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CHATHAM, VIRGINIA
JOSEPH W. MILAM, JR., JUDGE
DANVILLE, VIRGINIA
JAMES J. REYNOLDS, JUDGE
DANVILLE, VIRGINIA
CLYDE H. PERDUE, JR., JUDGE
ROCKY MOUNT, VIRGINIA
CHARLES J. STRAUSS, RETIRED JUDGE
CHATHAM, VIRGINIA
WILLIAM N. ALEXANDER, II, RETIRED JUDGE
ROCKY MOUNT, VIRGINIA
DAVID A. MELESCO, RETIRED JUDGE
DANVILLE, VIRGINIA
SAMUEL M. HAIRSTON, RETIRED JUDGE
CHATHAM, VIRGINIA

Commonwealth of Virginia

TWENTY-SECOND JUDICIAL CIRCUIT
CIRCUIT COURT OF PITTSYLVANIA COUNTY
CIRCUIT COURT OF FRANKLIN COUNTY
CIRCUIT COURT OF DANVILLE

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April 2, 2021

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RE: John Abraham Naff v. Ferrum College
Case # CL20-3549

Dear Counsel:

This matter came before the Court on March 4, 2021 for argument on Defendant's Demurrer and Plea in Bar. At the conclusion of the hearing, the Court took the matter under advisement. The questions are (1) whether Plaintiff has pled actionable claims for defamation, Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress, and (2) whether Plaintiff is barred from recovering on his defamation claim under the applicable statute of limitations.

BACKGROUND

John Abraham Naff (hereinafter referred to as "Plaintiff") filed his complaint against Ferrum College (hereinafter referred to as "Defendant") on May 29, 2020, bringing claims for Defamation, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and Breach of Contract. On October 27, 2020, this Court sustained the Defendants demurrer as to Defamation, Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress claims and granted leave to the Plaintiff to amend his complaint. Plaintiff filed his Amended Complaint on November 10, 2020, expanding on the Defamation, the

Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress claims, omitting the Breach of Contract claim. The Defendant filed a Demurrer and a Plea in Bar on December 1, 2020, and a Motion Craving Oyer on January 13, 2021. Thereafter, a hearing was held on March 4, 2021. The parties agreed the exhibits attached to the Motion Craving Oyer may be considered excluding Exhibit A, the severance letter.

FACTS

Plaintiff was employed by Defendant where he served as athletic director until June 12, 2019, when Defendant advised Plaintiff that he was on paid administrative leave for twenty-one (21) days while he considered certain terms of his severance. (AC ¶ 1,16). Defendant was terminated by Plaintiff officially on June 28, 2019. (AC¶ 1,24).

After the June 12th, meeting Plaintiff on June 17, 2019, sent an e-mail to the Ferrum College Athletic Department informing them that the Plaintiff "was taking some personal leave" (AC ¶22, 36, Ex. B).

On June 27, 2019, *the Franklin News Post* carried an article entitled: "Ferrum Athletic Director Abe Naff is taking time away from his post". This article contained the following statements:

> Officials aren't saying whether Naff has stepped down, been replaced, still under contract or when and if he plans to return to post.
> "Abe is taking some time off like many of our faculty and staff do during the summer months, "said Wilson Paine, the college's new vice president of institutional advancement.
>
> "That's all I can say and all I'm willing to say," Paine said during an interview that lasted more than four minutes.
> Paine repeated his statement when he was asked additional questions by a reporter from the Franklin News-Post. Efforts to reach him Wednesday for further comment were unsuccessful.
> "If there is more to comment on, I will let you know," said Paine adding that he would be the only college official to make further statements to the media on the matter and that no information would come from Ferrum's Athletic Department.
> "This is all I can say now," Paine said. "I'm not going to comment on whether (Abe) is still the Director of Athletics or any (other) speculation other than to say that he's taking some time off."
>
> ***

(AC ¶23, 38 Ex. F)

On July 18, 2019, *the Franklin News Post* ran an article entitled: "Naff, Ferrum sever professional ties," which included the following statements:

> No reasons were given as to why Ferrum and Naff have severed a professional relationship that's lasted almost 35 years. Paine said the college would have no comment regarding Naff's departure.
> "Abe Naff has requested that Ferrum not make any comments about him to the press. So, we are going to honor his request," Paine said.
> "We will be conducting a search later this summer for a permanent athletic director," Paine said.

***

(AC¶ 28, 39, Ex. G).

Plaintiff had directed the Defendant on July 15, 2019, to cease all communications with the press regarding the Plaintiff. (AC ¶ 27).

On July 19, 2019, *the Roanoke Times* ran an article entitled, "Ferrum College will be looking for new athletic director." The article stated:

> Abe Naff, who has served as Ferrum 's athletic director for the past 15 years, has been on a leave of absence since last month. Ferrum officials had declined to say in interviews last month if Naff would ever be returning to his job.
>
> But an email the college sent to faculty and staff members Thursday cleared up that point. The email thanked Naff for his service and announced that the college would be opening up a search for a new athletic director later this summer, two Ferrum sources who asked to remain anonymous said Friday.
>
> ***
>
> Holden was asked Friday if he wanted to say something about Naff's impact at Ferrum. <u>"Apparently we've been asked to honor Abe's wishes to not discuss it, and I'm going to honor that,</u>" Holden said. Paine had said Thursday that Naff had asked the college not to comment further to the media.

(AC ¶ 29, 40, Ex. H)

Plaintiff issued a press release announcing that he had filed a Complaint with the Equal Employment Opportunity Commission regarding the unjust termination of his employment. In response on October 2, 2019 defendant told *the Franklin News Post,* Defendant stated as follows:

> <u>"Neither Abe nor his representatives has contacted us so we can't comment. Once we've been contacted, we'll comment."</u>

(AC ¶ 32, Ex. I)

On October 3, 2019, defendant told reporters for *Roanoke Times*:
<u>"However, I can assure you that Ferrum College has been more than fair to Mr. Naff, and we have acted in the best interest of the College and its athletics department."</u>
(AC¶32, 41, Ex. E)

Plaintiff asserts that he suffered physical injury in the form of worsened prostate problems and weigh loss followed by unusual weight gain, severe emotional distress, depression, insomnia, crying spells, anger, fear, stress, lack of pleasure and enjoyment in activities, interference with family relations, loss of income and benefits, loss of employment, loss of self-esteem and self-confidence, humiliation, anxiety, financial hardship, and other damages. (AC ¶ 33)

Standard for Statute of Limitations Plea

The defendant has the burden of proof necessary to prevail on a statute of limitations plea. *Locke v. Johns-Manville Corp.*, 221 Va. 951 (1981). The Court reviews solely the pleadings in resolving the issue. The facts as stated in the pleadings by the Plaintiff are taken as true for the purpose of resolving the special plea. *Niese v. City of Alexandria, 264 Va. 230 (2002).*

ANAYLSIS: whether Plaintiff is barred from recovering on his defamation claim under the applicable statute of limitations

Statute of Limitations Plea

Defendant asserts that the plaintiff is barred from moving forward with the defamation claim based upon the statements in the articles listed above because he failed to assert said articles within the applicable one year statute of limitations, pursuant to Va. Code §8.01-247.1, asserting they do not relate back.

The Court finds that all the articles, including the June 27, 2019, are properly before the Court, finding they relate back to the original filing. Also, the statute of limitations was extended by one hundred twenty-six days (126) days because of the Declaration of Judicial Emergency for all but a portion of the June 27 statement. The Plea in Bar is overruled.

Standard for Demurrer

A demurrer is a pleading which raises an issue of law. *Va. Code §8.01-273, Va. Sup. Ct. R. 3:8.* The Court must determine whether the complaint states a cause of action upon which the relief requested can be granted. *RECP ID WG Land Investors LLC v. Capital One Bank USA, N.A. 295 Va. 268 (2018).* In deciding a demurrer, the Court accepts as truth the facts alleged by the Plaintiff. *Defetti v. Chester, 290 Va. 50 (2015).* "In deciding whether to sustain a demurrer, the sole question before the trial court is whether the facts pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against a defendant. " *Pendleton v. Newsome, 290 Va. 162, 171 (2015).*

ANAYLSIS: Has plaintiff pled actionable claims for defamation, Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress?

Defamation

To state a defamation claim under Virginia law, the plaintiff must plead facts sufficient to establish (1) the publication of, (2) an actionable statement with (3) requisite intent. *Schaecher v. Bouffault, 290 Va. 83, 91 (2015)* Whether a statement is an expression of opinion is a question of law. *Id.* "An actionable" statement must be both false and defamatory. Because statements of opinion cannot be "false" they are never actionable. *Sroufe v. Waldron , 297 Va. 396 (2019).*

The Supreme Court of Virginia has pronounced what is necessary to be considered a defamatory statement:

> Defamatory words are those tend[ing] so 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. A false statement must have requisite defamatory "sting" to one's reputation. Characterizing the level of harm to one's reputation required for defamatory "sting," we have stated that defamatory language 'tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous. *Schaecher at 91- 92.*

Virginia recognizes that "a defamatory charge may be made by inference, implication or insinuation, "*Carwile v. Richmond Newspaper, Inc.*, 196, Va. 1, (1954), and that a statement expressing a defamatory meaning may not be "apparent on its face." But such inference cannot rise above the statements themselves. *Id.* [I]t is a general rule that allegedly defamatory words are to be taken in their plain and natural meaning…" *Id. at.* 93 .

Plaintiff alleges that the statements referred to herein are defamatory by implying that he (i) was terminated due to performance reasons, (ii) lacked integrity and credibility to perform his job duties, (iii) was unfit to perform his job duties, (iv) was prejudice in profession and trade, and (v) struggled with addiction therefore unfit for his job. (AC ¶ 25, 30, 34-49). The Court finds that these statements are not actionable as a matter of law as they are not false, are not defamatory, and do not reasonably imply a defamatory meaning. None of the statements are false, namely: taking time off, on leave, no comment, ask not to comment and have not been contacted to make a comment. All the statements are true. Furthermore, none of these statements contain the requisite "sting." There is nothing in these statements that are unpleasant or offensive, much less imply that the Plaintiff was terminated for performances reasons, unfit for his job or struggled with addiction. The statements made in the news article are neutral and do not imply any actionable defamatory statements.

The plaintiff is attempting to extend the meaning of the words used by the defendant which is explicitly prohibited in defamation by implication claims. *Schaecher at 96.*

Lastly, the statement made to the *Roanoke Times* on October 3, 2019, the Court finds is an opinion of the defendant. The defendant's statement "… I can assure you that Ferrum College has been more than fair to Mr. Naff, and we have acted in the best interest of the College and it's athletics department," is relative in nature and depends largely on a speakers viewpoint, hence the statement is an expression of opinion. *Sroufe at 398.* Therefore, there is not an actionable claim for defamation as a matter of law.

Additionally, the statements are not defamatory *per se* as they do not directly or indirectly, suggest that plaintiff was unfit, incompetent, or unqualified to perform his job. *Tronfeld v. Nationwide Mut. Ins. Co.272 Va. 709 (2006).*

In short, the statements are true, benign and lack requisite sting. Therefore, the Court sustains the Demurrer to Count I of the Amended Complaint for defamation. The plaintiff has failed to set forth sufficient facts to support a cause of action for Defamation, Defamation by Implication or Defamation *per se*.

Intentional Infliction of Emotional Distress

Plaintiff asserts a claim for intentional infliction of emotional distress. In order to maintain a cause of action plaintiff must prove four elements: (1) the wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous or intolerable; (3) there was a causal connection between the wrongdoer's conduct and emotional distress; and (4) the emotional distress was severe. *Harris v. Kreutzer, 271 Va. 188, 203-04 (2006).*

The Virginia Supreme Court has defined "outrageousness" as:

> It is insufficient for a defendant to have acted with an intent which is tortious or even criminal. Rather, liability has been found only where the conduct has been so outrageous in character and so extreme in degree, as to go beyond all reasonable bounds of decency, and be regarded atrocious, and utterly intolerable in a civilized community. *Id. at* 204-205.

The liability for intentional infliction of emotional distress "arises only when the emotional distress is extreme, and only where the distress inflicted is so severe that no reasonable person could be expected to endure it." *Russo v. White, 241 Va. 23, 27 (1991).*

The Court finds that the plaintiff has failed to state facts sufficient to establish that the defendant's conduct was outrageous or intolerable and failed to establish a causal connection between defendant's conduct and the emotional distress. Therefore, the Court sustains the demurrer to Count II of the Amended Complaint.

Negligent Infliction of Emotional Distress

The plaintiff asserts a claim for negligent infliction of emotional distress against the defendant. The plaintiff must plead sufficient facts to establish that the plaintiff suffered a "physical injury" caused by the defendant's negligence. *Myseros v. Sissler, 239 Va. 8, 11 (1990).*

Plaintiff allegations are insufficient to demonstrate a physical injury which is required for a negligent intentional emotional distress claim. Evidence of symptoms or magnification of physical injury not merrily of an underlying emotional disturbance is required. For example the Supreme Court of Virginia has found that stress, anxiety, dizziness, nausea, difficulty sleeping and breathing, constriction of coronary vessels, two episodes of chest pain, hypertension, weight loss, a change in heart function which disabled the plaintiff from all work, were manifestations of a underlying disturbance, rather than a physical injury. *Id. at 11.*

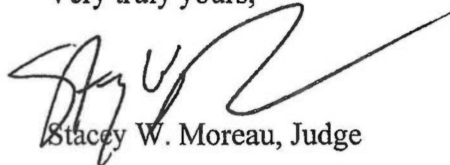
Here plaintiff alleges that he experienced physical injury due to worsening of his prostrate problems, sudden weight loss followed by unusual weight gain, need to seek medical treatment for depression, anxiety, and insomnia, as well as thoughts of self-harm. (AC ¶60, 64 65). These claims are very close to the claims made by plaintiff in *Myseros*. The plaintiff has set forth in his amended complaint typical symptoms of an emotional disturbance, not physical injury, therefore the plaintiff has failed to set forth sufficient facts for a cause of action of negligent infliction of emotional distress. Therefore, the Court sustains the Demurrer to Count III of the Amended Complaint.

Conclusion

For the foregoing reasons, Defendant's Demurrer to Count I, Defamation, Count II, Intentional Infliction of Emotional Distress, Count III, Negligent Infliction of Emotional Distress of the Amended Complaint are sustained, and the Amended Complaint is dismissed with prejudice. The Court overrules the Plea of the Statute of Limitations.

I ask that Mr. Leeson prepare an order reflecting the Court's ruling and circulate for endorsement so that it may be to the Court no later than April 16, 2021.

Very truly yours,



Stacey W. Moreau, Judge