation claims.

The summary of Harris' performance deficiencies in the July 18 memorandum is substantially true based on Harris' own testimony. (Harris Dep. 1 at 106-07, 111, 113, 116-17, 119-20, 131-32, 134-38, 145-49, 151-60, 165; *see also* Section II *supra*.). An internal memorandum from an employee's supervisor to Human Resources recommending the employee's termination based on performance issues is entitled to a qualified privilege. There is no evidence in the record to support a finding that Wallace acted with actual malice in publishing the memorandum. Harris acknowledges that Wallace did not exceed the scope of the privilege or act unreasonably in providing the memorandum to Wilson and Isbell, as he admits that both Wilson and Isbell "would have had a need to know" about the subject matter of the memorandum. (Harris Dep. 2 at 100.)

5. *Rumors in the Industry.*

Harris' fifth defamation claim surrounds his contention that there were "rumors in the industry that [he] w[as] terminated from Tietex for falsifying a test report." (Harris Dep. 2 at 29.) However, Harris never identified an actual statement that Tietex made with respect to these "rumors." Rather, Harris simply contended that he spoke to two former Tietex employees who allegedly informed him that they had heard about rumors being spread about him. (*Id.* at 114-24.) Harris never even alleged that Tietex was the actual source of these alleged rumors, and he never produced a witness to testify about what Tietex supposedly said. In the absence of any such allegations or testimony, this defamation claim cannot overcome Tietex's motion for summary judgment. Rule 56(e), SCRCP, requires that a party desiring to oppose summary judgment with testimony must "set forth such facts as would be admissible in evidence." Harris' claim regarding "rumors in the industry" is based on inadmissible hearsay. Accordingly, Harris cannot establish there was a statement or that Tietex published the statement, let alone prove the remaining elements of this claim.

6. *Harris' July 2007 Suspension with Full Pay.*

Harris' sixth defamation claim alleges that Tietex defamed him by suspending his employment—with full pay and benefits—in July 2007. (Harris Dep. 2 at 29.) The only statements Harris identified with respect to this claim are (1) Wallace's telephone call to Harris in which he informed Harris of the suspension, and (2) Wallace allegedly informing an individual at another company, Textile Rubber, that Harris was suspended. (*Id.* at 124-30.)

With respect to the telephone call between Wallace and Harris, there was no publication to a third party, as Harris admits that they were the only parties on the call. (*Id.* at 126-27.) Regarding Wallace's alleged statement to the Textile Rubber employee, Harris relies on inadmissible hearsay. Beyond being unable to specify any details about the alleged statement,

Harris admits that "[t]he only information [he] h[as] is like second hand what George Henderson told [him]." (*Id.* at 129.) Thus, Harris cannot establish that any statement was published for the purposes of this motion. Even assuming Wallace had informed this individual Harris was suspended, that statement is wholly true and cannot be defamatory as a matter of law.

7. *Harris' February 2007 Ban from the Laboratory.*

Finally, Harris contends that being "banned from going to the laboratory building" in February 2007 was defamatory. (Harris Dep. 2 at 29-30.) The only "statement" the Court can infer from this allegation is when Wallace told Harris "not to enter the lab under any circumstances." (Harris Dep. 1 at 101, Ex. 12.) While Wallace did make that statement, the Court is unable to determine how it could be defamatory with respect to Harris.

First, the statement was not about Harris—it was a work directive. Second, Wallace made that statement, and Tietex prohibited Harris form entering the lab, after Harris complained that the work conditions in the lab were detrimentally impacting his health. (*Id.* at 87-94, Ex. 12.) Tietex and Harris jointly attempted to find a solution that would have allowed Harris to continue working in the lab without harming his health, but they were unable to do so. (*Id.*) After "banning" Harris from the lab, Harris admits Tietex made special purchases of equipment to allow him to set up a work area in a different location that would be better for his health. (*Id.* at 111-13, Ex. 14.) These circumstances do not support any allegation of defamation.

B. <u>Collateral Estoppel</u>.

Placing aside the absence of any genuine dispute as to the material facts in this matter, the doctrine of collateral estoppel is fatal to Harris' claims. "Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits were the same." *Carolina*

Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (citing *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009)).

"The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* (citing *Beall v. Doe*, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 189-90 n.1 (Ct. App. 1984)). Tietex has met its burden to establish the presence of these elements.

Harris' claims in the First Action and his claims in this matter all rely on the same factual allegations—his contentions (a) that he was performing his job at Tietex at a level that met Tietex's legitimate expectations; (b) that the internal memoranda describing his performance deficiencies were false and defamatory; (c) that Tietex did not have a legitimate reason for terminating his employment; and (d) that Tietex's stated reason for terminating his employment was pretextual. However, the Federal Court considered all of these factual allegations in the First Action and made factual findings and conclusions that directly contradict Harris' version of the facts.

The Federal Court's findings and conclusions were necessary and relevant for its determination of Harris' ADEA claims, and the same findings and conclusions are equally applicable to the following issues at the forefront of Harris' state law claims in the Second Action, among others: (a) whether Tietex was justified in terminating Harris' employment; (b) whether Tietex's internal memoranda regarding Harris' performance—on which Harris relies heavily to support his defamation claims—were substantially true; (c) whether Tietex exhibited any actual malice or otherwise exceeded the scope of the qualified privilege with respect to the internal memoranda regarding Harris' performance; (d) whether Tietex conspired to replace him with a younger employee, as alleged in the Amended Complaint; (e) whether Tietex engaged in a

campaign to set up Harris for failure, as alleged in the Amended Complaint; (f) whether Tietex intentionally made it impossible for Harris to perform his job duties, as alleged in the Amended Complaint; (g) whether Tietex put forward false and defamatory reasons for the termination of Harris' employment, as alleged in the Amended Complaint; and (h) whether Tietex terminated Harris' employment based on pretextual reasons, as alleged in the Amended Complaint.

Harris "actually litigated" all of these issues in the First Action, in which he (a) submitted a brief in opposition to Tietex's motion for summary judgment; (b) submitted written objections to the Magistrate Order; (c) appealed to the Fourth Circuit Court of Appeals, which affirmed the Federal Court's decision; (d) filed a petition for re-hearing with the Fourth Circuit, which was denied; and (e) submitted a letter to the Federal District Court requesting further review after exhausting all avenues with the Fourth Circuit, which was rejected.

All of these issues were "directly determined" and were "necessary to support the prior judgment" in the First Action, as the Federal Court expressly relied on its findings and conclusions in granting Tietex's motion for summary judgment.

In light of the Federal Court's Orders, the Court is unable to imagine any set of credible facts Harris could present at trial that would support his claims without contradicting the findings and conclusions of the Federal Court. There is no evidence in the record that would accomplish this result, rendering summary judgment proper based on the doctrine of collateral estoppel.

C. **Statute of Limitations and *Res Judicata*.**

Harris admits that his First Action did not allege the following defamation claims: (1) his claim based on the February 9, 2007 e-mail from Wallace to Wilson (*id.* Harris Dep. 2 at 33); (2) his claim based on Tietex suspending his employment in July 2007 (*id.* at 33-34); or (3) his claim based on Tietex "bann[ing] him from the laboratory" (*id.* at 34). Rather, he first asserted the first two of these claims in his *pro se* Complaint in the Second Action, and he only identified

his claim based on being banned from the lab in his deposition in the Second Action. Using the October 12, 2011, filing of his *pro se* Complaint as the date on which Harris asserted these claims (assuming the third of these claims relates back to that date), they are barred by the statute of limitations. Due to Harris failing to in any way plead these claims in the First Action, they are also barred by the doctrine of *res judicata*.

The statute of limitations applicable to Harris' defamation claims is two years. S.C. Code Ann. § 15-3-550. The two-year statute of limitations runs from the date on which the allegedly defamatory statement was published, not from the time the statement was allegedly discovered. *Jones v. City of Folly Beach*, 326 S.C. 360, 369, 483 S.E.2d 770, 775 (Ct. App. 1997) ("[S]ummary judgment [should be granted] because South Carolina has not adopted the discovery rule in libel and slander cases."). Harris' defamation claims based on (1) the February 9, 2007 e-mail from Wallace, (2) Tietex suspending his employment in July 2007, and (3) Tietex banning him from the lab in February 2007, are all based on "statements" that Tietex allegedly made in February and July 2007. Harris first alleged these claims in the Second Action, which he did not file until October 12, 2011. (Harris Dep. 2 at 33-34.) Thus, the two-year statute of limitations bars these claims.

While Harris asserts that the statute of limitations for these claims should have been tolled under 28 U.S.C. § 1367(d) while his First Action was pending, he misreads that statute. Section 1367(d) is limited on its face to "any claim asserted under [a federal court's supplemental jurisdiction], and . . . any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under [a federal court's supplemental jurisdiction]." Harris did not plead these defamation claims in the First Action, and they were not dismissed from the First Action. Thus, they are excluded from the tolling provision of section 1367(d).

The complete absence of these three defamation claims in the First Action also implicates the doctrine of *res judicata*. "The doctrine of *res judicata* bars a litigant from raising any issues which were adjudicated in the former suit [between the parties] and any issues which might have been raised in the former suit." *Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997) (citing *Hilton Head Ctr. v. Public Serv. Comm'n*, 294 S.C. 9, 362 S.E.2d 176 (1987)); *see also id.* ("'*Res judicata* also bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.'" (quoting *Riedman Corp. v. Greenville Steel Structures, Inc.* 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992))).

These three defamation claims arose out of the same transaction or occurrence that was the subject of the First Action—his employment with Tietex and separation therefrom. Harris could have raised these claims in the First Action, but he chose not to do so. Based on Harris' failure to assert these claims in the First Action, the doctrine of *res judicata* precludes him from asserting the claims in the Second Action.

V. CONCLUSION

For all of the foregoing reasons, the Court finds that Tietex is entitled to summary judgment on all of Harris' defamation claims. It is hereby ORDERED, ADJUDGED, and DECREED that this action be DISMISSED, in its entirety, WITH PREJUDICE, and that JUDGMENT be entered in favor of Tietex.

Entered on this 20 day of March, 2014.

The Honorable J. Derham Cole, Jr.
South Carolina Circuit Judge
Seventh Judicial Circuit