STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Barth Ihenacho, Plaintiff, v. South Carolina Department of Education, Cynthia Hearn and Daniel Ralyea Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2019-CP-40-02660 **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Court pursuant to Defendants' Motion for Summary Judgment, which was filed on November 16, 2020, pursuant Rule 56 of the South Carolina Rules of Civil Procedure. A hearing was conducted via Cisco WebEx on February 18, 2021, at which time Plaintiff Dr. Barth Ihenacho ("Plaintiff") was represented by Ryan Hicks, Esquire. Defendants South Carolina Department of Education, Cynthia Hearn, and Daniel Ralyea were represented by S. Lynn Davis, Esquire.

For the reasons set forth below, Defendants' Motion for Summary Judgment is GRANTED.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff was hired by the South Carolina Department of Education ("SCDE") on November 2, 2012, as an Education Associate II within the Division of Accountability, Office of Data Management and Analysis ("ORDA"). ORDA provides ad hoc research services for SCDE and other constituents and produces school and district report cards for the accountability system. Defendant Daniel Ralyea ("Ralyea") was hired by SCDE as the Director of ORDA on or about November 2, 2015. In his capacity as Director, he served as Plaintiff's second-line supervisor.

Defendant Cynthia Hearn ("Hearn") was hired by SCDE in 1973; and, at the time of Plaintiff's employment, she served as the team lead of the data reporting team within ORDA.

The data reporting team is responsible for taking student and school data and preparing reports for the public and the U.S. Department of Education. SCDE has used a software coding program for statistical analysis entitle SAS since the 1970s. To ensure proficiency in the program, SCDE provides training to employees in order to increase their skill set. "SAS" is the program used when processing a large number of records. At that time, all members of the ORDA team were expected to use SAS to properly perform their job duties.

However, at some point prior to Ralyea's hiring, SCDE purchased a software package called "SAS Enterprise," which was being used incorrectly. As the Director of ORDA, Ralyea was tasked with ensuring that the new program was used correctly so that code would be stored in a shared location and the data files would be stored on a server and accessed from a server. Both Ralyea and Hearn communicated to the entire ORDA team (including Plaintiff) that they expected that SAS Enterprise be used to perform their job duties.

Plaintiff was one of five Education Associates on Hearn's team in ORDA. In 2017, ORDA took over responsibilities for 2017-2018 reporting, including the ACT report, from Assessment. These reports are incorporated into the report cards for each South Carolina public school as required by the Education Accountability Act. Upon the expectation that the ORDA team would use SAS Enterprise, Plaintiff begin to raise concerns with SAS Enterprise and the accountability reports. Plaintiff, throughout the course of discussion regarding SAS Enterprise, stated specifically that, in his opinion, SAS Enterprise was not the proper program to generate accurate reports. Further, Plaintiff refused to provide any SAS code as instructed by his supervisors and admitted that he did not use SAS Enterprise.

On July 30, 2018, Plaintiff received a written reprimand for failure to maintain harmonious working relationships and failure to follow instructions. The reprimand states that Plaintiff expressed to several coworkers that he "would not use SAS," referring to SAS Enterprise. On January 24, 2019, Plaintiff had a meeting with Ralyea and the Director of Human Resources, in which he was told he was being terminated. The termination letter, dated January 14, 2019, stated reasons for termination identical to those in the July written reprimand: failure to maintain harmonious working relationships and failure to follow instructions. Plaintiff was eventually allowed to resign in lieu of being terminated.

On May 13, 2019, Plaintiff commenced this suit against SCDE and against Ralyea and Hearn in their individual capacities, alleging public policy discharge, civil conspiracy, and defamation. Prior to the hearing, Plaintiff stipulated to the dismissal of his civil conspiracy and defamation claims against Ralyea and Hearn. Thus, the remaining claims in this action are public policy discharge and defamation as against SCDE.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A party is entitled to summary judgment "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." Rule 56(c), SCRCP. On summary judgment, "the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture." *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010). "The nonmoving party must come forward with

specific facts showing there is a genuine issue for trial." *Rife v. Hitachi Constr. Mach. Co.*, Ltd., 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005).

I. Public Policy

SCDE argues that Plaintiff has failed to present a clear mandate of public policy that was violated nor evidence of termination resulting from a retaliatory act, therefore his claim must fail as a matter of law. The Court agrees.

"In South Carolina, employment at-will is presumed absent the creation of a specific contract of employment." *Barron v. Labor Finders of S.C. 393 S.C. 614 (2011)*. "[A]n at-will employee may be terminated for any reason or no reason at all." *Id.* In *Ludwick*, our supreme court recognized a cause of action in tort for the discharge of an at-will employee when the discharge constituted a violation of public policy. 287 S.C. at 215, 337 S.E.2d at 216. The public policy exception clearly but not exclusively applies in cases which (1) the employer requires the employee to violate the law; or (2) the reason for the employee's termination itself is a violation of criminal law. *Id*.

Plaintiff does not dispute that he was an at-will employee. No argument exist in the record that a specific contract existed creating special conditions of employment that would make Plaintiff's termination a violation of law. Thus, Plaintiff could be terminated by SCDE for cause or for no reason at all.

A government employee fired for exercising discretionary authority cannot assert a claim for public policy discharge. *Antley v. Shepherd, 340 S.C. 541 (2000).* The court has declined to extend the public policy exception to situations where an employee is terminated for refusing to comply with a directive which they simply *believes* would require them to violate the law. *Id.* Distinguishable from *Donevant*, Plaintiff was not being required to break the law. The Department

issued a directive for him to use a specific program, which was not a violation of the law. *Donevant v. Town of Surfside Beach, 414 S.C. 396 (2015).*

Plaintiff chose not to follow the directive because he did not agree with his supervisors. He further argues that the directive would result in false data being disseminated by SCDE, which was a violation since SCDE was required to produce the statistical data for schools. Plaintiff's argument is misguided and assumes several variables that lead to this conclusion, which he is unable to substantiate with facts. The program itself was not a violation of the law, nor was the programs usage. By Plaintiff's own deposition he admits that he was not asserting a policy or regulation had been violated by the use of SAS Enterprise. Plaintiff contends that SAS Enterprise was producing inaccurate information and as an analyst it was unethical to knowingly disseminate inaccurate information. As such, Plaintiff has conflated his perception of an unethical request with an illegal directive, which is not synonymous.

Viewing the evidence in light most favorable to Plaintiff and given South Carolina's adherence to the at-will employment doctrine, Plaintiff's claim does not fall within the recognized bounds of the public policy exception to at-will employment. Further, Plaintiff's termination was not itself a violation of criminal law therefore summary judgement is proper as a matter of law.

II. Defamation

Plaintiff alleges that SCDE defamed him through the emails communications sent to his coworkers, which imputed his credibility in his professional. The Court disagrees.

Under South Carolina law, a statement is defamatory only "if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Holtzscheiter v. Thomson Newspapers,* 332 S.C. 502, 506 S.E.2d 497, 512 (1998). “To prove defamation, the plaintiff must show: (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." *McBride v. School District of Greenville County*, 389 S.C. 546, 698 S.E.2d 845, 852 (Ct. App. 2010). "The tort of defamation permits a plaintiff to recover for injury to his reputation caused by the defendant's communication to others of a false message about plaintiff." *Id.* "In order to succeed on a defamation claim, the plaintiff must show that the challenged statement is both defamatory (tending to impeach the plaintiff's reputation) and actionable (injuring the plaintiff)." *White v. Wilkerson*, 328 S.C. 179, 493 S.E.2d 345, 347 (1997). The focus of defamation is not on the hurt to the defamed party's feelings, but on the injury to his reputation. *Wardlaw v. Peck,* 282 S.C. 199, 318 S.E.2d 270 (Ct.App.1984).

Here, Plaintiff has provided a number of emails in which he asserts that his coworkers made defamatory statements. One statement in which refers to as derogatory is when a coworker accused him of "misusing a governmental email server". Plaintiff accuses another coworker of stating that he "doesn't understand how things are calculated"; "he was a bully and she didn't want to waste her time with him"; and "I will let your superiors deal with your overconfidence. I don't have time to waste." The statements used to support his claim do not rise to the level of defamation. Plaintiff provides no support that the claims stated in the email were false nor does he provide evidence that the statement resulted in injury. The effect to Plaintiff of the pleadings containing the alleged defamation are pure conjecture. At best, Plaintiff could have claimed that the alleged defamation resulted in his termination but he does not thus that issue is not before the court. Given Plaintiff presents no facts supporting his allegations of SCDE knowingly making false statements, nor facts of a resulting injury, the court finds no basis for a defamation action.

Further, SCDE asserts that Plaintiff's claim fails as a matter of law because he has not produced any evidence of a public unprivileged defamatory statement. SCDE further ascertains that all communications referred to by Plaintiff were made in good faith and in the usual course of business. The court agrees.

In a defamation action, the defendant may assert the affirmative defense of conditional or qualified privilege. Under this defense, 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. Restatement (Second) of Torts § 593 (1977); *see Bell v. Bank of Abbeville*, 208 S.C. 490, 38 S.E.2d 641 (1946). In determining whether the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. When one has an interest in the subject matter of a communication, and the persona to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. *Bell, 208 S.C. at 493–94, 38 S.E.2d at 643.*

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. *Fulton v. Atlantic Coast Line R. Co.,* 220 S.C. 287, 67 S.E.2d 425 (1951); 53 C.J.S. *Libel and Slander* § 79 (1987). To prove actual malice, the plaintiff must show that the defendant was activated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the statements were published with such recklessness as to show a conscious disregard for plaintiff's rights. *Holtzscheiter v. Thomson Newspapers,* 332 S.C. 502, 506 S.E.2d 497, 512 (1998).

Again, Plaintiff has provided no such evidence that the communication by his coworkers exceeded any privilege. Nor has Plaintiff demonstrated actual malice in any of the statements made by his coworkers. Conveniently, Plaintiff has excluded the context in which all of the email communications were made, to which this court hopes was not in effort to bolster his claim. The emails were presented to the court in the context of being unsolicited attacks on Plaintiff or his character. All parties made spirited statements in the back and forth exchange which this court would attribute to their passion for their respective duties and ensuring optimal performance on behalf of SCDE. As such, this court finds no support for a claim of defamation and summary judgment to be proper.

CONCLUSION

For the foregoing reasons, SCDE is entitled to summary judgment.

IT IS THEREFORE ORDERED that the Defendants' Motion for Summary Judgment is GRANTED.

AND IT IS SO ORDERED.

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Jocelyn Newman
CIRCUIT COURT JUDGE

Richland Common Pleas

Case Caption: Barth Ihenacho vs South Carolina Department Of Education , defendant, et al

Case Number: 2019CP4002660

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So Ordered

Jocelyn Newman