2016 IL App (2d) 150226-U
No. 2-15-0226
Order filed March 15, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DR. MARK THOMPSON, Plaintiff-Appellant, v. BOARD OF EDUCATION TOWNSHIP HIGH SCHOOL DISTRICT 113, BOARD OF EDUCATION CITY OF CHICAGO, VILLAGE OF DEERFIELD, HAROLD ARDELL, LINDA BROWN, REGINALD EVANS, AUDRIS GRIFFITH, CINDY J., JANE DOE, SAMANTHA J., STEPHANIE LOCASCIO, JAMES SULLIVAN, and ED WONG III, Defendants-Appellees.	)	Appeal from the Circuit Court of Lake County. No. 13-L-879 Honorable Jorge L. Ortiz, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed all of plaintiff's counts with prejudice; whether pursuant to section 2-615 or section 2-619, plaintiff can prove no set of facts that will entitle him to recover, and therefore, the trial court did not abuse its discretion in dismissing the complaint with prejudice; the trial court did not abuse its discretion by denying plaintiff leave to amend to incorporate a Title VII claim; and, the denial of plaintiff's petition for substitution of judge for cause was not against the manifest weight of the evidence; affirmed.

¶ 2 Plaintiff, Dr. Mark Thompson, filed the present, second-amended 12-count tort action against 13 defendants, stemming from accusations made in 2011 that he sexually assaulted defendant Jane Doe. The allegations led to an investigation and plaintiff's discharge by his employer, defendant Board of Education of City of Chicago (CPS). The circuit court of Lake County granted defendants' motions to dismiss all counts against them pursuant to combinations of sections 2-615, 2-619, and 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619, 2-619.1 (West 2014)). Plaintiff raises a number of issues on appeal regarding the dismissal of his second-amended complaint. In addition, he contends (1) the trial court abused its discretion by denying him leave to amend to incorporate an alleged related federal Title VII claim after receiving a right-to-sue notice from the Equal Employment Opportunity Commission (EEOC); (2) the trial court abused its discretion in dismissing his complaint with prejudice based on pleading deficiencies when his previous amendments were unrelated to correcting pleading deficiencies; and (3) the trial judge exhibited an appearance of impropriety and prejudice warranting a substitution of judge for cause. We affirm.

¶ 3 I. FACTS

¶ 4 A. Background

¶ 5 Plaintiff alleged the following.[1] In August 2009, plaintiff began to coach private cross-country training to Jane, then a student at Deerfield High School (defendant Board of Education township School District 113 (District 113)), and her sister, Samantha J., in Vernon Hills, Illinois. At the time, plaintiff was teaching at Harlan High School (defendant Board of

[1]Plaintiff continuously cites to an appendix rather than the record in violation of Illinois Supreme Court Rule 341(h)(6) (eff. Jan. 1, 2016).

Education of the City of Chicago (CPS)). On April 19, 2010, defendant Cindy J., Jane's and Samantha's mother, stopped her daughters from training with plaintiff but did not specify why.

¶ 6 In May 2010, Commander Walter Trillhaase of the Deerfield Police Department advised defendant Reginald Evans, who was principal of Harlan High, that plaintiff contacted Jane using the America Online screen name, "Laura Brucks." Trillhaase implied plaintiff had stalked Jane by sitting in the stands at Jane's sectional track meet on May 14, 2010. Jane turned 18 in January 2011.

¶ 7 In April 2011, Jane told defendant Stephanie Locascio, a Deerfield Police Department counselor, that plaintiff had inappropriate contact with her when he was coaching her. Trillhaase reported this allegation to the Illinois Department of Children and Family Services (DCFS). In May 2011, Dr. Claudia Welke filed a report with DCFS that her patient, Jane, alleged that plaintiff had raped her in an unknown suburb when she was 17. DCFS directed Welke to contact law enforcement because Jane was no longer a minor.

¶ 8 On May 4, 2011, Sharon Butler, a DCFS child protection investigator, went to Harlan High to notify plaintiff that a complaint had been made against him. Plaintiff alleged that a DCFS investigator came to Harlan High as part of an official investigation to notify him that Jane had made rape allegations against him.

¶ 9 According to plaintiff, the receptionist falsely claimed plaintiff was not available. Butler gave the receptionist a sealed "CANTS 8" notification letter (a DCFS form letter of suspected child abuse or neglect) with plaintiff's name on it and asked her to place it in plaintiff's work mailbox. Defendant Reginald Evans, the principal of Harlan High, confiscated the letter and faxed it to defendant Harold Ardell, a CPS law department investigator, and Lisa Huge, an attorney in the CPS Law Department. Plaintiff claims defendant Ed Wong III, a CPS attorney,

conspired with Evans and other attorneys to conceal and obstruct the DCFS investigation by stealing the CANTS 8 letter.

¶ 10 On May 5, 2011, Dr. Welke told Butler that Jane was never a student at Harlan High. According to plaintiff, on the same date, Butler came to Harlan High again to notify him of Jane's accusation. Evans falsely claimed plaintiff was not available.

¶ 11 Plaintiff claimed an unnamed individual instructed Evans to obstruct the DCFS investigation to prevent plaintiff from learning of Jane's accusation. Evans, Ardell, Wong, and other unnamed CPS attorneys, who knew of the CANTS 8 letter, failed to ensure it was delivered to plaintiff.

¶ 12 CPS began an investigation of the allegations, which included travelling to Deerfield High, located in Lake County, Illinois. Ardell interviewed Jane, who made false statements about plaintiff raping her. Defendant James Sullivan, Director of the Office of Inspector General (OIG), took over the investigation. Defendant Audis Griffith, principal of Deerfield High and Locascio were interviewed. As a result of those interviews, alleged confidential information and records of Jane were released to defendant Linda Brown, Sullivan's chief of investigations.[2] These allegations were the subject of the due process administrative hearing before the Illinois State Board of Education pursuant to the request of CPS.

¶ 13 On August 4, 2011, the OIG issued a subpoena to AOL for any and all subscriber information for the account of email address "laurabrucks@aol.com," and any historical records

[2]Plaintiff asserts that fact discovery will show that Jane "did indeed object to the use of her confidential information," again citing to his appendix. However, the record shows otherwise. Indeed, paragraph 91 of plaintiff's second-amended complaint states that Jane signed a consent form authorizing release of confidential information to Brown.

of emails sent by plaintiff or sent from "drmarkthompson@aol.com" to Jane or the email address of "pres2028@comcast.net" for documents covering the period of January 2009 through December 2010. AOL gave the OIG more than 20 screen names associated with plaintiff's private AOL email account but the "Laura Brucks" account was not among them.

¶ 14 In January 2012, Brown interviewed plaintiff and plaintiff learned for the first time that Jane had made rape claims against him in May 2011. On June 5, 2012, plaintiff was removed from Harlan High based upon the OIG's investigative report into Jane's accusations against him. Plaintiff alleged that, on September 13, 2012, CPS attorneys knowingly approved false charges against him, which led to his suspension without pay pending a discharge hearing. On August 16, 2013, plaintiff was dismissed from employment with CPS.

¶ 15 On November 21, 2013, plaintiff filed his original complaint in Lake County against 11 of the current 13 defendants. Plaintiff filed an amended complaint unrelated to pleading deficiencies, and thereafter, on January 29, 2014, plaintiff filed a verified second-amended complaint.[3] Plaintiff alleged that "[a]ll Defendants were involved in either staging and/or concealing false sexual assault allegations originating from Lake County against the Plaintiff, or obtaining, disclosing, or re-disclosing confidential communications without proper authorization, as part of a conspiracy to terminate Plaintiff's employment." The complaint raises the following specific counts against the following defendants:

> Count I—Civil Conspiracy against Ardell, Brown, Griffith, Evans, Sullivan, Locascio, Wong, Cindy and Jane, and District 113, CPS, and Deerfield as *respondeat superior*;
>
> Count II—Defamation *per se* against Jane, Cindy, and Samantha;

[3]Plaintiff has filed several lawsuits against CPS and others in state and federal court as a result of the investigations into Jane's allegations.

Count III—Libel *Per Se* against Jane and Cindy;

Count IV—Tortious Interference with Contract against Ardell, Brown, Griffith, Evans, Sullivan, Wong, and Locascio, and CPS, District 113, and Deerfield as *respondeat superior*;

Count V—Fraudulent Concealment against Ardell, Evans, Wong, Cindy, and Jane, and CPS as *respondeat superior*;

Count VI—Fraud—Intent to Deceive against Brown, and CPS under *respondeat superior*;[4]

Count VII—Violation of the School Code against Brown, Sullivan, and CPS under *respondeat superior*;

Count VIII—Violation of the Mental Health and Developmental Disabilities Confidentiality Act against Ardell, Brown, Griffith, and Locascio, and District 113, CPS, and Deerfield under *respondeat superior*;

Count IX—Violation of the Illinois School Records Act against Griffith and District 113 under *respondeat superior*;

Count X—Violation of the Right to Privacy against Brown, Evans, Sullivan, and Wong, and CPS under *respondeat superior*;

Count XI—Negligent Infliction of Emotional Distress against Ardell, Brown, Griffith, and Locascio, and District 113, CPS, and Deerfield under *respondeat superior*;

Count XII—Negligent Supervision against District 113, CPS, and Deerfield.

¶ 16 B. Procedural History

[4]In plaintiff's response to the motion to dismiss, he withdrew count VI from his complaint.

¶ 17 Between February 20, 2014, and March 20, 2014, all defendants except Ardell and Wong filed motions to dismiss. On April 22, 2014, plaintiff gave notice to the court and defendants in his motion to proceed under a pseudonym of a "not yet Title VII claim," which he claimed was related to the present case.[5] Oral argument was heard by Judge Winter on April 29, 2014, and the court denied plaintiff's motion to proceed under a pseudonym on May 28, 2014.

¶ 18 On May 29, 2014, plaintiff received the right-to-sue notice from the EEOC, which gave him 90 days to file his Title VII claim in State court. On May 30, 2014, before a ruling was issued on the pending motions to dismiss, plaintiff filed a motion for substitution of judge as of right. Plaintiff's motion was granted, and the case was reassigned to Judge Ortiz. At a status call on July 10, 2014, Judge Ortiz notified the parties in open court that he would convene a status on August 28, 2014, at which time he would issue his ruling on the pending motions to dismiss.

¶ 19 In August 2014, plaintiff filed and twice amended a motion for leave of court to add a Title VII claim to his second-amended complaint or, in the alternative to file a third-amended complaint. Plaintiff noticed that motion for August 26, 2014, which was the day before the 90-day Title VII filing period was to expire, and two days before the court was to rule on the motions to dismiss, which had been pending since the previous March.

[5]On August 18, 2014, plaintiff filed a complaint in federal court alleging that CPS and certain CPS employees violated Title VII of the Civil Rights Act of 1966 (42 U.S.C. § 2000e *et seq.*) alleging that, after he filed other charges of discrimination and a lawsuit against CPS, he was discharged and he alleged that he had been discriminated against in retaliation for engaging in protected activity.

¶ 20 On August 26, 2014, the court denied plaintiff's motion to add a Title VII claim to his second-amended complaint or to file a third-amended complaint. The court held that plaintiff had failed to timely serve the proposed amended complaint on defendants as well as the court, and a delay would be prejudicial to defendants, violate principles of judicial economy, and was the result of plaintiff's own conduct.

¶ 21 Plaintiff then filed a petition for substitution of judge for cause after Judge Ortiz cited plaintiff's prior conduct of filing a motion for substitution of judge as a reason to deny plaintiff's motion to file his Title VII claim. The Chief Judge heard and denied the petition.

¶ 22 At the hearing on the motions to dismiss, plaintiff withdrew and dismissed with prejudice counts IV and VI against defendants Brown, Evans, Sullivan, and CPS, and against Brown and CPS, respectively. Plaintiff further withdrew and dismissed without prejudice count V against Jane and Cindy. As to count II, the court dismissed the privileged communications allegations, with prejudice but, the allegations of defamatory statements made by Jane to her friends were dismissed without prejudice. The remaining counts against all defendants except Ardell and Wong were dismissed with prejudice. Plaintiff filed a motion to reconsider on September 17, 2014, which the trial court denied.

¶ 23 On October 9, 2014, Ardell and Wong filed a combined motion to dismiss plaintiff's second-amended complaint pursuant to section 2-619.1 of the Code. On January 23, 2015, the court granted the motion to dismiss with prejudice counts I, IV, V, VII, X, XI, and XII. In its memorandum opinion and order, the trial court noted that, during the hearing on the motion, plaintiff withdrew and dismissed with prejudice count IV against Ardell, Wong, and CPS.

¶ 24 On February 5, 2015, the court granted plaintiff leave to file a third-amended complaint against the sole remaining defendant (Doe) within 28 days. In the order, the court wrote the following:

> "Plaintiff, in open court waived his right to file any amended complaint, and standing on his second amended complaint and stated he wishes to appeal the court's rulings. *** Because Plaintiff has waived his right to file an amended complaint, and is standing on his second amended complaint, the judgment in this case is now a full and final order of dismissal."

¶ 25 Plaintiff timely appeals the dismissal of his second-amended complaint with prejudice.

¶ 26 II. ANALYSIS

¶ 27 A. Standard of Review

¶ 28 "A motion to dismiss under section 2-615(a) of the Code (735 ILCS 5/2-615(a) (West 2014)) tests the legal sufficiency of the complaint, whereas a motion to dismiss under section 2-619(a) of the Code (735 ILCS 5/2-619(a) (West 2014)) admits the legal sufficiency of the complaint, but asserts affirmative matter outside the complaint that defeats the cause of action." *Kean v. Wal–Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). Section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)) permits a party to combine a section 2-615 motion to dismiss based upon a plaintiff's substantially insufficient pleadings with a section 2-619 motion to dismiss based upon certain defects or defenses. When ruling on a motion to dismiss under either section 2-615 or section 2-619, the court must accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from those facts in favor of the nonmoving party. *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 162 (1998). We review dismissals under sections 2-615, 2-619, and 2-619.1 *de novo*. See *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App

(4th) 120139, ¶¶ 25, 31; *Morris v. Harvey Cycle & Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009).

¶ 29 Defendants propose the following bases of dismissal: (1) plaintiff's lack of standing to assert rights belonging to his alleged victim; (2) plaintiff has no implied private right of action authorized for a violation of the School Code; (3) failure to allege facts to support claims; (4) failure to state a cause of action; and (5) protection of the Illinois Local Governmental and Governmental Employee Tort Immunity Act (Tort Immunity Act) (see 745 ILCS 10/1-101 *et seq*. (West 2014)).[6] Because we may affirm the trial court's judgment on any basis supported by

[6]The Deerfield and CPS defendants also argue plaintiff's claims against them are barred by the one-year statute of limitations under the Tort Immunity Act (745 ILCS 10/8-101 (West 2014)). Plaintiff filed his initial complaint on November 21, 2013. Plaintiff alleged that he learned that Jane made rape claims against him in January 2012; that he was removed from Harlan High related to the OIG's investigative report of Doe's sexual assault accusations against him on June 5, 2012; and that he was suspended without pay on September 13, 2012, pending a termination hearing. However, plaintiff argues that he did not know all of the allegations against him until he was able to obtain the OIG investigative files in his federal court suit until sometime in February and April 2013. Determining the point at which the running of the statute of limitations period begins under the discovery rule is generally a question of fact. *Rasgaitis v. Waterstone Financial Group, Inc.*, 2013 IL App (2d) 111112, ¶30. Because we affirm the decision of the trial court on other grounds, we need not address this issue.

the record, we need not address all of the reasons for dismissal. *Rodriguez v. Sheriff's Merit Commission*, 218 Ill. 2d 342, 357 (2006).

¶ 30 B. Counts VIII and IX (Lack of Standing)

¶ 31 In count VIII, plaintiff alleged Ardell, Brown, Griffith, Locascio, and CPS, District 113, and Deerfield, under *respondeat superior*, violated the Illinois Mental Health and Developmental Disabilities Confidentiality Act (MHDDCA) (740 ILCS 110/1 *et seq.* (West 2014)), and, in count IX, plaintiff alleged Griffith and District 113, under *respondeat superior*, violated the Illinois School Student Records Act (ISSRA) (105 ILCS 10/1 *et seq.* (West 2014)). Plaintiff alleged that the respective defendants disclosed Jane's protected health information, confidential communications, and student records to the CPS investigator without proper written consent. We conclude that plaintiff lacks standing to assert rights belonging to Jane, his alleged sexual assault victim.

¶ 32 The purpose of the MHDDCA and the ISSRA is to protect the confidentiality of a mental health recipient's information and the confidentiality of a student's school records. See 740 ILCS 110/2 ("recipient means a person who is receiving or has received mental health or developmental disabilities services") and 105 ILCS 10/2 ("Student" means any person enrolled or previously enrolled in a school). The person entitled to the privileges under the MHDDCA and ISSRA is Jane. At no point did plaintiff allege that any of his own MHDDCA-protected or ISSRA-protected information was disclosed. Nor has plaintiff alleged what it is about the information that makes it protected mental health or student record information. Because plaintiff is not the recipient of the treatment, he is not entitled to the protection.

¶ 33 Generally, a plaintiff "must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S.

400, 410 (1991). To have third-party standing, (1) the litigant must have suffered a concrete injury: (2) the litigant must have a close relation to the third party; and (3) there must exist some hindrance to the third party's ability to protect her own interests. *Id*. at 411. Plaintiff has no close relationship with Doe to have a right to protect her interests. Rather, she is a named defendant, and she has accused plaintiff of sexually assaulting her. He, therefore, cannot assert Jane's legal rights to protect his own interests. Jane is the only individual who can disclose or object to the disclosure of her confidential records, and the record reveals that she does not object to the disclosure of these documents in order to protect her own interests.

¶ 34 The claims against CPS, District 113, and Deerfield derive from the claims against their employees and, therefore, those claims also fail for lack of standing. See 745 ILCS 10/2-109 ("A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable"). Accordingly, plaintiff lacks standing to assert a violation of the MHDCCA and ISSRA, and counts VIII and IX were properly dismissed.

¶ 35 C. Count VII (No Private Cause of Action)

¶ 36 In count VII, plaintiff alleged a violation of section 34-13.1(a) of the School Code (which he calls the Inspector General Statute) (105 ILCS 5/34-13.1 (West 2014)) against Brown, Sullivan, and CPS under *respondeat superior*. This section provides that the Inspector General shall have the authority to conduct investigations into allegations of or incidents of waste, fraud, and financial mismanagement in public education by an employee. 105 ILCS 5/34-13.1(a) (West 2014). Plaintiff alleged that Brown with Sullivan's approval willfully and wantonly violated this section by conducting an investigation not related to "waste, fraud, and financial mismanagement in public education." Plaintiff asserted that the OIG is limited to only those types of issues and that the investigation into the allegations against him violated this provision.

¶ 37 Section 34-13.1(a) does not imply a private right of action upon which plaintiff may base a claim. Implication of a private right of action is appropriate if: (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute. *Fisher v. Lexington Health Care, Inc.*, 188 Ill. 2d 455, 460 (1999).

¶ 38 Section 34-13.1(a) was not enacted to benefit employees charged with wrongdoing, such as plaintiff. It was enacted to protect taxpayers from "waste, fraud, and financial mismanagement in public education." 105 ILCS 5/34-13.1(a) (West 2014). Plaintiff failed to articulate how he was injured by the OIG's investigation, and thus, he cannot show that the Inspector General Statute was designed to prevent his non-injury. Moreover, allowing plaintiff to sue the OIG for conducting an investigation is inconsistent with the purpose of the provision, which is to uncover wrongdoing. Therefore, plaintiff failed to state a cause of action and count VII was properly dismissed.

¶ 39 D. Counts I, IV, V, X, XI, XII

¶ 40 1. Tort Immunity Act

¶ 41 The purpose of the Tort Immunity Act is to protect local public entities and public employees from liability arising from the operation of government. 745 ILCS 10/1-101.1 (West 2014). A local public entity includes a school district, school board, a township, or a municipality. 745 ILCS 10/1-206 (West 2014). An employee includes a present or former member of a board, agent, or an employee of a local public entity. 745 ILCS 10/2-202 (West 2014). Clearly, District 113, CPS, and Deerfield are local public entities, and Ardell, Brown, Evans, Griffith, Locascio, Sullivan, and Wong are public employees.

¶ 42 Section 2-201 of the Tort Immunity Act provides that "except as otherwise provided by statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 2014). The Act immunizes public employees from liability where the injury claimed is the result of a "discretionary policy determination." *Courson v. Danville School District No. 118*, 333 Ill. App. 3d 86, 88 (2002). "[D]iscretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 371-72 (2003). Because governmental immunity is an affirmative defense, the defendant bears the burden of proving that the immunity applies to defeat the plaintiff's claim. *Id*. at 370. The defense must be apparent on the face of the complaint supported by affidavits or other evidentiary materials. *Id*. at 377.

¶ 43 Policy decisions require the public entity or employee to "balance competing interests and to make a judgment call as to what solution will best serve each of those interests." *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 342 (1998). The definition of "discretionary" encompasses a wide range of governmental behavior. See, *e.g.*, *Arteman v. Clinton Community Unit School District No. 15*, 198 Ill. 2d 475, 487-88 (2002).

¶ 44 Brown, Sullivan, Ardell, Wong, and CPS, as *respondeat superior*, are immune from liability from all of plaintiff's claims against them pursuant to the Tort Immunity Act because they exercised their discretion in conducting their investigation into the accusations against plaintiff. The decisions as to how to proceed with the investigation, who and what to subpoena,

which witnesses and statements to be sought, what leads to pursue, and what information to provide to the CPS law department for use in termination and disciplinary hearings were all inherently discretionary decisions. These decisions also were policy decisions because they required the weighing of options and choosing which course was the best one to follow.

¶ 45 Furthermore, the claims against Brown, Sullivan, Griffith, CPS and District 113 were properly dismissed pursuant to other sections of the Tort Immunity Act. Section 2-107 provides that "[a] local public entity is not liable for injury caused by an action of its employees that is libelous or slanderous or for the provision of information *** orally." 745 ILCS 10/2-107 (West 2014). Section 2-106 states that a local public entity is not liable for an injury caused by an "oral promise or misrepresentation of its employee, whether or not such promise or misrepresentation is negligent or intentional." 745 ILCS 10/2-106 (West 2014). These immunities are not subject to common law exceptions; matters under these provisions are absolutely immune from challenge in the courts. *Village of Bloomingdale v. CDG Enterprise, Inc.*, 196 Ill. 2d 484, 493-94 (2001). The immunities are not subject to the common law exceptions for "corrupt or malicious motives" or "willful and wanton conduct" unless the plain language of the applicable section of the Act indicates otherwise. *Id*. Moreover, section 2-210 immunizes an employee acting in the scope of his employment from liability for an injury caused by his negligent misrepresentation or the provision of information orally. 745 ILCS 10/2-210 (West 2014).

¶ 46 Counts I, IV, X, and XI all rely on allegations of either the unauthorized release of information, disclosure of private facts among the public employee defendants, or misrepresentation of facts. Similarly, counts I, IV, VIII, IX, and XI against Griffith rely on the disclosure or re-disclosure of confidential communications. These allegations are immunized by section 2-210 of the Tort Immunity Act. 745 ILCS 10/2-210 (West 2014). See also *Goldberg v.*

Brooks, 409 Ill. App. 3d 106, 111 (2011) ("[T]he provision of information is a separate category from negligent misrepresentation, providing a broad protection to public employees acting within the scope of their employment"). Brown and Sullivan were conducting an investigation within the scope of their employment and how they provided information about their investigation is immunized from liability. Additionally, the claims against Griffith are based on the provision of oral information and they too fall within the immunity granted by the Tort Immunity Act.

¶ 47 Counts I, V, VII, VIII, and X also encompass both the OIG's investigation and the initiation and prosecution of charges against plaintiff, which led to a hearing before a State of Illinois hearing officer pursuant to the Illinois School Code. This activity directly relates to instituting or prosecuting of an administrative proceeding against plaintiff and is subject to immunity under section 2-208. 745 ILCS 10/2-208 (West 2014). Because the public employee defendants are immune from liability, the public entity defendants are also immune. See 745 ILCS 10/2-109 (West 2014) (local public entity not liable for injury resulting from act or omission of its employee where employee is immune from liability—no matter the theory of liability).

¶ 48 To the extent that plaintiff's second-amended complaint seeks punitive and exemplary damages against any of the public entity defendants, those counts also should be dismissed. See 745 ILCS 10/2-102 (West 2014) ("Notwithstanding any other provision of law, a local public entity is not liable to pay punitive or exemplary damages in any action brought directly *** against it by the injured party or a third party").

¶ 49 Accordingly, the trial court properly dismissed with prejudice counts I, IV, V, VII, X, XI, and XII against the public employee defendants and the public entity defendants under *respondeat superior*.

¶ 50 2. Count I (Conspiracy)

¶ 51 In count I, plaintiff alleged conspiracy against Ardell, Brown, Evans, Griffith, Cindy, Jane, Locascio, Sullivan, Evans, and Wong, and CPS, District 113, and Deerfield as *respondeat superior*. Specifically, plaintiff alleged that "[a]ll Defendants were involved in either staging and/or concealing false sexual assault allegations originating from Lake County against the Plaintiff, or obtaining, disclosing, or re-disclosing confidential communications without proper authorization, as part of a conspiracy to terminate Plaintiff's employment." In particular, plaintiff alleged that Evans and Wong concealed the DCFS notification from him and obstructed the DCFS investigation; Ardell and Brown furthered the conspiracy by traveling to Lake County to obtain information; Griffith and Locascio furthered the conspiracy by disclosing confidential communications from Jane; Cindy and Jane further conspired with Brown to use the practice schedule to develop a credible rape story; Brown furthered the conspiracy with Ardell, Cindy, and Jane to obstruct justice by re-recording an interview, deleting Facebook messages, or manipulating the investigative file; and Sullivan approved of the actions of Brown.

¶ 52 "The elements of civil conspiracy are: (1) a combination of two or more persons, (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means, (3) in the furtherance of which one of the conspirators committed an overt tortious or unlawful act." *Fritz v. Johnston*, 209 Ill. 2d 302, 317 (2004). Conspiracies are often intentionally "shrouded in mystery," which by nature makes it difficult for the plaintiff to allege with complete specificity all of the details of the conspiracy. *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 66 (1994). Thus, a plaintiff is not required to plead with specificity and precision the facts that are within the defendant's control and knowledge. *Id.* However, the complaint

"must contain more than the conclusion that there was a conspiracy, it must allege specific facts from which the existence of a conspiracy may properly be inferred." *Fritz*, 209 Ill. 2d at 318.

¶ 53 The trial court concluded that plaintiff's complaint failed to set forth any facts that the CPS investigation into the sexual assault allegations against him had any unlawful purpose or was conducted by unlawful means. We agree with the trial court. One cannot properly infer from the facts alleged that a school board's investigation of an alleged sexual assault claim against its employee, through any of the defendants involved in the investigation, conspired with each other to terminate plaintiff. Any disclosure of information regarding Jane, as discussed above in counts XIII and IX was not unlawful. Furthermore, plaintiff fails to allege any facts that establish an agreement between Griffith and the CPS investigator.

¶ 54 Additionally, a civil conspiracy cannot exist between a corporation and its agents or employees because the acts of an agent are considered to be the acts of the principal. *Bonanno v. LaSalle & Bureau County Railroad Company*, 87 Ill. App. 3d 988, 995 (1980). There can be no conspiracy between Evans and Wong, as both are CPS employees. Likewise, Ardell, Brown, and Sullivan cannot conspire with each other because they are employees of the same employer. Because plaintiff's claims for civil conspiracy fail, the claims against the public entity defendants also fail. 745 ILCS 10/2-109 (West 2014) (local public entity not liable for injury resulting from act or omission of its employee where employee not liable); *Bowers by Bowers v. Du Page County Regional Board of School Trustees District No. 4*, 183 Ill. App. 3d 367, 378 (1989).

¶ 55 Accordingly, in addition to finding the local public entity defendants and its employee defendants immune from liability from count I pursuant to the Tort Immunity Act, and finding that plaintiff lacks standing to challenge the disclosure of confidential information of defendants Jane and Cindy, plaintiff fails to set forth sufficient facts under count I.

¶ 56 E. Count II (Defamation *Per Se*)

¶ 57 In count II, plaintiff alleged defamation *per se* against Cindy, Jane, and Samantha. To state a defamation claim, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages. *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). Statements that do not contain factual assertions are protected under the first amendment and may not form the basis of a defamation action. *Naleway v. Agnich*, 386 Ill. App. 3d 635, 638 (2008). Similarly, a statement may not form the basis of a defamation action where it is substantially true. *Id*.

¶ 58 Defamatory statements are not actionable if they are protected by an absolute or conditional privilege. *Solaia Technology, LLC v. Specialty Publishing Company*, 221 Ill. 2d 558, 585 (2006). This is a question of law. *Id*. "It has long been held that statements made to law enforcement officials, for the purpose of instituting legal proceedings are granted absolute privilege." *Vincent v. Williams*, 279 Ill. App. 3d 1, 7 (1996). Absolute privilege extends to proceedings by administrative agencies which act in a judicial or quasi-judicial capacity. *Barakat v. Matz*, 271 Ill. App. 3d 662, 668 (1995). "When absolute privilege attaches, no action for defamation lies, even where malice is alleged." *Vincent*, 279 Ill. App. 3d at 7.

¶ 59 Plaintiff alleged that, on numerous dates and to numerous persons, including plaintiff's employer, professional counselors or doctors, law enforcement personnel, and plaintiff's termination hearing officer, Jane falsely alleged that plaintiff sexually assaulted her in 2010. Plaintiff further alleged that Jane made numerous false statements to her friends. Plaintiff failed to specifically allege the substance of the defamatory statements with sufficient precision and

particularity required to properly inform Jane of the accusations against her. See, *e.g.*, *Krueger v. Lewis*, 342 Ill. App. 3d 467, 470 (2003).

¶ 60 Regardless, the statements Jane made to the counselors or the investigators would be privileged. See *Vincent*, 279 Ill. App. 3d at 7. Likewise, the statements attributed to Cindy were all made to the Vernon Hills Police Department to file an order of protection against plaintiff. "It has long been held that statements made to law enforcement officials, for the purpose of instituting legal proceedings, are granted absolute privilege." *Id.*

¶ 61 Plaintiff also alleged that Samantha made a false statement to Brown that plaintiff gave her "recovery pills." Plaintiff argues that coaches accused of providing "pills" to their athletes are permanently stigmatized. We find nothing in this statement that factually establishes the basis of a defamatory *per se* action. See *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 87-88 (1996).

¶ 62 We note that the trial court dismissed with prejudice the privileged communications, and that the court only allowed plaintiff leave to file a third-amended complaint on the unprivileged defamation *per se* claim regarding the defamatory statements made by Jane to her friends. However, plaintiff did not file a proposed third-amended complaint. Rather, plaintiff informed the court that he chose to stand on his second-amended complaint. The trial court dismissed the complaint and entered a final order of dismissal. Having entered a final order, that portion of the judgment that previously had been entered without prejudice became final, and plaintiff lost the right to request an amendment regarding the unprivileged defamation *per se* claim. Our review is thus properly limited only to what plaintiff set forth in the second-amended complaint (see *Criscione v. Sears, Roebuck & Company*, 66 Ill. App. 3d 664, 670 (1978)); he cannot seek leave to amend the unprivileged defamation *per se* claim.

¶ 63 F. Count III (Libel *Per Se*)

¶ 64 In count III, plaintiff alleged libel *per se* against Cindy and Jane. Specifically, plaintiff alleged that on "February 18, 2012, defendant Jane Doe willfully and knowingly provided a signed written statement to the Vernon Hills police department alleging that Plaintiff had raped her." He alleged that on "August 27, 2012, Defendant Cindy J. filed for an Order of Protection against Plaintiff in Lake County, signing a sworn statement she knew to be false, and then failed to appear in Court to defend or extend the Order of Protection she originally filed."

¶ 65 Libel and slander are treated similarly and the same rules apply regardless of whether the statement is written or oral. *Bryson*, 174 Ill. 2d 89. Like in Count II, Jane's written statement to the police is privileged and Cindy's statements in the written petition for an order of protection are also considered absolutely privileged. Accordingly, the trial court properly dismissed this count with prejudice.

¶ 66 G. Count IV (Tortious Interference with Contract)

¶ 67 Plaintiff brought this claim for tortious interference with contract against Ardell, Brown, Evans, Griffith, Cindy, Jane, Locascio, and Sullivan and, under *respondeat superior*, District 113, CPS, and Deerfield. During the hearing on the motions to dismiss, plaintiff withdrew and dismissed this count against the defendants Ardell, Brown, Evans, Sullivan, Wong, and CPS with prejudice and, against Jane and Cindy, he withdrew and dismissed the count without prejudice. Because plaintiff stood on his second-amended complaint, he forfeited his right to file an amended count for tortious interference with contract against Jane and Cindy, although we must still review whether the dismissal of this claim against them was error.

¶ 68 Plaintiff alleged that Griffith and Locascio willfully provided confidential communications to Brown without proper authorization that cast plaintiff in a negative light and

could be used against him. Because these allegations are based on the provision of oral information, it is barred by the Tort Immunity Act (745 ILCS 10/2-106, 2-107, 2-210 (West 2014)). District 113 and Deerfield cannot be held liable because the employees are immune from liability. See 745 ILCS 10/2-109 (West 2014). As to Jane and Cindy, plaintiff alleged that they "willfully and wantonly made numerous false statements to Plaintiff's employer and his ISBE termination hearing officer relating to allegations that plaintiff assaulted [Jane]." Plaintiff argues that his tortious interference claims are based on unprivileged comments by Jane to Ardell and Brown and Cindy's email to Ardell as part of a conspiracy. Cindy's and Jane's communications were absolutely privileged. The absolute privilege which protects actions required or permitted in the course of a quasi-judicial proceedings also embraces actions "necessarily preliminary' to such a proceeding. *Parrillo, Weiss & Moss v. Cashion*, 181 Ill. App. 3d 920, 928 (1989). CPS was investigating the allegations of sexual assault when they interviewed Jane and requested information from Cindy, which led to plaintiff's quasi-judicial termination hearing. Therefore, the trial court properly dismissed count IV with prejudice.

¶ 69 H. Count X (Right to Privacy)

¶ 70 In count X, plaintiff alleged Brown, Evans, Sullivan, and Wong, and CPS under *respondeat superior*, violated his right to privacy in two instances. Plaintiff alleged that, after Evans obtained possession of plaintiff's originally sealed CANTS 8 letter, he opened and stole the mail from his work mailbox, made no effort to deliver the letter to plaintiff, and faxed it to other CPS employees. Wong, after learning Evans had the letter, made no effort to deliver the letter to plaintiff, thus sanctioning Evans' actions. Wong authorized Evans to steal plaintiff's confidential mail as part of a conspiracy to retaliate against plaintiff and expose false allegations that plaintiff raped a minor. Plaintiff also alleged that Brown and Sullivan illegally sought and

obtained information from plaintiff's private AOL email account without any complaint or evidence that plaintiff's email was connected to Doe's sexual assault allegations.

¶ 71 The complaint must allege facts necessary to state a cause of action and, it is a fundamental rule that the test of the sufficiency of a complaint is whether or not necessary elements or essentials of a cause of action are alleged. *Dear v. Locke*, 128 Ill. App. 2d 356, 364 (1970). Count X of plaintiff's complaint is generically labeled and it fails to establish which theory of privacy is alleged. Thus, as Evans argues, "he would be required to play a guessing game and analyze the elements of each and every privacy claim."

¶ 72 Plaintiff cited Article I, Section 6, of the Illinois Constitution, section 16-1 of the Criminal Code (720 ILCS 5/16-1 (West 2014)), and the confidentiality of records statute (325 ILCS 5/11 (West 2014)), as the bases for the violation of the right to privacy. However, plaintiff attempted to amend the deficiencies in his complaint without leave of the trial court. Moreover, he never explained why or how these provisions were relevant. Accordingly, we hold the trial court properly dismissed count X with prejudice.

¶ 73 I. Title VII Claim

¶ 74 Plaintiff contends that the trial court abused its discretion by denying him leave to file an amended complaint to include a Title VII claim. Plaintiff initially asked the court to extend the 90-day filing period after the right-to-sue notice issued from the EEOC. He now does not challenge the trial court's ruling that it had no authority to extend the 90-day period. See *Lee v. Cook County*, 635 F.3d 969, 972 (7th Cir. 2011) (courts cannot extend statutory limitations periods).

¶ 75 Plaintiff claims that the trial court was without subject matter jurisdiction to require him to attach his proposed amended complaint to his motion to amend. Clearly, the court had

jurisdiction over the matter. See *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 199 Ill. 2d 325, 334 (2002) (subject matter jurisdiction refers to the power of the court to hear and determine cases of the general class to which the proceeding in question belongs).

¶ 76 The real issue here is whether the trial court abused its discretion by not allowing plaintiff leave to file an amended complaint to add a Title VII claim. Judge Ortiz denied plaintiff's motion on the following grounds: (1) the motion was procedurally defective for failure to timely serve the proposed amended complaint on defendants and the court; (2) delay that the amended complaint would engender was prejudicial to defendants, violated principles of judicial economy, and was a result of plaintiff's own conduct; and (3) the court lacked the authority to extend the Title VII's 90-day filing requirement.

¶ 77 The trial court's determination of whether to allow or deny an amendment is a matter of discretion and will not be reversed absent an abuse of discretion. *In re Estate of Hoover*, 155 Ill. 2d 402, 416 (1993). In *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992), the supreme court adopted four factors to be used in determining whether the trial court's denial of a party's motion to amend constituted an abuse of discretion: (1) whether the proposed amendment will cure the defective pleading; (2) whether the proposed amendment would surprise or prejudice the opposing party; (3) whether the proposed amendment was timely filed; and (4) whether the movant had previous opportunities to amend.

¶ 78 Between February 20 and March 20, 2014, 11 of the 13 defendants filed motions to dismiss the complaint. Plaintiff received a notice of right-to-sue letter from the EEOC on May 29, 2014, giving him 90 days notice to file his Title VII claim. On May 30, plaintiff filed a motion for substitution of judge as a matter of right, which was granted on June 10. On August 1, plaintiff filed his first motion related to his Title VII claim: a motion for leave of court to

extend time to file a Title VII claim. On August 13, plaintiff filed an amended motion to extend time to file a Title VII claim, seeking in the alternative, a third-amended complaint. On August 15, plaintiff filed a second-amended motion for leave of court to extend time to file a Title VII claim and alternatively, a third-amended complaint. Plaintiff noticed that motion for August 26, 2014. Plaintiff had known since May 29, 2014, that the 90-day Title VII filing period was to expire on August 27, 2014, and he had known since July 10, 2014, that Judge Ortiz would issue his ruling on motions to dismiss on August 28, 2014. Additionally, plaintiff never attached his proposed amended complaint to any of his three motions.

¶ 79 Given the lack of timeliness, the delay in filing the motion, the fact that plaintiff was aware of the deadline and that the court was to issue a ruling on the motions to dismiss, and that plaintiff did not apprise the parties and the court of what the proposed amendment entailed, we cannot say that the trial court abused its discretion by denying plaintiff's motion to amend his pleadings.

¶ 80 J. Dismissal with Prejudice

¶ 81 Plaintiff argues that the trial court abused its discretion in dismissing his complaint with prejudice based on pleading deficiencies when his previous amendments were unrelated to correcting pleading deficiencies. Plaintiff's argument assumes that he will not be able to effectively amend his complaint in areas that were dismissed on standing and privilege grounds. Several counts were dismissed for failure to plead sufficient facts.

¶ 82 Whether pursuant to section 2-615 or section 2-619, a complaint should be dismissed with prejudice only if it is apparent that the plaintiff can prove no set of facts that will entitle him or her to recover. *Bruss v. Przybylo*, 385 Ill. App. 3d 399, 405 (2008). Where a claim can be stated, the trial court abuses its discretion if it dismisses the complaint with prejudice and refuses

the plaintiff further opportunities to plead. *Muirfield Village-Vernon Hills, LLC v. K. Reinke, Jr., & Company*, 349 Ill. App. 3d 178, 195 (2004). We thus review the trial court's decision to dismiss a complaint with prejudice for an abuse of discretion. *Muirfield Village*, 349 Ill. App. 3d at 195. "An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera*, 2013 IL 112467, ¶ 37.

¶ 83 We concluded that counts I, II, III, IV, V, VII, X, XI, and XII were properly dismissed with prejudice because plaintiff could not plead any set of facts that would entitle him to relief under those counts based on standing and privilege grounds. Moreover, because the trial court properly granted defendants' motions to dismiss pursuant to section 2-619 of the Code, we do not need to consider whether the trial court also properly granted defendants' motions to dismiss pursuant to section 2-615 of the Code. Even if the trial court's decision concerning the section 2-615 motions to dismiss were erroneous, it would not affect our ultimate holding that the trial court properly dismissed with prejudice plaintiff's complaint.

¶ 84 The only statement that is not privileged is attributed to Samantha in count II, and we determined that it is not defamatory *per se*. Thus, it is apparent that plaintiff can prove no set of facts that would entitle him to relief to a defamatory *per se* action against Samantha. Accordingly, the dismissal with prejudice was not an abuse of discretion.

¶ 85 K. Substitution for Cause

¶ 86 Plaintiff last argues that the trial court erred in denying his petition for substitution of Judge Ortiz for cause. Subsection (a)(2)(ii) of section 2-1001 of the Code directs that a litigant is entitled to one automatic substitution if the request for substitution is "presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in

the case." 735 ILCS 5/2-1001(a)(2)(ii) (West 2014). After a substantive ruling has been made, however, subsection (a)(3) requires substitution "[w]hen cause exists." 735 ILCS 5/2-1001(a)(3) (West 2014). Although the statute does not define "cause," Illinois courts have held that, in such circumstances, actual prejudice has been required to force removal of a judge from a case, that is, either prejudicial trial conduct or personal bias. *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 30. Moreover, in construing the term "cause" for purposes of a substitution once a substantial ruling has been made in a case, Illinois courts have consistently required actual prejudice to be established. *Id.* We will reverse the determinations of the judge pertaining to allegations of prejudice only if the court's finding is contrary to the manifest weight of the evidence. *In re Marriage of Schweihs*, 272 Ill. App. 3d 653, 659 (1995).

¶ 87 Plaintiff received his right-to-sue letter on May 29, 2014. At that time, the majority of defendants' motions to dismiss had been fully briefed and argued. On May 30, 2014, one day after plaintiff received the right-to-sue letter, he requested a substitution of judge as of right. Judge Winter granted the motion, and the case was assigned to Judge Ortiz. Judge Ortiz notified the parties that he would issue his ruling on the motions to dismiss on August 28, 2014. Two days before the ruling, plaintiff filed a notice to amend his complaint again to add a Title VII claim against some of the defendants.

¶ 88 On August 26, Judge Ortiz denied plaintiff's motion to amend, and plaintiff filed a petition to substitute for cause the next day. Chief Judge John Phillips heard arguments the following day and denied his petition.

¶ 89 Plaintiff argues Judge Ortiz's impartiality might reasonably be questioned because he said that he had to read "all those files" after plaintiff moved for a substitution of judge before Judge Winter ruled on the motions to dismiss; that plaintiff's conduct led to "all this extra work;"

and that he had an issue with the third-amended complaint having 175 pages "before he even read it." Plaintiff also argues Judge Ortiz was biased against him when he denied plaintiff's motion to amend his second-amended complaint, which plaintiff argues was "arbitrarily based without legal foundation."

¶ 90 Judges are presumed impartial, and the burden of overcoming the presumption by showing prejudicial trial conduct or personal bias rests on the party making the charge. *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002). "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id*. at 281.

¶ 91 Judge Ortiz's critical comments of plaintiff may have been based on plaintiff's actions in the case, but they do not show actual prejudice from an extrajudicial source; revealing such a high degree of favoritism or antagonism as to make fair judgment impossible. See *Id*. at 281. Moreover, Judge Ortiz's ruling on plaintiff's motion to amend was not without legal foundation. Even if it had been, "erroneous findings and rulings by the circuit court are insufficient reasons to believe that the court had personal bias or prejudice for or against a litigant." *McCormick v. McCormick*, 180 Ill. App. 3d 184, 194 (1988).

¶ 92 Chief Judge Phillips determined that plaintiff had failed to demonstrate any prejudice on the part of the trial court. Furthermore, he found no basis to indicate that Judge Ortiz was biased against plaintiff or his case. Our review of the record similarly gives no indication of prejudice. Accordingly, the denial of plaintiff's petition for substitution of judge for cause was not against the manifest weight of the evidence.

¶ 93 III. CONCLUSION

¶ 94 For the reasons stated, we affirm the judgment of the circuit court of Lake County dismissing plaintiff's second-amended complaint with prejudice.

¶ 95 Affirmed.