

NO. 2012-63740

DENNIS WALKER
Plaintiff,

V.

LARRY SCHION
Defendant.

§ **IN THE DISTRICT COURT**
§
§
§ **215th JUDICIAL DISTRICT**
§
§
§ **OF HARRIS COUNTY, TEXAS**

**DEFENDANT'S MOTION TO DISMISS
AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, Larry Schion, and requests this Honorable Court to dismiss the above-styled cause on the grounds set forth herein.

I. RELIEF SOUGHT

Defendant requests dismissal of this matter because Plaintiff's entire causes of action are based solely on and in response to Defendant's exercise of his rights to free speech and to petition. Accordingly, and pursuant to Chapter 27 of the Texas Civil Practice and Remedies Code (hereinafter sometimes referred to as "Citizens' Participation Act"), Plaintiff's petition should be dismissed with prejudice and Defendant should be awarded his costs of court, including reasonable attorney's fees and expenses incurred.

II. INTRODUCTION

1. **Exhibits:** The items listed below are incorporated by reference and, along with the pleadings on file and this motion, demonstrate that Plaintiff's lawsuit is based on Defendant's rights to free speech and to petition government.

EXHIBIT A Affidavit of Defendant, Larry Schion

EXHIBIT A-1 Attachment to Schion Affidavit: Odom & Levin correspondence dated July 24, 2012, addressed to Defendant and Christopher Schion

- EXHIBIT A-2 Attachment to Schion Affidavit: Hand written “complaint” dated July 27, 2012, and delivered to City of Jacinto City Police Department
- EXHIBIT B Certified Copy of City of Jacinto City Council Meeting Minutes for meeting conducted June 28, 2012
- EXHIBIT C Certified Copy of City of Jacinto City Council Meeting Minutes for meeting conducted July 26, 2012
- EXHIBIT D Certified Copy of City of Jacinto City Council Meeting Minutes for meeting conducted August 9, 2012

2. **The Parties:** Plaintiff is an officer with the City of Jacinto City Police Department (Plaintiff’s Pet. ¶ 5) and has held that position for nearly 13 years (Exhibit B, p 7). Defendant is a citizen residing in Crosby, Texas, (Plaintiff’s Pet. ¶ 2), and performs work in Jacinto City, Texas (Exhibit A (Schion Aff.) ¶ 3; Exhibit B, p. 4). For forty years, Defendant resided in Jacinto City and actively participated in the city’s local government; because of his connection with the city, Defendant continues to participate in matters of public concern in Jacinto City (Exhibit A (Schion Aff.) ¶ 3).

3. **Background:** The Code of Ordinances for the City of Jacinto City, Texas, provides for city business discussions to be held in City Council Meetings, conducted twice monthly. JACINTO CITY, TEX, ORDINANCES ch. 1, sec. 23 §A (1981). The city secretary is charged with the task of “record[ing] the minutes of all meetings . . . and except where prohibited or exempted by law . . . reproduce[ing] and keep[ing] such minutes . . . and mak[ing] such minutes a public record.” *Id.* ch. 1, sec. 24 §B (1981). The meeting minutes are presented for adoption at subsequent meetings and published on the City’s website. Much of the communications complained of by Plaintiff occurred during regular monthly meetings of City Council of Jacinto City.

Defendant is in the business of repairing fences and gates (Exhibit B, p 4). On June 18, 2012, Plaintiff arrested Defendant's son, Christopher Schion, on a charge of assault by threat (Plaintiff's Pet. ¶ 5). The arrest followed an incident involving Defendant and his son, Christopher, Defendant's customer, Ms. Osario, and her neighbor, Mr. Heerman, and others while Defendant was attempting repairs on his customer's fence (Exhibit B, pp 4-7). Prior to the arrest, Defendant and Ms. Osario were victims of belligerent conduct on the part of Mr. Heerman (Exhibit B, pp 4-7). After enduring months of harassment from Mr. Heerman while Defendant attempted to repair Ms. Osario's fence, Defendant requested the presence of city police to temper Mr. Heerman's conduct (Exhibit B, pp 4-7). Defendant believed Mr. Heerman was equally responsible for the trouble that ensued between Mr. Heerman and Christopher; however, Plaintiff only placed Christopher under arrest (Exhibit B, p 5; Exhibit C, p 4; Exhibit D, p 9).

Following the arrest, Defendant acquired information regarding Mr. Heerman that elevated Defendant's level of concern for the safety of his customer and the surrounding community (Exhibit B, pp 4, 5). Because of his concern for the public safety, and because of his belief that Plaintiff should have also arrested Mr. Heerman at the time of Christopher's arrest, Defendant addressed the City Council at its meeting on June 28, 2012 (Exhibit B). Shortly after his address, Defendant received a letter from the law firm of Odom and Levin accusing Defendant and his son of defaming Plaintiff (Exhibit A-1).

In response to the Odom and Levin letter,¹ Defendant penned a complaint regarding Plaintiff (Exhibit A-2) and again addressed the City Council at the July 26, 2012, (Exhibit C), August 9, 2012, (Exhibit D) meetings. At some point between the time of the arrest and Plaintiff's lawsuit, Defendant also met with the Chief of Police to lodge his grievances regarding

¹ When speaking before the City Council, Defendant refers to the letter received from Odom and Levin as a "law suit."

Plaintiff's conduct as it pertained to Defendant, and to inquire as to whether certain other matters regarding Plaintiff were true (Exhibit A (Schion Aff.) ¶ 4). Plaintiff brings this suit because of the comments made by Defendant in the course of the City Council meetings and Defendant's inquiries into Plaintiff's conduct as a police officer (Plaintiff's Pet. ¶ 6).

4. **The Lawsuit:** Plaintiff's petition alleges three causes of action: (1) Defamation; (2) "Intentional Interference with a Contract/Business Relationship,"² and (3) Intentional Infliction of Emotional Distress (Plaintiff's Pet.). Plaintiff's claims for "Intentional Interference with a Contract/Business Relationship" and for Intentional Infliction of Emotional Distress are indistinguishable from his Defamation claim in that all three causes are based on allegedly defamatory statements made about Plaintiff to his employer (Plaintiff's Pet. ¶¶ 6-9.). According to Plaintiff, Defendant's statements caused severe emotional distress and mental anguish necessitating medical expenses, damage to reputation, and loss of income (Plaintiff's Pet. ¶¶ 7-10). Plaintiff seeks recovery of an unspecified amount of special damages as well as punitive damages, costs of court, and interest (Plaintiff's Pet. ¶ 10). The statements complained of are:

- a. Plaintiff intentionally held Christopher's paperwork so he could not bond out of jail (Plaintiff's Pet. ¶ 6.i);
- b. Plaintiff intentionally lied about the value of a machine that Christopher stole (Plaintiff's Pet. ¶ 6.i.i);
- c. Plaintiff intentionally lied about the threat to assault committed by Christopher (Plaintiff's Pet. ¶ 6.iii);

² Paragraph 8 of Plaintiff's Petition refers to his third alleged cause of action as "Intentional Interference with a Contract/Business Relationship." It is unclear if Plaintiff's alleges a tort of Business Disparagement or of Tortious Interference with a Contract; however, as alleged, it appears Plaintiff's cause of action in this regard is for the tort of Business Disparagement.

- d. Plaintiff used his police vehicle for personal use and was suspended and lost use of the vehicle because of such use (Plaintiff's Pet. ¶ 6.iv);
- e. Plaintiff applied for off-duty work while on duty (Plaintiff's Pet. ¶ 6.v);
- f. Plaintiff took money from a vending machine (Plaintiff's Pet. ¶ 6.vi.);
- g. Plaintiff covered up a crime (Plaintiff's Pet. ¶ 6.vii); and
- h. Plaintiff is a liar and is crooked (Plaintiff's Pet. ¶ 6.viii).

Plaintiff claims Defendant acted with the intent to defame Plaintiff and to convince city officials to terminate Plaintiff's employment (Plaintiff's Pet. ¶¶ 6, 8). Defendant denies Plaintiff's allegations (Defendant's Answer).

III. THE STATEMENTS

Most of the statements complained of – to the extent they were uttered, were made during Defendant's addresses to the members of the City Council, and documented in the meeting minutes (Exhibits B, C, and D). Some of the statements complained of were contained in Defendant's handwritten complaint (Exhibit A-2), or addressed during a meeting between Defendant and Chief Ayala (Exhibit A (Schion Aff.) ¶ 4). None of the statements alleged, however, rise to the level complained of in Plaintiff's Petition. All of the statements alleged are expressions of opinion protected by the First Amendment. Moreover, all of the statements made were part and parcel of Defendant's right to free speech and right to petition as defined in Section 27.001 of Texas Civil Practice and Remedies Code.

The context within which each of the statements complained of were made and the nature of each of those statements are summarized as follows:³

³ For brevity, Defendant's various addresses to the City Council are paraphrased below. The contents of Defendant's statements to the City Council are contained in Exhibits B, C, and D, attached hereto.

1. **Plaintiff held Christopher's paperwork so he could not bond out of jail:** On June 28, 2012, Defendant addressed the meeting of City Council and discussed in detail the events leading up to and including the time of Christopher's arrest (Exhibit B, pp 4-7). Defendant explained that he requested police assistance while he repaired a fence because his customer's neighbor (Mr. Heerman) "started trouble" (Exhibit B, p 4). Defendant believed Mr. Heerman: (1) was threatening to his customer (Exhibit B, p 4); (2) had a background warranting concern for safety of other individuals (Exhibit B, pp 4, 5); and was challenging Christopher (Exhibit B, p 5).

Defendant admitted he was unhappy over his son's arrest (Exhibit B, p 6). On the issue of bail, Defendant complained that when he presented to Jacinto City police department he was informed by Plaintiff that he could not post bond at that time and that Christopher would be transferring to the Harris County jail facilities (Exhibit B, p 6). Believing that individual police officers were capable of manipulating the system so as to require inmate transfer to Harris County, Defendant concluded that Plaintiff was in fact attempting to delay Christopher's release and stated as much in his address (Exhibit B, p 6).

Chief Ayala responded to Defendant's complaints and candidly admitted the possibility of Christopher's transfer to Harris County (Exhibit B, p 6). Plaintiff also responded to Defendant's address and explained his actions in arresting Christopher (Exhibit B, p 7).

2. **Plaintiff lied about the value of a machine that Christopher stole:** In his handwritten complaint to the Jacinto City Police Department, Defendant stated "I shook (Plaintiff's) hand out of courtesy for the law. My son (Christopher) refused to because he lied on paper work about the price of a tractor" (Exhibit A-2). The issue is not whether Plaintiff lied – it is whether Defendant understood Christopher's reason in refusing to shake Plaintiff's hand. The

complaint was made and delivered in response to a cease and desist letter from Plaintiff's attorneys to Defendant and his son (Exhibit A-1). The letter contains inaccuracies with regard to Defendant's comments.⁴ Defendant believed the letter was an inappropriate means to quiet his rightful prerogative to question an official's conduct (Exhibit A-1).

3. **Plaintiff lied about the threat to assault committed by Christopher:** Again, the nature of Defendant's complaints regarding his son's arrest is contained in the minutes of the meeting held on June 28, 2012. Defendant believed Plaintiff's arrest of Christopher was "unfair" (Exhibit B, p 5). During his address to the City Council on July 26, 2012, Defendant again complained of Plaintiff's decision to arrest only Christopher (Exhibit C, p 4). Because Plaintiff did not arrest Mr. Heerman as well, Defendant characterized his son's arrest as an "unlawful arrest" (Exhibit C, p 4).

Defendant did not say Plaintiff "lied about the threat to assault"; however, Defendant did express his opinion that Plaintiff had lied to him on other cases (Exhibit B, p 9).

During his address to the City Council on August 9, 2012, Defendant said there was a tape of the incident leading up to the arrest of his son (Exhibit D, p 9). If, as he suspected, the tape indicated Plaintiff had lied about the incident, then Defendant suggested Plaintiff should be terminated from his position.

4. **Plaintiff used his police vehicle for personal use and was suspended and lost use of the vehicle because of such use:** Defendant, in the course of a meeting with Chief Ayala, inquired as to Plaintiff's use of the police vehicle. The inquiry was intended to simply put the Chief on notice that an investigation of Plaintiff's conduct as a police officer may be necessary.

⁴ For instance, in the first paragraph Mr. Levin states: "You have publicly accused him (Plaintiff) of being a corrupt police officer . . ." In the course of his later addresses to the City Council, Defendant emphatically denies referring to Plaintiff as a corrupt police officer.

5. **Plaintiff applied for off-duty work while on duty:** Defendant, in the course of a meeting with Chief Ayala, inquired as to Plaintiff's use of his time on duty. Again, the inquiry was intended to simply put the Chief on notice that an investigation of Plaintiff's conduct as a police officer may be necessary.

6. **Plaintiff took money from a vending machine:** Defendant, in the course of a meeting with Chief Ayala, inquired as to Plaintiff's access to the vending machine proceeds. Again, the inquiry was intended to simply put the Chief on notice that an investigation of Plaintiff's conduct as a police officer may be necessary.

7. **Plaintiff covered up a crime:** During his address to the council on June 28, 2012, Defendant expressed his belief that Plaintiff spoke untruthfully to Defendant about a case that occurred ten years ago (Exhibit B, p 9). This same belief is contained in Defendant's handwritten complaint. Defendant merely asserted his belief that some information was covered up in the past and that Plaintiff was untruthful to him regarding the subject. There is no allegation that Plaintiff covered up crime.

8. **Plaintiff is a liar and is crooked:** Nothing in the record substantiates this claim. During the August 9, 2012, meeting, Defendant expressed his belief that, in allowing a cease and desist letter that contained inaccuracies to be sent on his behalf, Plaintiff was in essence "putting false documents on the people" (Exhibit D, p 8).

IV. MEMORANDUM OF LAW ON MOTION TO DISMISS

1. **Grounds for Dismissal:** The purpose of the Citizens' Participation Act is to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury."

TEX. CIV. PRAC. & REM. CODE § 27.002. Plaintiff's Petition should be dismissed so as to not frustrate the purposes the Act.

Plaintiff's claims are based entirely on allegedly defamatory statements made about Plaintiff. Because Defendant can show by "a preponderance of the evidence . . . that the legal action is based on, relates to, or is in response to [Defendant's] exercise of the right of . . . free speech . . . [or] right to petition . . ." this case should be dismissed. TEX. CIV. PRAC. & REM. CODE § 27.005(b). Additionally, because Plaintiff cannot meet his burden to establish "by clear and specific evidence a *prima facie* case for each essential element of the claim[s] in question" this case should be dismissed. *Id.* § 27.005(c).

2. **Attorney's Fees and Costs of Court:** In addition to dismissing Plaintiff's Petition with prejudice, Defendant seeks an award of damages and costs under the Act including court costs, reasonable attorney's fees, and expenses incurred. *Id.* § 27.009(a)(1). Because the Act requires a hearing on Defendant's motion (*Id.* § 27.004), Defendant will necessarily incur additional attorney's fees beyond preparation of this motion. Accordingly, Defendant moves for an additional period of time, not to exceed fourteen days following hearing, within which to present evidence via affidavit of Defendant's costs and attorney's fees.

V. ARGUMENT and CITATION OF AUTHORITIES

1. **The Legal Action is based on Defendant's Rights of Free Speech and Right to Petition:** The Citizens' Participation Act defines "[e]xercise of the right of free speech" as "a communication made in connection with a matter of public concern." *Id.* § 27.001(3). "[P]ublic concern" includes an issue related to: . . . health or safety; . . . the government; . . . [or] a public official . . ." *Id.* §27.001(7). "Exercise of the right to petition" is "a communication pertaining to a public meeting dealing with a public purpose, including statements and discussions at the

meeting or other matters of public concern occurring at the meeting.” *Id.* § 27.001(4)(A)(ix). “Exercise of the right to petition” is also defined as “any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.” *Id.* § 27.001(4)(E).

City Council meetings are public meetings with a public purpose – they are open to the public and the public is invited to address the Council with matters concerning city business. Every communication referred to in Plaintiff’s Petition are prime examples of Defendant’s exercise of his rights to free speech and to petition: Defendant spoke on matters of public concern at public meetings, and with the city’s Chief of Police.

a. Plaintiff held Christopher’s paperwork so he could not bond out of jail:

When read in context of the entire minutes of the meeting, and on its own, the communication complained of is merely an expression of Defendant’s opinion that Plaintiff – *a public official* - acted improperly when he arrested Christopher and that no city official had at that time provided adequate assistance in tempering Mr. Heerman’s behavior. The minutes reflect that Defendant was speaking on issues related to the *safety* of his customer, the city *government*, and a *public official* – all matters contemplated in the Citizens’ Participation Act. *Id.* §27.001(7). That is, Defendant was acting on his right to free speech and to petition by communicating his concerns in a “public meeting with a public purpose” *See id.* § 27.001(1)(4)(A)(ix). Moreover, Defendant was acting on his right to free speech by communicating “matters of public concern.” *Id.* § 27.001(3).

b. Plaintiff lied about the threat to assault committed by Christopher: When read in context of the entire minutes of the meetings, and on its own, the statement

contained in subparagraph iii. of paragraph 6 is a mischaracterization of Defendant's words. Defendant did not say Plaintiff lied about the arrest. Rather, Defendant complained of the nature of the arrest as a whole, expressed his opinions that the arrest was unlawful and unfair, and suggested a method to determine if Plaintiff acted properly and was truthful about his actions. The minutes reflect that Defendant was speaking on issues related to the *safety* of his customer, the city *government*, and a *public official* – all matters contemplated in the Citizens' Participation Act. *Id.* §27.001(7). That is, Defendant was acting on his right to free speech and to petition by communicating his concerns in a “public meeting with a public purpose” *See id.* § 27.001(1)(4)(A)(ix). Moreover, Defendant was acting on his right to free speech by communicating “matters of public concern.” *Id.* § 27.001(3).

c. **Plaintiff used his police vehicle for personal use and was suspended and lost use of the vehicle because of such use:** Defendant met with the Chief for the purpose of exercising his right to petition the government by communicating a matter of public concern regarding a public official. *See id.* § 27.001(1)(4)(E).

d. **Plaintiff applied for off-duty work while on duty:** Defendant met with the Chief for the purpose of exercising his right to petition the government by communicating a matter of public concern regarding a public official. *See id.*

e. **Plaintiff took money from a vending machine:** Again, Defendant met with the Chief for the purpose of exercising his right to petition the government by communicating a matter of public concern regarding a public official. *See id.*

f. **Plaintiff covered up a crime:** When read in context of the entire minutes of the meetings, and on its own, the statement contained in subparagraph vii of paragraph 6 is

another mischaracterization of Defendant's words. Defendant did not say Plaintiff covered up a crime. The minutes reflect that Defendant was speaking on issues related to the city *government*, and a *public official* – all matters contemplated in the Citizens' Participation Act. *Id.* §27.001(7). That is, Defendant was acting on his right to free speech and to petition by communicating his concerns in a “public meeting with a public purpose” *See id.* § 27.001(1)(4)(A)(ix). Moreover, Defendant was acting on his right to free speech by communicating “matters of public concern.” *Id.* § 27.001(3).

g. Plaintiff is a liar and is crooked: As noted above, nothing in the record substantiates this claim. During the August meeting, Defendant expressed his belief that, in allowing a cease and desist letter that contained inaccuracies to be sent on his behalf, Plaintiff was in essence “putting false documents on the people” (Exhibit D, p 8). The minutes reflect that Defendant was speaking on issues related to the city *government*, and a *public official* – all matters contemplated in the Citizens' Participation Act. *Id.* §27.001(7). That is, Defendant was acting on his right to free speech and to petition by communicating his concerns in a “public meeting with a public purpose” *See id.* § 27.001(1)(4)(A)(ix). Moreover, Defendant was acting on his right to free speech by communication “matters of public concern.” *Id.* § 27.001(3).

2. Plaintiff Cannot Establish A Prima Facie Case: Having established by a preponderance of the evidence that Plaintiff's causes of action are based entirely on Defendant's rights to free speech and to petition, the burden shifts to Plaintiff to “establish by clear and specific evidence a *prima facie* case for each essential element of the claim[s] in question.” *Id.* §27.005. Plaintiff cannot meet this burden.

a. **Plaintiff's Claims for Defamation:** "To sustain a defamation cause of action, a public official, or public figure must prove that (1) the defendant published a statement, (2) that was defamatory concerning the public official or public figure, and (3) that the false statement was made with actual malice." *Musser v. Smith Protective Serv., Inc.*, 723 S.W.2d 653, 654–55 (Tex. 1987) (*citations omitted*).

(1) The statement must be one of fact. "All assertions of opinion are protected by the First Amendment of the United States Constitution and article I, section 8 of the Texas Constitution." *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989). To determine whether it is an expression of opinion protected under the First Amendment the court must examine the totality of circumstances in full context of communication to see if it would be received by average person as a factual assertion or writer's personal opinion. *See, El Paso Times, Inc. v. Kerr*, 706 S.W.2d 797 (Tex. App. 1986).

(2) The statement must defame. Whether the statement is defamatory is determined by the court as a matter of law. The "statement must be construed as a whole, in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement. Only when the court determines the language to be ambiguous or of doubtful import should a jury be permitted to determine the statement's meaning and the effect the statement has on the ordinary reader." *Carr v. Brasher*, 776 S.W.2d 567, 569-70 (Tex. 1989).

(3) The statement must be made with malice. "Actual malice is not ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true. *Musser v. Smith Protective Serv., Inc.*, 723 S.W.2d 653,

654–55 (Tex. 1987) (*citations omitted*). “Reckless disregard” is defined as a high degree of awareness of probable falsity, for proof of which the plaintiff must present ‘sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.’ An error in judgment is not enough. *Carr v. Brasher*, 776 S.W.2d 567, 570-71 (Tex. 1989) (*citations omitted*).

At the various meetings addressed by Defendant, no one gave any indication that they considered Defendant to be speaking on facts regarding Plaintiff. Nor was there any indication that Defendant delivered his address to defame Plaintiff. Finally, nothing indicates Defendant acted with actual malice or with reckless disregard of the truth. Everything in the record indicates Defendant conducted an investigation of some of the matters surrounding the altercation with Mr. Heerman and relied on his understanding of events from the past when he presented his complaints to city officials.

Councilmembers and members of the public offered words of praise to the police department in general and to Plaintiff in particular in spite of Defendant’s comments. At the June meeting, Councilmember Garcia, following Defendant’s address, applauded Plaintiff for his work (Exhibit B, p 10). At the July meeting, Mr. Rodriguez (a public participant), following Defendant’s address, praised Plaintiff on a personal level (Exhibit C, p 6). At the August meeting, Councilmembers Lee and Gonzalez acknowledged Defendant’s right to speak before the Council and stated it was the “public’s duty to come up here and voice their opinion” (Exhibit D, p 10).

Frankly, if Defendant cannot lodge a complaint or concern regarding the conduct of a public official with that official's employer (such as a city councilmember or the police chief), then to whom may such a complaint be given?

The totality of circumstances considered in full the context of the communications indicates there was no statement of fact, nor where there any defamatory remarks made with malice. Because Plaintiff cannot demonstrate by clear and specific evidence a *prima facie* case for Defamation, his Petition should be dismissed with prejudice.

Because Plaintiff cannot prevail on his claim of Defamation, all other claims based on allegedly false, and defamatory or disparaging statements must likewise be dismissed. *See, KTRK Television v. Felder*, 950 S.W.2d 100, 108 (Tex. App. 1997) (Having found statements were substantially true, claims founded entirely on a defamation claim must also fail.)

b. **“Intentional Interference with a Contract/Business Relationship” / BUSINESS DISPARAGEMENT:** As pled, Plaintiff appears to be asserting a cause of action for Business Disparagement. To prevail on a Business Disparagement claim, a plaintiff must establish that: (1) the defendant published false and disparaging information about plaintiff, (2) with malice, (3) without privilege, that (4) resulted in special damages to plaintiff. *See, Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987).

In his petition, Plaintiff states: “Defendant has made false and disparaging remarks about Plaintiff for the purpose of injuring plaintiff's reputation and trying to get him fired. Defendant has no legal excuse for his actions. Such interference has caused significant damage to Plaintiff.” Plaintiff's Pet ¶ 8. As pled, this claim appears to be

stating a cause of action for Business Disparagement because each element of the cause is stated therein: (1) “false and disparaging remarks,” and (2) “for the purpose of injuring,” with (3) “no legal excuse,” and (4) “significant damage to Plaintiff.”

Business Disparagement claims differ from Defamation claims in that “[m]ore stringent requirements have always been imposed on the ‘plaintiff seeking to recover for (Business Disparagement) in three important respects – falsity of the statement, fault of the defendant, and proof of damage.’” *Id. (citations omitted)*. In other words, Plaintiff must plead and *prove* that Defendant’s statements were false, and that Defendant “knew of the falsity or acted with reckless disregard concerning it, or [that] he acted with ill will or intended to interfere in the economic interest of the plaintiff in an unprivileged fashion.” *Id.*

As demonstrated above, nothing Defendant actually uttered was false, nor did he utter any false facts, nor is there anything to indicate any intent to interfere with Plaintiff’s economic interests. At best, Plaintiff can simply complain that he does not agree with or approve of Defendant’s criticisms on how Plaintiff handled the situation involving Christopher’s arrest.

Plaintiff must also *prove* pecuniary loss. “Proof of special damages is an essential part of the plaintiff’s cause of action for business disparagement. . . . [T]he communication must play a substantial part in inducing others not to deal with the plaintiff with the result that special damage, in the form of loss of trade or other dealings is established. *Id. (citations omitted)*.”

Plaintiff alleges loss in the form of mental anguish and medical expenses – neither of which speak to a pecuniary loss in the form of business dealings.

Because Plaintiff cannot demonstrate by clear and specific evidence a *prima facie* case for Business Disparagement, his Petition should be dismissed with prejudice.

c. **“Intentional Interference with a Contract/Business Relationship” / TORTIOUS INTERFERENCE WITH A CONTRACT:** As indicated above, Plaintiff appears to be alleging a cause of action for Business Disparagement. However, if Plaintiff intended to allege a cause of action for Tortious Interference with a Contract or Business Relations, he has no basis in support. To prevail on a claim of interference with business relations, Plaintiff must state a cause of action for wrongful interference with a contract. The elements for wrongful interference with a contract are: (1) the existence of a contract subject to interference, (2) a willful and intentional act of interference, (3) that was a proximate cause of damage, and (4) actual damage or loss occurred. *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 926 (Tex 1993).

Plaintiff has neither pled nor offered any proof of a contract within which Defendant interfered. Because Plaintiff cannot satisfy by clear and specific evidence the threshold requirement of the existence of a contract, he cannot demonstrate a claim for interference with business relations, and his Petition should be dismissed.

d. **Intentional Infliction of Emotional Distress:** To sustain a claim for Intentional Infliction of Emotional Distress, Plaintiff must prove: (1) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the actions of the defendant caused the plaintiff emotional distress, and (4) the emotional distress suffered by the plaintiff was severe. *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). There simply are no circumstances to support the threshold inquiry of extreme and outrageous conduct, nor is there anything tending to show that a thirteen-year veteran

on the police force suffered severe emotional distress because of complaints lodged against him for his conduct. Indeed, in his response to Defendant at the June meeting, Plaintiff indicated a willingness to continue to serve as an officer in spite of what he perceived to be personal issues (Exhibit B, p 7), and he remains employed in that capacity.

VI. CONCLUSION

Having demonstrated by a preponderance of the evidence that Plaintiff's causes of action are based entirely on Defendant's rights to free speech and to petition; and having shown that Plaintiff cannot by clear and specific evidence prove each essential element of his claims, Plaintiff's Petition should be dismissed with prejudice and Defendant is entitled to an award of his costs including attorney's fees and expenses.

WHEREFORE, Defendant requests this Honorable Court to dismiss this matter with prejudice, and for such other and further relief that may be awarded at law or in equity.

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CERTIFICATE OF SERVICE

I certify that on January 14, 2013 a true and correct copy of Defendant's Motion to Dismiss was served by facsimile transmission on Mark G. Lazarz at 713-621-0993.

Pamela S. England

Pamela S. England