UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MICHAEL JOHN LOPOS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil No.3:04CV00352(AWT)
	:	
CITY OF MERIDEN BOARD OF EDUCATION and ELIZABETH RUOCCO, FORMER SUPERINTENDENT OF SCHOOLS, MERIDEN BOARD OF EDUCATION,	:	
	:	
Defendants.	:	

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The plaintiff brings a Title VII retaliation claim contending that he was not interviewed for two paraprofessional positions because he had filed an EEOC complaint against defendant Ruocco, the then Superintendent of Schools for the City of Meriden. He also brings a defamation claim, arguing that the defendants slandered him. The parties have filed cross motions for summary judgment, and the defendants' motion is being granted as to both claims.

I. Factual Background

The plaintiff was employed as a tutor by the Meriden Public Schools in 1996 and 1997. In October 1997 he filed a complaint with the Equal Employment Opportunity Commission (EEOC) against defendant Ruocco. Several years later, in August and September

2002, the plaintiff applied for two paraprofessional positions that were open in the Meriden school system, one at the Casmir Pulaski School and the other at the Roger Sherman School. The applicant pool included 216 applications that were on file, as well as additional candidates for the specific positions. The principal of Casmir Pulaski selected seven candidates for interviews; the principal of Roger Sherman selected nine. The plaintiff was not included in either interview pool. He argues that he was not interviewed in retaliation for filing the EEOC complaint against defendant Ruocco.

The plaintiff also contends that the defendants made defamatory statements about him to members of the education community and the general public sometime between 1997 and 2002. The plaintiff asserts that defendant Ruocco stated he was mentally and psychologically unstable. The plaintiff also contends that members of the Meriden Board of Education stated that he was crazy, paranoid and dangerous.

II. Legal Standard

A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Gallo v. Prudential Residential Servs., 22 F.3d

1219, 1223 (2d Cir. 1994). Rule 56(c) "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." See Celotex Corp., 477 U.S. at 322.

When ruling on a motion for summary judgment, the court must respect the province of the jury. Therefore the court may not try issues of fact. See e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 58 (2d Cir. 1987); Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975). It is well-established that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge." Anderson, 477 U.S. at 255. Thus the trial court's task is "carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined . . . to issue-finding; it does not extend to issue-resolution." Gallo, 22 F.3d at 1224.

Summary judgment is inappropriate only if the issue to be resolved is both genuine and related to a material fact. Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly

supported motion for summary judgment. An issue is "genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248 (internal quotation marks omitted). A material fact is one that would "affect the outcome of the suit under the governing law." Id. As the court observed in Anderson: "[T]he materiality determination rests on the substantive law, [and] it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." Id. Thus, only those facts that must be decided in order to resolve a claim or defense will prevent summary judgment from being granted. When confronted with an asserted factual dispute, the court must examine the elements of the claims and defenses at issue on the motion to determine whether a resolution of that dispute could affect the disposition of any of those claims or defenses. Immaterial or minor facts will not prevent summary judgment. See Howard v. Gleason Corp., 901 F.2d 1154, 1159 (2d Cir. 1990).

When reviewing the evidence on a motion for summary judgment, the court must "assess the record in the light most favorable to the non-movant and . . . draw all reasonable inferences in its favor." Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Del. & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 177 (2d Cir. 1990)). Because credibility is not an issue on summary judgment, the nonmovant's

evidence must be accepted as true for purposes of the motion. Nonetheless, the inferences drawn in favor of the nonmovant must be supported by the evidence. "[M]ere speculation and conjecture" is insufficient to defeat a motion for summary judgment. Stern v. Trs. of Columbia Univ., 131 F.3d 305, 315 (2d Cir. 1997) (quoting W. World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2d Cir. 1990)). Moreover, the "mere existence of a scintilla of evidence in support of the [nonmovant's] position" will be insufficient; there must be evidence on which a jury could "reasonably find" for the nonmovant. Anderson, 477 U.S. at 252.

Finally, the nonmoving party cannot simply rest on the allegations in its pleadings since the essence of summary judgment is to go beyond the pleadings to determine if a genuine issue of material fact exists. See Celotex Corp., 477 U.S. at 324. "Although the moving party bears the initial burden of establishing that there are no genuine issues of material fact," Weinstock, 224 F.3d at 41, if the movant demonstrates an absence of such issues, a limited burden of production shifts to the nonmovant, which must "demonstrate more than some metaphysical doubt as to the material facts, . . . [and] must come forward with specific facts showing that there is a genuine issue for trial." Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993) (quotation marks, citations and emphasis omitted).

Furthermore, "unsupported allegations do not create a material issue of fact." Weinstock, 224 F.3d at 41. If the nonmovant fails to meet this burden, summary judgment should be granted. The question then becomes: is there sufficient evidence to reasonably expect that a jury could return a verdict in favor of the nonmoving party. See Anderson, 477 U.S. at 248, 251.

Because the plaintiff in this case is proceeding pro se, the court must read the plaintiff's pleadings and other papers liberally and construe them in a manner most favorable to the plaintiff. See Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994). Moreover, because the process of summary judgment is "not obvious to a layman," Vital v. Interfaith Med. Ctr., 168 F.3d 615, 620 (2d Cir. 1999), the district court must ensure that a pro se plaintiff understands the nature, consequences and obligations of summary judgment. See id. at 620-21. Thus the district court may itself notify the pro se plaintiff as to the nature of summary judgment; the court may find that the opposing party's memorandum in support of summary judgment provides adequate notice; or the court may determine, based on thorough review of the record, that the pro se plaintiff understands the nature of summary judgment. See id.

After reviewing the record, the court concludes that the plaintiff understands the nature, consequences and obligations of summary judgment. First, the defendants adequately informed the

plaintiff of the meaning and process of summary judgment when they provided him with the notice to pro se litigants regarding summary judgment (Doc. No. 226). The plaintiff was instructed that he must file papers that show "evidence contradicting the defendants' version [of the facts]" and that the evidence relied on, "if believed by a jury, would be sufficient to support a verdict in [his] favor." (Notice to Pro Se Litigant Opposing Summ. J. (Doc. No. 226) at 2.) He was apprised of the importance of affidavits and their function. He was also informed of other evidence that could be submitted, including deposition transcripts and responses to discovery requests. Finally, he was advised that if he failed to submit evidence contradicting the defendants' version of the facts, his claims could be dismissed without further notice.

Second, the plaintiff's papers reflect that he understands the legal standard for summary judgment. The plaintiff indicates in his papers that he has been unable to secure deposition testimony because of a lack of funds and that he cannot provide affidavits because the witnesses are afraid of retaliation as they are employees of the Meriden Board of Education. Also, he argues that the defendants' motion should be denied because "genuine issues of material fact exist." (Pl.'s Opp'n to Defs.' Mot. for Summ. J. & Cross Mot. for Summ. J. (Doc. No. 231) (hereinafter "Pl.'s Opp'n").) Additionally, the plaintiff's

memorandum was followed by an exchange of papers between the parties relating to various issues raised by each side. The plaintiff showed his understanding by filing the requisite documents in response to the concern expressed by the defendants about the missing reply to their Rule 56(a)1 statement, as well as by the plaintiff's own Rule 56(a)1 statement in support of his motion for summary judgment. Finally, over the past two years, the plaintiff has filed a variety of motions in this case, and these motions reflect an understanding of the litigation process and the requirements thereof.

III. Discussion

A. The Title VII Retaliation Claim

The plaintiff's first claim is for retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The U.S. Supreme Court has articulated a burden-shifting analysis for evaluating retaliation claims. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, "[t]o make out a prima facie case of retaliation, an employee must show that he was engaged in a protected activity; that he suffered an adverse employment decision; and a causal connection between the protected activity and the adverse employment decision." Taitt v. Chem. Bank, 849 F.2d 775, 777 (2d Cir. 1988) (citation omitted). To survive summary judgment, the plaintiff's burden at the prima facie case stage is minimal or de minimis. Jute v.

Hamilton Sundstrand Corp., 420 F.3d 166, 173 (2d Cir. 2005) (citation omitted). "In determining whether this initial burden is satisfied in a Title VII retaliation claim, the court's role in evaluating a summary judgment request is to determine only whether proffered admissible evidence would be sufficient to permit a rational finder of fact to infer a retaliatory motive." Id.

Second, once the plaintiff meets his initial burden, the onus shifts to the defendant to articulate a non-discriminatory reason for the employment action. Taitt, 849 F.2d at 777. Third, if the defendant articulates a non-discriminatory reason, the burden shifts back to the plaintiff "to show that the reasons profferred [sic] by the defendant were not the defendant's true reasons, but rather a pretext for discrimination." Id.

The plaintiff has met his burden with respect to the first two elements of a prima facie case. First, his October 1997 EEOC complaint is considered a protected activity, and this fact is not disputed by the defendants. Second, the defendants failed to interview him for two paraprofessional positions that were available in the Meriden school system in the fall of 2002.

However, the plaintiff fails to meet his burden with respect to the third element of a prima facie case because he has not made out a prima facie case as to a causal nexus between the protected activity and an adverse employment action, i.e., that

he was not interviewed for a position because he filed an EEOC complaint against defendant Ruocco. There are several ways the plaintiff could establish a causal connection:

> Proof of causal connection can be established *indirectly* by showing that the protected activity was followed closely by discriminatory treatment, or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or *directly* through evidence of retaliatory animus directed against a plaintiff by the defendant.

DeCintio v. Westchester County Med. Ctr., 821 F.2d 111, 115 (2d Cir. 1987) (alteration in original) (internal citation omitted).

The plaintiff's EEOC complaint did not occur in close temporal proximity to the denial of interviews. Almost five years elapsed between the filing of the plaintiff's complaint and the failure to offer him interviews. This is too long a time period to demonstrate a causal nexus based on temporal proximity. See McPhatter v. Cribb, No. 97-CV-0360E(F), 1998 U.S. Dist. LEXIS 10780, at *9-10 (W.D.N.Y. Jul. 1, 1998) (alleged retaliation occurring between 20 and 32 months following the protected activity did not satisfy the requirement of close temporal proximity); Matos v. Bristol Bd. of Educ., 204 F. Supp. 2d 375, 384 (D. Conn. 2002) (concluding that almost a year between filing of a CHRO complaint and the alleged retaliation was too long to show causal nexus based on temporal proximity).

This is not a situation where there was disparate treatment of fellow employees who engaged in similar conduct. Rather, the

plaintiff argues that there was a pattern of retaliation against people who made complaints. He points to a 1998 lawsuit he filed against Ruocco and others[1], in which judgment was entered in favor of the defendants, and to a complaint filed in August 2005 by Richard Pagani, a science teacher in Meriden, against the defendants in this case and others. However, all that has been submitted with respect to Pagani's claims is a copy of the complaint filed in his lawsuit, and that does not satisfy the requirement of Fed. R. Civ. P. 56 that the plaintiff submit affidavits made on personal knowledge setting forth such facts as would be admissible evidence.

Finally, the plaintiff fails to produce evidence of retaliatory animus. First, he provides no evidence that either defendant was directly involved in the decision as to which candidates to interview for the paraprofessional positions. When the plaintiff was asked during his deposition if he knew if defendant Ruocco ever saw his application, he responded, "No. I believe that she was told I was applying for it" and responded further that the basis for his belief was "Speculation." (Lopos Dep. at 109.) He also acknowledged that he had "[n]o idea" who selected the applicants to be interviewed. (Id. at 110.) In contrast, the defendants submitted affidavits from defendant

[1] See Lopos v. Ruocco, Case No. 3:98CV00781 (GLG) (D. Conn. filed Apr. 21, 1998).

Ruocco and David Roy, the Director of Personnel Services. Ruocco states that she was not involved in deciding which candidates to interview. Roy states that the interview and hiring decisions were made by the principals of the respective schools, neither of whom are parties in this action. The plaintiff does not assert that the board was involved in the interview or hiring process.

Second, the plaintiff provides no admissible evidence that the defendants took steps to influence the decision as to whether he was interviewed. The plaintiff points to interview notes made by James Jedrziewski, a CHRO investigator, which are inadmissible hearsay. The investigator spoke with the following individuals by telephone: Keith Lombardo, Guidance Counselor, Lincoln Middle School; Michael Iovanna, former Director of Special Education, Meriden Public Schools; and Ed Jachimowski, Guidance Counselor, Pulaski Elementary School. Although those notes state that Lombardo thought that comments by defendant Ruocco about the plaintiff's mental and psychological state affected the plaintiff's chance at the job, and also state that Lombardo thought the plaintiff had a "justifiable claim," the notes also state that Lombardo acknowledged that he had no direct knowledge of the incident and that this was only his impression. (Pl.'s Opp'n and Cross Summ. J. Mot. (Doc. No. 231/232) Ex. B.) The notes reflect that Iovanna and Jachimowski also stated that they had no direct knowledge of any retaliation. Although the

plaintiff stated during his deposition that he plans to call Iovanna, Jachowiski and Lombardo at trial to testify that the defendants retaliated against the plaintiff for filing the EEOC complaint, the plaintiff failed to provide affidavits from these individuals to support his factual contentions in this case. However, not only are Jedrziewski's notes inadmissible hearsay, but they reflect that even if the plaintiff had obtained affidavits from the individuals Jedrziewski spoke with, those affidavits would not have been sufficient to create a genuine issue of fact because the individuals lacked personal knowledge. In contrast, the defendants provided affidavits stating that defendant Rocco was unaware that the plaintiff had applied for the paraprofessional positions, and that she was in no way involved with the selection of candidates for interviews.

Accordingly, the court concludes that the plaintiff has failed to produce evidence sufficient to meet his de minimis burden of showing a causal connection between protected activity and an adverse employment action.

The second step of the burden-shifting analysis requires the defendants to proffer a non-discriminatory reason for failing to interview the plaintiff. The defendants provide an affidavit of David Ray and deposition testimony in which they proffer such a reason. First, Roy's affidavit states that there were over 216 applicants for the position, that fewer than 10 were interviewed

for each position, and that not all qualified applicants were interviewed. Second, the plaintiff stated during his deposition that the successful candidate for the position at Casmir Pulaski was "[a]bsolutely" qualified for the position and that he and the person were "equal" candidates. (Lopos Dep. at 96.) Finally, Roy's affidavit states that the plaintiff's application did not fit the criteria for the position.

Finally, assuming arguendo that the plaintiff had satisfied his de minimis burden with respect to all the elements of a prima facie case, he has failed in any event to meet his burden, with respect to the third stage of the McDonnell Douglas burden-shifting analysis, of producing evidence that the defendants' articulated non-discriminatory reason for failing to interview him is a pretext for discrimination. He has produced no evidence from which a reasonable inference could be drawn that the defendants' explanation for why he was not interviewed was pretextual.

Accordingly, the defendants' motion for summary judgment should be granted as to the Title VII retaliation claim.

B. The Defamation Claim

The plaintiff has also brought a defamation claim against defendants Ruocco and the Meriden Board of Education. Although the plaintiff did not allege the specifics of the defamation claim in his complaint, he did indicate in his answers to the

defendants' interrogatories that the following individuals made defamatory oral statements about him between 2001 and 2003: that defendant Ruocco said the plaintiff was "unqualified" and "crazy"; that board member Frank Kogut said the plaintiff was "crazy"; and board member Glen Lamontagne said the plaintiff was "paranoid" and "crazy". (Defs.' Summ. J. Mot. (Doc. No. 224) Ex. D.)

Under Connecticut law, a defamatory statement is "a communication that 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." Levesque v. Town of Vernon, 341 F. Supp. 2d 126, 140 (D. Conn. 2004) (citation omitted). "To succeed on a defamation claim in Connecticut, a plaintiff must show that: (1) defendant made a false statement about plaintiff; (2) defendant published the statement to a third party; *and* (3) plaintiff's reputation was thereby injured." Cweklinsky v. Mobil Chem. Co., 364 F.3d 68, 73 (2d Cir. 2004) (citations omitted).

The plaintiff has failed to produce evidence that creates a genuine issue of material fact with respect to his defamation claim. All he offers is speculation. First, the plaintiff directs the court to Ann Prescott's affidavit, which is inadmissible hearsay. Prescott is the former owner of a diner in Meriden. Prescott stated that board member Noreen Tow told her

at her diner, during the summer of 2001, that the Board thought the plaintiff was crazy. When asked about Prescott's affidavit, the plaintiff testified during his deposition that Tow told him that the Board of Education "thinks" he is crazy. (Lopos Dep. at 132.) He also testified, "So there is a possibility that Noreen probably inquired why isn't Mike being hired. What's the issue here? And again, it's speculation. Maybe somebody said to her – I'm sure somebody said to her, we think he's crazy. If I had to roll the days [sic], I think it's Elizabeth Ruocco or Frank." (Lopos Dep. at 133.) He went on to admit that he had no evidence of this and that this was his speculation.

Second, the plaintiff provides the CHRO investigator's notes from telephone interviews of Lombardo, Iovanna, and Jachimowski. These are the same inadmissible hearsay notes discussed above. The notes from the interviews of Lombardo and Jachimowski make no reference to the alleged defamatory statements and the notes from the interview of Iovanna state explicitly that he did not hear defendant Ruocco or any member of the Board of Education say anything about the plaintiff. The plaintiff identified these individuals as witnesses he would call at trial but failed to provide affidavits from them in support of his contentions.

Finally, the plaintiff offers the deposition testimony of Board member Leonard Suzio. But when Suzio was asked if he had

heard anyone say the plaintiff was "crazy, insane, paranoid, [or] dangerous," Suzio testified, "I don't remember anything that was said of that nature. The only thing I can recollect . . . was one situation where I think it was Bill Lutz had asked Glen LoMontagne about the Lopos situation and Glen rolled his eyes but he didn't say anything." (Suzio Dep. at 5.) Suzio also testified that "in Board of Ed meetings, both publically and executive session, I never heard any kind of discussion specifically about [Lopos] being hired or not hired or being considered for a position." (Suzio Dep. at 6.)

The defendants provided affidavits by defendant Ruocco and each of the members of the Board of Education stating that they did not make any such comments about the plaintiff to anyone. Defendant Ruocco states that she did not say that the plaintiff was "mentally or psychologically unstable" nor that he was "unqualified and crazy." (Ruocco Aff. ¶¶ 3, 4.) Each Board member's affidavit attests that he or she did not say that the plaintiff was "crazy, paranoid or dangerous." (Suzio Aff. ¶ 3; Tow Aff. ¶ 3; Gooding Aff. ¶ 3; Hozebin Aff. ¶ 3; Hughes Aff. ¶ 3; Kogut Aff. ¶ 3; Kosienski Aff. ¶ 3; Lutz Aff. ¶ 3; Torpes Aff. ¶ 3.)

Even if the plaintiff had produced admissible evidence of defamatory statements, the defendants would be entitled to judgment as a matter of law because the alleged statements are

statements of opinion, not objective fact. Under Connecticut law, statements of opinion generally cannot serve as the basis for a defamation claim. Daley v. Aetna Life & Cas. Co., 249 Conn. 766, 796, 734 A.2d 112, 129 (Conn. 1999). Whether the alleged statements are statements of opinion or of objective fact is a threshold question, and if the statements are opinions, then the claim must be dismissed. Grossman v. Computer Curriculum Corp., 131 F. Supp. 2d 299, 312 (D. Conn. 2000). The determination of whether a statement is one of opinion or objective fact is a matter of law unless the statement is ambiguous; in that case the determination is a question of fact for the jury. Goodrich v. Waterbury Republican-Am., Inc., 188 Conn. 107, 112, 448 A.2d 1317, 1322 (Conn. 1982).

"A statement can be defined as factual if it relates to an event or state of affairs that existed in the past or present and is capable of being known [whereas] [a]n opinion. . . . is a personal comment about another's conduct, qualifications or character that has some basis in fact." Goodrich, 188 Conn. at 111, 448 A.2d at 1321. The determination is based on "whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact." Id. at 112, at 1321-22 (citations and internal quotation marks omitted). The court may consider some of the following

factors: "(1) the context and circumstances, (2) the language used, and (3) whether the statement is objectively capable of being proved true or false." Johnson v. Schmitz, 119 F. Supp. 2d 90, 101 (D. Conn. 2000) (citing Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 226 (2d Cir. 1985)).

In Schmitz, the court found that statements made by defendant faculty members during an academic evaluation of the plaintiff were not defamatory. Schmitz, 119 F. Supp. 2d at 102. In that context, the statements would be seen by a reasonable person as opinions. Id. See also Byrnes v. Lockheed-Martin, Inc., No. C-04-03941(RMW), 2005 U.S. Dist. LEXIS 39060, at *20-21 (N. D. Cal. 2005) (a reference to someone as an "unstable person" is couched in the individual's perception and is therefore an opinion); Haywood v. Lucent Tech., Inc., 169 F. Supp. 2d 890, 915-16 (N. D. Ill. 2001) (assertion that an employee was "unstable" was an opinion because it was not objectively verifiable and therefore not actionable); Rizvi v. St. Elizabeth Hosp. Med. Ctr., 765 N.E.2d 395, 400 (Ohio Ct. App. 2001) (citation omitted) (referring to a fellow doctor as "crazy" was an opinion based on previous finding that "people frequently use adjectives such as 'stupid' or 'crazy' to express their feelings or opinions about an individual").

Consequently, assuming arguendo that the defendants made the statements alleged by the plaintiff, such statements do not

rise to the level of defamation because they would be matters of opinion, not objective fact; the average listener would assume that the individuals were expressing their opinion, not objective fact, about the plaintiff's psychological health.

Accordingly, the defendants' motion for summary judgment should be granted as to the defamation claim because the plaintiff has failed to create a genuine issue as to whether the defendants made the alleged statements and, in any event, because the alleged statements would be considered statements of opinion and therefore would not rise to the level of being defamatory.

IV. Conclusion

Accordingly, the Defendants' Motion for Summary Judgment (Doc. No. 224) is hereby GRANTED, and the Plaintiff's Cross-Motion for Summary Judgment (Doc. No. 232) is hereby DENIED. Judgment in favor of the defendants shall enter as to all claims in the complaint.

The Clerk shall close this case.

It is so ordered.

Dated this 16th day of May 2006 at Hartford, Connecticut.

/s/
Alvin W. Thompson
United States District Judge