STATE OF INDIANA	)	IN THE ST. JOSEPH CIRCUIT COURT
	) SS:	
COUNTY OF ST. JOSEPH	)	CAUSE NO. 71C01-1407-CT-000253

PETER AGHIMIEN, M.D. (sic), and MABEL AGHIMIEN,	)	- FILED -
Plaintiffs,	)	DEC 11 2015
v.	)	
MARK FOX,	)	St. Joseph Circuit Court Clerk
Defendant.	)	

ORDER GRANTING SUMMARY JUDGMENT

This matter pends before this Court on the Defendant's Motion for Summary Judgment, which was filed on June 1, 2015, and the Plaintiffs' Cross-Motion for Summary Judgment, which was filed on July 2, 2015. Plaintiffs also filed a Surreply to Defendant's Response Brief Opposing Plaintiffs' Cross Motion for Summary Judgment. All briefing was completed not later than August 18, 2015.

On September 3, 2015, the Court held a global hearing on the pending cross-motions. At the hearing, Plaintiffs appeared by attorney Michael P. Misch, and Defendant appeared by attorney of record, John A. Drake. Following the hearing, the Court took this matter under advisement. The Court, having reviewed the pending motions, the designated evidence, and the arguments of counsel now determines that this matter is ripe for consideration, and FINDS and ORDERS as follows:

FACTS AND PROCEDURAL HISTORY

Dr. Peter Aghimien ("Aghimien" or "Plaintiff") filed this action alleging defamation, tortious interference with business relationship, intentional infliction of emotional distress, and loss of consortium against Mark Fox, ("Fox" or "Defendant"). *Plaintiff's Amended Complaint for Damages, ¶ 1.* Plaintiff is joined by his wife Dr. Mabel Aghimien in this suit as plaintiff as well. *Id.* Aghimien is employed as a professor in the Judd Leighton School of Business and Economics of Indiana University, South Bend. *Defendant's Brief in Support of Motion for Summary Judgment, Page 2.* As such, he is responsible for teaching students, researching and providing other services. *Plaintiff's Amended Complaint for Damages, ¶ 6.* At the time in which this action was commenced, Aghimien was also Chair of Accounting within the business school at the same institution. *Plaintiff's Complaint, ¶ 5.* Fox is also a professor and was Chair of Management and Entrepreneurship at Indiana University, South Bend. *Defendant's Brief in Support of Motion for Summary Judgment, Page 2.*

In about June of 2012, Fox discovered an article written by Aghimien and then colleague Douglas Agbetsiafa ("Agbetsiafa") that appeared to contain plagiarism. *Defendant's Brief Supporting Motion for Summary Judgment.* Fox also discovered other articles written by Aghimien and Agbetsiafa separately, and a thesis by Agbetsiafa that appeared to contain plagiarism. *Id. at 5-6; Declaration of Mark Fox, ¶ 8.* On June 28, 2012, Fox alerted the Research Integrity Office of Indiana University of his findings concerning the articles and thesis, pursuant to the university's Research Misconduct Policy. *Defendant's Brief, page 5, [citing Fox Decl. ¶ 6].* Fox produced copies of the work by Aghimien and Agbetsiafa, and copies of the original works that he alleged they copied and submitted them in support of his complaint. *Id. at 9.* The number of pages Fox submitted to the Research Integrity Office totaled over 600. *Id.*

Fox's allegations were made in several emails. *Defendant's Designation, Exhibit C2; Defendant's Designation, Exhibit C3.*

In response to Fox's complaint, the Research Integrity Office initiated an inquiry regarding the alleged plagiarism and notified Aghimien and Agbetsiafa of the complaint against them. *Defendant's Designation, Exhibit C, page 5.* The inquiry committee initially met on August 23, 2012 and reviewed and discussed their findings on September 11, 2012. *Defendant's Designation, Exhibit C4, page 5.*

On October 4, 2012, while the Inquiry Committee was still in consideration of the allegations, Fox exchanged an email concerning a chair position for the following spring semester. *Defendant's Designation, Exhibit C4, page 5.* In the email Fox stated that he did not desire to be chair in the spring because he would be on sabbatical. *Plaintiff's Designation, Exhibit A.* He further wrote, "I realize we do not have any formal guidelines for who should be a chair, but I suggest that in light of the remarkable lack of originality of some of the research conducted by Douglas and Peter that they should not be chair. Examples of this lack of originality are attached and you should be able to confirm these..." *Id.* He also attached articles to his email supporting his position and insinuation that Aghimien had plagiarized and his opinion that he should not be chair. Eight people received these emails. *Id.*

In the same month, Fox created a blog entitled "Agbestiafa's Wording" and posted articles which Agbestiafa and Aghimien had written. *Defendant's Designation, Exhibit C6, page 1.* Additionally, he uploaded original articles with corresponding wording. *Id.* In an October 17, 2012 post by Fox, he wrote, "This document shows similarities in wording of the following article by...Agbetsiafa and Peter Aghimien and the wording of earlier published authors." *Id.* Later, on December of 2012, the Inquiry Committee rendered its report, finding grounds for

further investigation of the plagiarism allegations. *Defendant's Designation, Exhibit D, page 7.* All allegations were then forwarded to the Investigation Committee. *Id.* The Investigation Committee's initial meeting was held the following year on May 17, 2013. *Defendant's Designation, Exhibit D, page 8.*

On May 30, 2013, while the Investigation Committee was still conducting its investigation, Fox exchanged an email with Aghimien regarding insufficient staffing for fall 2013 accounting classes. *Plaintiff's Designation, Exhibit A.* As part of his response to Aghimien's email, Fox wrote, "I suggest that area chairs who have a remarkable ability to generate research that contains identical wording to earlier published authors (surely a sign of someone with Sage-like qualities) should be elevated to some sort of super-professor status and not have to teach at all." *Id.* As this email exchange was a part of a group message, ten faculty and staff members received this email. *Id.*

After the follow-up investigation and analysis concluded, the Investigation Committee found that the article Agbetsiafa and Aghimien co-authored contained plagiarism and attributed all of the plagiarized text to Agbestiafa; Aghimien was found not responsible for the plagiarized text of the article they co-authored. *Defendant's Designation, Exhibit D, pages 11-15.* The Investigation Committee also found that in one citation from a separate written work, Aghimien had omitted an end quotation mark in the article he wrote. *Defendant's Designation, Exhibit D, page 14.* However, the Investigation Committee's final determination absolved him of all plagiarism complaints filed against him. *Id.*

Plaintiff filed a complaint on June 22, 2014 against Defendant alleging defamation, tortious interference with business relationship, intentional infliction of emotional distress, and loss of consortium against Fox. *Plaintiff's Surreply Brief, page 2.* In 2014, sometime after the

complaint was filed, there were press conferences held regarding the complaints filed against Aghimien with the Research Integrity Office of Indiana University, South Bend and the lawsuit that had commenced. *Plaintiff's Designation, Exhibit 3, page 1.* In a written statement included in an article published in the South Bend Tribune in July of 2014, Fox stated, "I have simply pointed out that wording in research by Dr. Aghimien is the same wording used by others." *Id.* Aghimien had requested the press conferences regarding the complaints in starting a discourse about the case he filed. *Defendant's Reply Brief, page 3.*

On July 23, 2014, Defendant was served notice of the suit filed against him. *Defendant's Motion for Enlargement.* Fox filed a motion to dismiss on August 29, 2014, after which, Aghimien filed an amended complaint. *Plaintiff's Amended Complaint for Damages.* The Court accepted the amended complaint on October 24, 2014. *Plaintiff's Designation, Exhibit A.* Defendant later filed for summary judgment on May 26, 2015 on Plaintiff's defamation per se claim. *Plaintiff's Reply Brief in Opposition to Motion for Summary Judgement and Cross-Motion for Summary Judgement, page 1.* Plaintiff subsequently filed a Cross-Motion for Summary Judgment on July 2, 2015. *Plaintiff's Brief, Cross–Motion for Summary Judgement, page 1.* Defendant filed a reply brief on August 03, 2015 in support of the motion for summary judgement. *Defendant's Reply Brief, page 9.* Plaintiff filed a surreply brief on August 18, 2015. *Plaintiff's Surreply Brief, page 1.*

DISCUSSION AND DECISION

A. Introduction

Under Indiana law, offensive statements may rise to the level of defamation in two ways: defamation *per se* or defamation *per quod.* A statement is "defamation *per se*" if it imputes: (1) criminal conduct, (2) a loathsome disease, (3) misconduct in a person's trade, profession, office

or occupation, or (4) sexual misconduct. *Cortez v. Jo-Ann Stores, Inc., 827 N.E.2d 1223, 1230 (Ind. App. 2005); Baker v. Tremco, Inc., 890 N.E.2d 73, 83–84 (Ind. App. 2008).* Where a defendant commits defamation per se, the plaintiff is "entitled to presumed damages 'as the natural and probable consequence' of the per se defamation." *Rambo v. Cohen, 587 N.E.2d 140, 145 (Ind. App. 1992) [quoting Elliott v. Roach, 409 N.E.2d 661, 683 (Ind. App. 1980), reh'g denied, trans. denied].* Defamatory statements that do not fit the definition of defamation per se are, at most, defamation *per quod. Id.*

It is also well-settled under Indiana law that obnoxious remarks – even remarks that are tasteless, crude, insulting, racist, or sexist – are not defamatory *per se* and will not result in recovery without proof of special damages. *Rambo, 587 N.E.2d at 147.*[1] The rationale is that the law tolerates obnoxious language as an expression of free speech in a free society. *Id.*[2] In order to be actionable, the words must be "so obviously and naturally harmful that proof of their injurious character can be dispensed with." *Levee v. Beeching, 729 N.E.2d 215, 220 (Ind. App. 2000) [quoting Moore v. University of Notre Dame, 968 F. Supp. 1330, 1334 (N.D. Ind. 1997)].*

Whether a communication is defamatory is a question of law. *McQueen v. Fayette County Sch. Corp., 711 N.E.2d 62, 65 (Ind. App. 1999), trans. denied; see also, Moore v. University of Notre Dame, 968 F. Supp. 1330, 1334 (N.D. Ind. 1997).* As such, defamation claims are particularly appropriate for disposition under Ind. Trial Rule 56 (summary judgment).

B. Summary Judgment

The purpose of summary judgment is to "terminate litigation about which there can be no factual dispute and which may be determined as a matter of law." *Noble Roman's, Inc. v. Ward,*

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[1] The *Rambo* case contains an excellent primer on case law in Indiana and among the States regarding offensive epithets. *See, Rambo, 587 N.E.2d at 148.*

[2] Of course, truth is a complete defense to a claim of defamation. *See, Indiana Constitution, Art. I, Sec. 10; Gatto v. St. Richard School, Inc., 774 N.E.2d 914, 924 (Ind. App. 2002).*

760 N.E.2d 1132, 1137 (Ind. App. 2002); United Farm Bureau Mutual Insurance Co. v. Schult, *602 N.E.2d 173, 174 (Ind. App. 1992).* The standard for granting a motion for summary judgment is well settled – summary judgment is appropriate only where the designated evidence demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Ind. Trial Rule 56(C);* Levee v. Beeching, *729 N.E.2d 215, 219 (Ind. 2000).* The moving party has the burden to designate sufficient evidence to demonstrate that no genuine factual issues remain. Coffman v. PSI Energy, Inc., *815 N.E.2d 522 (Ind. App. 2004), trans. denied.* Once the movant has met this prima facie burden, the burden shifts to the nonmoving party to produce evidence to the contrary. Id.; *See also,* Levee, *729 N.E.2d at 219 [citing* Jacques v. Allied Bldg. Servs. of Indiana, *717 N.E.2d 606, 608 (Ind. App. 1999)].* Any doubt as to a fact, or an inference to be drawn from those facts, is resolved in favor of the party opposing the motion for summary judgment. Id.; *see also,* Jones v. City of Logansport, *436 N.E.2d 1138, 1143 (Ind. App. 1982), reh. denied, trans. denied.* A fact is material if its resolution is decisive of either the action or a relevant secondary issue. Jones, *436 N.E.2d at 1143;* Crowe, Chizek & Co., LLP v. Oil Tech., Inc., *771 N.E.2d 1203, 1206 (Ind. App. 2002).* A factual issue is genuine if the designated evidence demonstrates a dispute that requires the trier of fact to resolve the opposing parties' differing versions of the facts. Jones, *436 N.E.2d at 1143.* Summary judgment may be granted in whole or in part. *Ind. Trial Rule 56(C).*

C. Defamation Per Se

A communication is defamatory per se if it meets the following standard: it imputes criminal or sexual misconduct, a loathsome disease, or misconduct in a person's trade, profession, office, or occupation. Levee, *729 N.E.2d (Ind. 2000);* Moore v. Univ. of Notre Dame, *968 F. Supp. 1330, 1334 (N.D. Ind. 1997) [applying Indiana law by citing* Rambo v. Cohen, *587*

N.E.2d 140 (Ind. App. 1992), trans. denied, and Gibson v. Kincaid, *221 N.E.2d 834 (1966)].* Communications or statements are defamatory per se if they are "so obviously and naturally harmful that proof of their injurious character can be dispensed with." *Id. [citing* Schrader v. Eli Lilly Co., *639 N.E.2d 258 (Ind. 1994), reh'g denied;* Levee, *729 N.E.2d at 220 citing* Rambo, *587 N.E.2d 140,148].* The four elements of defamation per se are: defamatory imputation; malice; publication and damages.

In the present case, Plaintiff contends that Fox's emails and the blog posts are defamatory. The court will first address each email and then will address each blog post.

The first email sent in October of 2012 was in regards to filling a chair position for the following term. In this email, Fox recommended that Aghimien and Agbetsiafa not be chairs "in light of the remarkable lack of originality of some of the research conducted by Douglas and Peter." *Plaintiff's Designation, Exhibit A.* Fox also attached documents highlighting the similarity between of Aghimien's and Agbetsiafa's work and the original works for the recipients review. Fox's email imputes misconduct as a professor in his duties of researching and writing on the part of Aghimien, and thus, its meaning has serious implications. An allegation of plagiarism is indeed a matter of concern for any professor, scholar, or researcher contributing to the intellectual community. Such an allegation could prejudice the accused's reputation in the eyes of the university's faculty community or his fellow colleagues. Under the established legal standard, a communication is defamatory per se if it contains "a serious charge of incapacity or misconduct in words so obviously and naturally harmful that proof of their injurious character can be dispensed with." Moore, *968 F. Supp. at 1334 [citing* Schrader, *639 N.E.2d 258].*

Here, the defendant provided proof of his assertion as part of the email. Any recipient who read the email and examined the documents could have easily been led to infer that

plagiarism had occurred. This email and the documents attached to it, strongly made the communication appear to be true, not false.

The involvement of an administrative board – the Indiana University Investigation Committee – in making a determination about plagiarism makes this case unique. Eventually, the Investigation Committee determined that Aghimien was not responsible for the plagiarized material, but these findings were made only after a lengthy process of review. The Inquiry Committee's first finding that there was a preponderance of the evidence that plagiarism had occurred indicates that the basis for Fox's allegations in this email had merit. Thus, the Court finds that the allegation appeared to be true, but that this email bears a defamatory imputation.

(a) Malice

The standard for defamation per se requires a showing of malice. *Hamilton v. Prewett, 860 N.E.2d 1234, 1243 (Ind. App. 2007)*. Fox attached documents to support his opinion that Aghimien should not be chair, which highlighted the similar wording between the original article and the article he co-authored. The Court finds that Fox shared his opinion in good faith, believing that based upon the materials he had personally obtained and reviewed, plagiarism had occurred. His email attachment of materials corroborating his opinion buttresses Fox's argument that he had no ill will, but had sufficient grounds to believe his suspicions as true. Thus, even drawing reasonable inferences in favor of the nonmovant from the designated evidence, the inferences fail to demonstrate that Fox acted with malice. A claim of defamation per se cannot be sustained without meeting the malice element and the Plaintiffs have failed to demonstrate a genuine issue of fact exists with respect to essential element of malice.

(b) Publication

The publication element of defamation per se requires that the defamatory statement be communicated to another. *Cortez v. Jo-Ann Stores, Inc., 827 N.E.2d 1223, 1229 (Ind. App. 2005).* "A publication can consist of communication to just one individual." *Doe v. Methodist Hospital, 690 N.E.2d 681, 692 (Ind. 1997) [citing RESTATEMENT (SECOND) OF TORTS § 577(l) (1977)].*

Here, in the instant case, Fox's email was sent to eight recipients, all whom were faculty at Indiana University. The Court notes that Fox only included recipients who directly had connection with the subject matter of the email. Each recipient was involved with the affairs of the business school in their individual capacities. They were included in this email because they were to decide who was to become chair. Nevertheless, because eight recipients received this email, the Court finds that the publication element of defamation has been met.

(c) Damages

The last element of defamation per se is damages. If the court finds a communication defamatory per se, damages are presumed for a plaintiff who has a defamation per se claim. *Kennedy v. Schneider Elec. Co., No. 2:12-CV-122-PRC 2014 WL 4388147, at *7 (N.D. Ind. Sept. 5, 2014); see also Prewett, 860 N.E.2d 1243* (stating that damages are presumed without "proof of actual harm" to the reputation of plaintiff if a communication is defamatory per se). Even if damages can be presumed by publication of the first email, a claim of defamation per se cannot succeed with respect to the first email due to the lack of malice.

The Court now turns to the second email, sent in May of 2013. This email was sent in response to Aghimien's e-mail regarding inadequate staffing for future classes. In this email, Fox wrote, "I suggest that area chairs who have a remarkable ability to generate research that

contains identical wording to earlier published authors (surely a sign of someone with Sage-like qualities) should be elevated to some sort of super-professor status and not have to teach at all."

Applying each element for defamation per se to the second email, the designated evidence shows that Fox's email does not contain a defamatory imputation. Although Fox's response bears sarcasm and an attempt at wit on his part, the e-mail does not directly accuse Aghimien of plagiarism, and neither does it impute criminal conduct, a loathsome disease, sexual misconduct, or misconduct in his profession – the latter being the most corresponding to the instant case. It is obvious that Fox made snarky, obnoxious, and critical comments in his email, but he wrote the comments to make a contentious point about the management and direction of the Accounting Department. The identical wording that he mentions in his email is supported by the articles which he found and reviewed. Furthermore, obnoxious remarks, including insulting remarks do not meet the standard for defamation per se. *Rambo, 587 N.E.2d at 147.* While the email was communicated to ten people, it publication was limited. However, as the second email did not contain defamatory statements, its publication was legally immaterial. Turning to the malice element, the Court finds that Fox's email does not indicate malice. Fox is stating an opinion in his email and although undue and inappropriate, the nature of the email demonstrates that Fox's email is not to be regarded as serious. Taken together, the Court finds that this second email is not actionable per se.

The Court now will now address the blog entitled "Agbetsiafa's Wording" that Fox started in October of 2012 and his post. The Court finds that the blog post Fox made in the same month and year bears no defamatory imputation. Fox uploaded the articles and left the reader to infer his purpose and its meaning. The blog contains no statement that can be identified as a direct allegation of plagiarism by Fox, however, the blog allows the reader to review the actual

documents and draw a conclusion. One can speculate at the motivation for such a posting, but the actual intention behind the post is indecipherable. Perhaps it was Fox's intent to bring attention to what he believed was plagiarism, without blatantly stating it. If so, perhaps Fox was attempting to incite other interested parties to take up the claim of plagiarism. By creating the blog and providing sources that can lead a reader to believe his own presumption, Fox is able to demonstrate his claims while not expressing an opinion. There is no direct accusation of plagiarism on the blog. While Fox cannot claim that the posting was an accident, mistake, or otherwise unintentional, the fact that he included the actual documents for comparison does not demonstrate that he had defamatory intent. Rather, it tends to show that Fox was seeking the reader to arrive at the truth by drawing his or her own conclusions. As such, the Court finds that the blog did not have a defamatory imputation.

As for the publication element, the blog post does meet the publication element, as it was published on the web. Today it is common knowledge that the internet is widely accessible around the world, and thus anyone could have accessed and viewed the website. The Court need not address this issue any further.

Concerning the malice element, Plaintiff has not proven that Defendant "entertained serious doubts as to the truth." *Moore, 968 F. Supp. at 1336 [citing St. Amant v. Thompson, 390 U.S. 727, 88 S. Ct. 1323, 20 L.Ed.2d 262 (1968); Chester v. Indianapolis Newspaper, Inc., 553 N.E.2d 137 (Ind. App. 1990), reh'g denied, trans. denied].* Under the standard, malice requires that the defamer make the publication knowing that it is false. *Id.* Fox made this publication the same year that he discovered the articles appearing to contain plagiarism, which is also the year that he made the formal complaint. The Court thus finds that at the time that the blog was published, Fox had reason to believe his conclusions were correct. He did not publicize the blog

with a reckless disregard for the truth, but with a reasonable belief that the wording was similar. The publication of this blog and its post therefore, does not rise to a level of malice under the standard. The Court thus finds that the blog is not actionable under defamation per se.

D. Defamation per quod

A communication is defamatory per quod if it is statement with defamatory imputation, malice, publication, and damages, and is not considered defamatory per se. *Moore, 968 F. Supp. at 1335 [citing Schaefer v. Newton, 57 F.3d 1073, No. 94-2821, 1995 WL 349977 at *3 (7th Cir. Ind.) June 8, 1995; Street v. Shoes Carnival, Inc., 660 N.E.2d 1054, (Ind. App. 1996); Schrader, 639 N.E.2d 258].* To maintain a defamatory per quod action, the plaintiff must show that there is malice and damages. *Moore, 968 F. Supp. at 1335.*

(a) Damages

A claim under defamation per quod is maintained only "if it causes plaintiff special damages." *Moore, 968 F. Supp. at 1335 [citing Schrader, 621 N.E.2d at 640, Rambo, 587 N.E.2d at 145; Agnew v. Hiatt, 466 N.E.2d 781 (Ind. App. 1984); Brockmen v. Detroit Diesel Allison Div. of General Motors Corp., 366 N.E.2d 1201 (Ind. App. 1977)].* Special damages are monetary damages that are "incurred as a natural and proximate cause of the wrongful act." *Id. [quoting Tacket, 937 F.2d at 1206; Stanley v. Kelly, 422 N.E.2d 663 (Ind. App. 1981)].* Special damages are pecuniary in nature.

(b) Malice

In order to maintain a defamation per quod claim, the plaintiff must also demonstrate that the defendant "acted with the requisite 'malice.'" *Moore, 968 F. Supp. at 1336, [quoting New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed 2d 686 (1964)].* The plaintiff must prove that

the "publication was made with knowledge that it was false or with reckless disregard of whether it was false." *Id. [citing Rosenbloom v. Metromedia Inc., 403 U.S. 29, 91 S. Ct. 1811, 24 L. Ed 2d 296 (1971); AAFCO Heating and Air Conditioning Co. v. Northwest Publ's, Inc., 321 N.E. 2d 580 (1975), cert. denied, 424 U.S. 913, 47 L. Ed. 2d 318 (1976)].* To prove that the defendant published the communication with malice, there must be "sufficient evidence" to conclude that the defendant had "serious doubts as to the truth of his publication." *Moore, 968 F. Supp. at 1336 [quoting St. Amant v. Thompson, 390 U.S. 727, 20 L. Ed. 2d 262 (1968); Chester v. Indianapolis Newspaper, Inc., 553 N.E. 2d 137 (Ind. App. 1990), reh'g demied, trans. denied].*

It is not sufficient for plaintiff merely "to allege that a defamatory falsehood has been published." *Moore, 968 F. Supp. at 1337 [citing Fadelle v. Minneapolis Star & Tribune Co., 425 F. Supp. 1075 (1976), aff'd, 557 F.2d 107 (7th Cir. 1977), cert. denied, 434 U.S. 966, 54 L. Ed. 2d 452].* Rather, the plaintiff must demonstrate the publication was made with malice. *Id.*

In the present case, the Court has already determined that there was no defamatory imputation, that there was publication, but no malice. Furthermore, as to the malice element, Fox did not send the email with a reckless disregard to the truth or falsity of his allegation. Fox attached documents as proof of his allegation. These facts lend to the Court's finding that there is no malice. As to the last element, Plaintiff also does not demonstrate pecuniary loss as a result of the first e-mail.

Thus, Plaintiff has not shown a genuine issue of fact with regard to defamation per quod claim under the first email. As to the second email, the Court has found that, while it was published, there was no defamatory imputation and that there was an absence of malice. As each of the elements to maintain a defamation per quod action have not been met, the Plaintiff has not demonstrated that genuine issues of fact arise as to the second email.

A similar analysis applies to the blog and blog post. This Court previously determined that the blog post did not meet the defamatory imputation and malice elements. For these reason, the Court finds that Plaintiff has no action under defamation per quod as to the blog.

E. Privilege Defense

A defendant may raise a privilege defense in a defamation case. There is an absolute privilege and a qualified privilege under law.

(a) Absolute Privilege

Six areas in which courts have recognized as an absolute privilege include: "(1) "Judicial Proceedings"; (2) "Legislative Proceedings"; (3) "Executive Communications"; (4) "Consent of the Plaintiff"; (5) "Husband and Wife"; and (6) "Political Broadcasts". *Weenig v. Wood, 349 N.E.2d 235 (Ind. App. 1976) [quoting Prosser,* supra, *§ 114, pp. 777-785; Restatement of Torts, §§ 583-92, pp. 219-41 (1938); 1 Harper & James,* supra, *§§ 5.22-5.24, pp. 421-35; Fleming,* The Law of Torts, *ch. 22, § V, pp. 525-537, (2d ed. 1965)].*

In the instant case, neither the Plaintiff nor the Defendant can claim an absolute privilege based on the nature of the communication or their status. Accordingly, neither the emails nor the blog are covered by an absolute privilege.

The parties agreed that Fox's formal complaint to the Research Integrity Office of Indiana University is protected by an absolute privilege, and the Court accepts the parties' agreement regarding an absolute privilege applying to the University's formal complaint process. Under the institution's policy, any suspicion of research plagiarism and lack of integrity can be reported. The Research Integrity Office exists to resolve matters such as this and its function can

only be fulfilled with proper disclosure. Fox properly initiated the report, bringing his concerns to light and providing supporting documentation by contacting the Research Integrity Office.

(b) Qualified Privilege

The qualified privilege serves to protect "communications made in good faith on any subject matter in which the party making the communication has an interest or in reference to which he has a duty, either public or private." *Kelley v. Tanoos, 865 N.E.2d 593, 597 (Ind. 2007) [citing Bals v. Verduzco, 600 N.E.2d 1353, 1356 (Ind. 1992) quoting Chambers v. American Trans. Air, Inc., 577 N.E.2d 612, 615 (Ind. App. 1991), trans. denied].* When there is no "factual dispute, the applicability of the privilege is a question of law," *Id.* [citing *Bals*, 600 N.E.2d at 1356]. There are two types of qualified privilege that courts have recognized: the common interest privilege and the public interest privilege. The common interest privilege protects "communications made in connection with membership qualifications" and the public interest privilege protects communications made 'to one entitled to act in the public interest.'" *Tanoos, 865 N.E.2d at 597-98 [citing Indianapolis Horse Patrol Inc. v. Ward, 247 Ind. 519, 217 N.E.2d 626 (1966); employment references, Passmore v. Multi-Mgmt Servs. Inc., 810 N.E.2d 1022 (Ind. 2004); intracompany communications, Schrader, 639 N.E.2d at 258].*

The common interest privilege protects "communications between employers and employers, business partners, members of fraternal organizations, creditors and credit agencies *See, e.g., Cortez, 827 N.E.2d at 1233.* This qualified privilege applies to "communications made in good faith on any subject matter in which the party making the communication has an interest or in reference to which he has a duty, either public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty." *Id. [quoting Schrader v. Eli Lilly & Co., 639 N.E.2d 258, 262 (Ind. 1994)].* The qualified privilege of a common interest "rebuts the

element of malice implied by law for the making of a defamatory statement." *Cortez, 827 N.E.2d at 1232.* To successfully assert a common interest privilege, the defendant must demonstrate (1) good faith, (2) an interest to be upheld, (3) a statement limited in its scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner to the appropriate parties only. *Id.*

The public interest privilege has been applicable in cases involving statements made to police officers conduction investigations. *Tanoos, 865 N.E. at 600.* The public interest privilege is inapplicable in the present case. The common law of qualified privilege has been extended to media and courts have considered that a qualified privilege "exists for all media expression." *Moore, 968 F.Supp at 1337 [citing Fazekas v. Crain Consumer Grp. of Crain Commc'n Inc., 583 F. Supp. 110 (S.D. Ind. 1984); AAFCO, 321 N.E. 2d at 586.* Plaintiffs alleging libel have the burden to "prove actual malice by clear and convincing evidence." *Id.* The court makes the determination as to whether or not the matter is of public interest. *Id.; AAFCO, 321 N.E.2d at 590.*

Here, Fox's claim that there is a qualified privilege covering the e-mail communications sent. The Court finds that Fox is correct – a qualified privilege exists regarding the emails. The emails were sent to other faculty members to discuss the coming vacant chair position and staffing for classes, respectively. Each party to the email had an interest in the subject matter of each email as they were faculty of the institution, who have the power to discuss and decide such issues. Furthermore, each email was sent in good faith regarding the subject matter. Fox first email was direct and frank and Fox's second email, again contains snarky undertones, but nevertheless these were communications sent to help make decisions pertaining to the department and to resolve a staffing issue, respectively. Fox's response to each email was not

only important but necessary as a member of the professorial team and thus meets the qualified privilege standard.

The Court now turns to the blog. The publication of media is not without a protection. *See, e.g., Moore, 968 F. Supp. at 1337.* This protection is granted under the First Amendment of the U.S. Constitution. *Id.* The protection afforded to the press may be different than that provided to a personal blog, yet "[i]f the matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved or because in some sense the individual did not 'voluntarily' choose to become involved." *Id. [citing Rosenbloom v. Metromedia, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971)].* While Fox's blog does not meet the usual definition of press publication, the focus must be on the content of the blog and not on its designation. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct. *Rosenbloom, 403 U.S. at 43, 91 S.Ct. at 1819–1820.* Moreover, the publication of matters that elicit a general or public concern is an activity protected by Article 1, Section 9 of the Indiana Constitution. *Moore, 968 F. Supp. at 1337 [citing Fazekas v. Crain Consumer Group of Crain Communications, Inc., 583 F. Supp. 110 (S.D.Ind.1984); AAFCO, 321 N.E.2d at 586].*

Fox's blog contained information about the qualifications of professors to teach at a state university and concerning the integrity of that institution. As such, the blog contains matters of general or public concern. Accordingly, the Court concludes that a qualified privilege exists for the blog. Furthermore, as the Court has already concluded that the contents of the blog were not defamatory, the Court need not elaborate further on this issue. Suffice to say that no genuine issue of material fact exists as to the qualified privilege.

F. Tortious Interference with Business Relationship

The elements of tortious interference with business relationship are: (1) the existence of a valid relationship, (2) the defendant's knowledge of the existence of the relationship, (3) the defendant's intentional interference with that relationship, (4) the absence of justification, and (5) damages resulting from the defendant's wrongful interference with the relationship. *Levee, 729 N.E.2d at 222 [citing Bradley v. Hall, 720 N.E.2d at 751; Harvest Life Ins. Co. v. Getche, 701 N.E. 2d 871, 876 (Ind. App. 1998), trans. denied; Biggs, 446 N.E. 2d at 983].*

Courts have determined that illegal conduct is a necessary element of the tort. *Levee, 729 N.E.2d at 222-23.* Defamation is not considered an illegal conduct by courts. *Id. at 223.* In the instant case, Aghimien had a relationship with Indiana University as an employee. Fox knew of Aghimien's relationship with his fellow faculty members and Indiana University, South Bend. The Court finds that Fox's conduct was not an intentional interference with Aghimien's relationship with Indiana University, South Bend.

In this same email regarding the chair position, Fox voiced his opinion and strong concern that Aghimien and Agbetsiafa appeared to have plagiarized in the article. Professors and researchers employed by the institution are to produce work of sound quality. The Court does not ignore the fact that the article was later found to have plagiarized text and that Aghimien was declared not responsible for these unoriginal portions. The Court instead recognizes that at the time in which Fox sent the email, his observations of the plagiarism led him to believe that both of them were responsible. Fox's intent was to provide his opinion in making the decision and not to destroy relationship between Aghimien and their employer.

Fox's conduct is also justified on the basis of his good faith belief that Aghimien and Agbetsiafa's co-work lacked originality. The Court notes that Fox did not commit any illegal

conduct, which is a necessary element of the tort, as reporting his suspicions that Aghimien had plagiarized by formally making a complaint does not give rise to illegality. Furthermore, the first email relating to this case, in which Fox informs his colleagues that he disapproves of Aghimien and Agbetsiafa having the chair position is by no means illegal. Quite possibly, Aghimien was disappointed and astonished that Fox would share a negative opinion concerning him and his work. Still, the Court cannot find that Fox's actions amount to a crime in regards to this claim.

Without further unnecessary discussion, the Court finds that Aghimien's tortious interference with a business relationship claim fails as a matter of law. The Court finds it worth noting that the tortious interference claim was buttressed by the defamation claim, and as the Court has found the defamation claim deficient, that claim cannot and does not support the tortious interference claim.

G. Intentional Infliction of Emotional Distress

Indiana courts have given the clear definition and standard for intentional infliction of emotional distress. In *Cullison*, our Supreme Court defined the tort of intentional infliction of emotional distress as: "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another." *Lindsey v. DeGroot, 898 N.E.2d 1251 [quoting Cullison,* 570 N.E.2d at 31]. "It is the intent to harm the plaintiff emotionally which constitutes the basis for the tort of intentional infliction of emotional distress." *Id.* "The elements of the tort are that the defendant: (1) engages in extreme and outrageous conduct (2) which intentionally or recklessly (3) causes (4) severe emotional distress to another." *Id.* "The requirements to prove this tort are rigorous." *Id.* "Intentional infliction of emotional distress is found where conduct exceeds all bounds usually tolerated by a decent society and causes mental distress of a very serious kind." *Lindsey, 898 N.E.2d 1251* [*quoting Lachenman*, 838 N.E.2d at 457].

Admittedly, summary judgment is usually not appropriate in negligence actions. *See, e.g.,* Lucas v. Dorsey Corp., *609 N.E.2d 1191, 1198 (Ind. App. 1993), trans. denied.* The rationale for this rule is that negligence actions are inherently factual in nature and that summary judgment is rarely appropriate. *Id.* However, if this case, the negligence consists of intentional infliction of emotional distress by publication of putative slanderous statements. As noted above, the claim of defamation raises a question of law, which is appropriate for disposition by summary judgment. McQueen., *711 N.E.2d at 65;* Moore, *968 F. Supp. at 1334.*

Here, Fox's actions are not extreme and outrageous. Fox was entitled to make a formal complaint to the Research Integrity Office. Indiana University set forth their policies regarding research integrity, formal complaints, and the investigative process. Fox's complain is therefore, reasonable and acceptable. Fox's first email response in regards to the filling the chair position was only provided to give his honest opinion. This action does not suggest any indecent conduct, such that anyone would find it highly disturbing.

The second email relating to this suit also suggests no outlandish conduct. Again, Fox sent a sarcastic response to the email regarding the staffing issues for the upcoming classes. The simple action of responding to emails with disdain, sarcasm, or pessimism does no rise to a level of the standard for intentional infliction of emotional distress. The content of his emails demonstrates his repugnance toward plagiarism and were arguably not on par with professionalism, but sending e-mails with an opinion is normal as part of his job function.

The Court cannot find that either e-mail was extreme and outrageous. The second and third prongs of the test require that the conduct 1) intentionally or recklessly causes 2) severe emotional distress to another. Fox's emails do not demonstrate that he engaged in conduct that would intentionally or recklessly cause severe emotional distress. Aghimien states that he

experienced panic attacks and restless nights. His discomfort and physiological issues were not from the context of the emails Fox sent per se, but was as result of the possible implications of the complaint. Aghimien certainly realized that his professional reputation could have been marred and that his work was being questioned on grounds that professorial positions partly rest upon in academia.

For Aghimien, the complaint had a greater meaning and significance, and until the investigative process was completed, a concern loomed over his head in the midst of his regular responsibilities. Aghimien may have also been very well worried in addition to being astonished and bewildered that a fellow colleague had filed a complaint against him, alleging plagiarism.

Although the Court recognizes this as a possibility, the Court does not find that the conduct of sending emails in the context of Fox's employment recklessly caused severe emotional distress. Unfettered worry can create stress, which in turn affects the body negatively; but this is a secondary effect of the complaint, not to be confused with Fox's conduct intentionally or recklessly causing emotional distress.

The Court now turns to the blog. Applying the same standard, the Court also concludes as a matter of law that Fox's conduct in creating the blog is not conduct that is extreme and outrageous. Creating the blog was a poor use of his time but in doing so, Fox committed no harm. The blog contains no personal opinion, bashing, or otherwise unacceptable comments or accusations. The blog bears no indecent text.

Fox's stated intent was to bring awareness to the plagiarism he believed existed. His conduct is not intolerable, as anyone is free to create a blog and post articles as they like. The subject matter of the posts is the prerogative of the creator or administrator. Blogs are expressive in nature, allowing the creator to share as they wish.

Here, Fox posted what anyone else could have found if they conducted the same thorough research. Perhaps those mentioned in the blog experienced anger and indignation that their written work was now available for scrutiny by the public. However, the Court notes that in publishing their work, they held it out for the public to read and scrutinize. Further, presentation of their work for examination by a disgruntled colleague does not rise to a level of indecency, such that the community would consider it extreme. Certainly, Fox's conduct concerning the blog creation did not recklessly cause severe emotional distress.

CONCLUSION

This case presents the Court with an interesting question about the right of free speech and the impact of words in an academic work environment. As noted by Indiana University's policy, "[s]cholars must be able to trust their peers, students must be able to trust their teachers, and citizens must be able to trust the integrity of the results of research performed in institutions of higher education." *Indiana University Policy and Procedures on Research Misconduct, Defendant's Ex. C-1.* Certainly, any professional who takes pride in his work and has good character will perform his job with attention and care. Such a professional will also not take it lightly when his professional reputation appears to be threatened, no matter whether by honest means or through malicious and reckless behavior. The emotional turmoil and upheaval that impact a professor or other specially qualified professional when facing spurious and/or dishonorable allegations may affect not only his professional life, but his self-esteem and personal affairs.

As Defendant has met his burden to demonstrate that there are no genuine issues of material fact, and the Plaintiff has failed to successfully counter the Defendant's demonstration,

the Court must find in favor of the Defendant and against the Plaintiffs with respect to the cross-motions for summary judgment.

In so ruling, the Court is not approving the conduct of the Plaintiff, either explicitly or implicitly – taken in the best light, his behavior as a coworker was insensitive and inconsiderate, and arguably was morally reprehensible. While recognizing the moral outrage that accompanies this type of conduct, the court can only render a ruling in consonance with the law. Here, the defamation claim fails as a matter of law. Thus, the derivative claims of tortious interference with a business relationship, intentional infliction of emotional distress, and loss of consortium also must fail as a matter of law.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that, based on the foregoing and the Court having determined that there remain no genuine issues of material fact with respect to the allegations of defamation per se averred, Defendant's motion for summary judgment is GRANTED and Plaintiff's cross-motion for summary judgment is DENIED. As this Order resolves all issues pending before this Court, and there being no just reason for delay, this Order is final and appealable judgment of this Court.

SO ORDERED on the date filemarked hereon. JUDGMENT.

Hon. Michael G. Gotsch, Sr.
Judge, St. Joseph Circuit Court

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