No. 1-09-2234

SIXTH DIVISION
March 25, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MEANITH HUON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 09 L 173
	)	
WILLIAM G. BEATTY, SCOTT W. HOYNE, CHARLES P. RANTIS, and JOHNSON & BELL, LTD.,	)	The Honorable
	)	Jennifer Duncan-Brice,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE GARCIA delivered the judgment of the court.
Justices Cahill and R.E. Gordon concurred in the judgment.

O R D E R

HELD: The circuit court properly dismissed with prejudice the plaintiff's first amended complaint asserting eight defamation counts and two counts of intentional infliction of emotional distress. The plaintiff's defamation claims, based on an adverse evaluation by the individual defendants working for the defendant law firm, failed to state a cause of action because a qualified privilege attaches to such evaluations and no facts were alleged to support the plaintiff's assertion that the privilege was abused. The intentional infliction of emotional distress claims, based on the same statements arising from the evaluation process, did not allege extreme and outrageous conduct.

Plaintiff Meanith Huon asserts the circuit court erred in dismissing with prejudice his first amended complaint for failure to state causes of action for defamation and intentional infliction of emotional distress (IIED). The plaintiff's claims arise from a 2007 evaluation of Mr. Huon's work as an associate attorney for defendant Johnson & Bell, Ltd. Mr. Huon was assigned work by at least two of the three individual defendants, William G. Beatty, Charles P. Rantis, and Scott W. Hoyne, shareholders of Johnson & Bell. Defendants Beatty and Rantis issued written evaluations in 2007 of Mr. Huon's work as an associate attorney. At a shareholders' meeting to discuss the evaluations of associates, defendant Hoyne gave a verbal assessment of Mr. Huon's performance as an associate. The written evaluations and the verbal assessment of the three individual defendants form the basis for Mr. Huon's claims. The circuit court dismissed the complaint with prejudice pursuant to section 6-215 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 2008). We agree with the circuit court that in the context of an evaluation process, the statements made by the defendants are entitled to qualified privilege protection for defamation and no evidence exists that the defendants abused that privilege. Because the plaintiff asserts the same allegations from his defamation claims as the basis for his claims of IIED, the same allegations cannot constitute extreme and outrageous conduct. We also reject his contention that he should have been allowed to amend his complaint when no such request was made to the circuit court. We affirm.

BACKGROUND

From 2003 to 2007, Mr. Huon was an associate attorney with Johnson & Bell in Chicago. In his first amended complaint, the plaintiff alleged he received "very good" annual performance

reviews for the years 2004 through 2007 from one of the firm's named shareholders, John W. Bell. Mr. Bell advised him he "was on the partnership track." During that same period, other shareholders found the plaintiff met or exceeded expectations. He received pay raises each year and earned bonuses in 2004, 2005, and 2006. In 2006 and 2007, however, defendants William G. Beatty and Charles P. Rantis began assigning him work "not commensurate" with his experience as an attorney. According to Mr. Huon, Mr. Beatty and Mr. Rantis, both shareholders of the firm, assigned him paralegal and secretarial work rather than substantive legal work. Mr. Huon alleged Mr. Beatty had a history of wrongfully blaming associates, including an associate named Christana Mungai, for his own shortcomings.

In his 2007 annual written review, Mr. Beatty wrote of Mr. Huon:

> "a. We have had deadline problems in discovery responses in several cases that have resulted in motions to compel;
>
> b. Some projects still require extensive editing/revision;
>
> c. I don't have much information about his contact with clients, but CNH (Cass Corporation) [a client] end[ed] up calling me on some frustration over discovery matters;
>
> d. *** occasional issues have arisen (in asbestos cases) about his relationship with opposing counsel;
>
> e. I believe that someone of Meanith's experience should be working more independently, i.e. full case assignments. But I believe he requires a higher level of supervision;

f. *** supervision need[ed] beyond his experience level;

g. Things have tended to become bogged down and require my intervention;

h. [Overall rating is] average to a bit below average based upon expectations for his level of experience;

i. Needs to instill more confidence in his supervising attorneys;

j. I expect a greater degree of independent work for someone of his experience level;

k. Sometimes stretched 'too thin' on his time to devote to my cases;

l. Follow through is an occasional problem;

m. Tends to present a 'brighter picture' than the actual status of the case;

n. Discovery deadlines missed have resulted in motions to compel;

o. Have not used Meanith to get a case ready for trial;

p. Not yet [feel comfortable having as a second-chair];

q. ***[H]e should work more independently for a person of his experience level;

r. Writing projects (briefs, etc, and responsive pleadings)

> still need review to correct mistakes and for editing and revision. Meanith displays an outward eagerness to help, but follow-through is sometimes an issue. A greater degree of problem-solving ability and development of a solution-oriented mentality would help and may facilitate quicker resolution of issues such as discovery conflicts, etc."

In his 2007 evaluation of Mr. Huon, Mr. Rantis wrote:

> "a. [Overall rating is] below average (He has been a lawyer for 11 years.);
>
> b. Fallen beneath [expectations];
>
> c. [Overall evaluation is] below average (Given 11 years of experience.);
>
> d. Meanith continues to send less than appropriate e-mails. Nothing bad, just strange. I talked to him in the past about e-mails to his fellow associates who like to pick on him."

Mr. Huon alleged that the statements of Mr. Beatty and Mr. Rantis were "false" and were made with malice or reckless disregard for the truth. Mr. Huon's belief was that these statements were disseminated to "certain shareholders on the executive committee or management committee at Johnson and Bell, Ltd. [as they] would have reviewed [his] annual written review."

On January 9, 2008, Mr. Huon was terminated from his position with Johnson & Bell.

On July 7, 2008, Mr. Huon filed a claim before the Illinois Department of Human Rights

(IDHR) alleging Johnson & Bell discriminated against him on the basis of race, color, or national origin. At an IDHR fact-finding conference, William V. Johnson, president of Johnson & Bell, testified that at the 2007 personnel evaluations meeting conducted by the Johnson & Bell shareholders, defendant Scott W. Hoyne stated that he believed Mr. Huon to be "incompetent" given the work Mr. Huon did for him.

On April 13, 2009, Mr. Huon filed his first amended complaint accusing the defendants of defamation and IIED, seeking punitive damages under each theory. He asserted he could prove the evaluations submitted by defendants Beatty and Rantis were false and made with malice or reckless disregard for the truth. As to the statement from Mr. Hoyne, Mr. Huon alleged he assigned him no work in 2007. Therefore, Mr. Hoyne's statement was "false," and it was made with malice or reckless disregard for the truth.

Pursuant to section 2-615, the defendants moved to dismiss the defamation claims on four grounds: (1) the statements at issue are constitutionally protected statements of opinion; (2) the statements are subject to an innocent construction; (3) the statements are protected by a qualified privilege; and (4) the comment by Mr. Hoyne was subject to an absolute privilege as it surfaced in a quasi-judicial proceeding. The two IIED claims were also subject to dismissal because Mr. Huon failed to allege any facts to support the conclusory allegation of extreme and outrageous conduct on the part of the defendants.

Mr. Huon responded that the constitutional protection of statements of opinion did not apply because the plaintiff is not a public figure and the defamatory statements were not made by a media organization. In any event, many of the defendants' statements were not statements of

opinion but could be proved to be false, which made the statements not subject to an innocent construction. Mr. Huon asserted it was for the jury to decide whether the defamatory statements were subject to a qualified privilege and Mr. Hoyne's statement at the IDHR was not subject to an absolute privilege because the statement was first made at the shareholders' meeting. Finally, he asserted the defendants' statements were extreme and outrageous, which adequately supported his IIED claims.

Judge Duncan-Brice ruled the statements by the defendants central to the plaintiff's complaint were protected by the First Amendment as they were statements of opinion rather than statements of objectively verifiable fact. Also, the statements were made during an evaluation process and, thus, protected by a qualified privilege:

> "[The defendants] had an interest to uphold as the statements were made, as part of or in connection with, employee evaluations, the statements were limited in their scope to that interest based on the fact that there is no allegation[] of wide-spread publication; the statements were made in a proper occasion as they were made in the context of an employee evaluation; and, the statements were published in a proper manner to the proper parties."

Judge Duncan-Brice found Mr. Huon's pleadings that the statements in the evaluation process were made in bad faith to support his abuse of privilege claim were "conclusory" as they were "unsupported by allegations of specific facts." The judge ruled Mr. Hoyne's statement at the

shareholders' meeting was protected by absolute privilege because the statement was first brought to Mr. Huon's attention in testimony before an administrative agency that was performing a quasi-judicial function.

Regarding the IIED claims, Judge Duncan-Brice ruled the claims failed to allege extreme and outrageous conduct given the statements were made in the context of an annual evaluation. In support of its ruling, the circuit court relied on a federal district court case, which cited a case from this court, for the proposition that if the stress of job performance evaluations "formed the basis for the tort of intentional infliction of emotional distress, virtually every employee would have a cause of action." *Hamros v. Bethany Homes,* 894 F.Supp. 1176, 1180 (N.D. Ill. 1995), quoting *Miller v. Equitable Life Assurance Society*, 181 Ill. App. 3d 954, 957, 537 N.E.2d 887, 889 (1989).

Accordingly, Judge Duncan-Brice dismissed with prejudice Mr. Huon's complaint in its entirety.

This timely appeal followed.

ANALYSIS

Mr. Huon contends the defendants' statements made in the 2007 evaluation process support his claims of defamation and IIED. He contends the defamatory statements are not entitled to First Amendment protection because he is not a public figure and no media organization stands as a defendant. In any event, the statements fall outside First Amendment protection because many of them are actionable false assertions of fact, not mere opinions. He also contends the circuit court wrongly ruled on the defendants' 2-615 motion because the claim

of privilege is an affirmative defense that can only be considered under section 2-619 (735 ILCS 5/2-619 (West 2008)). Had a section 2-619 motion been filed, the plaintiff would have been entitled to discovery. Also, he is entitled to challenge the application of qualified privilege before a jury as it raises a question of fact. In particular, it is for a jury to decide whether the defendants abused that privilege based on their alleged recklessness and malice. Finally, he contends Mr. Hoyne's statement, brought out before the IDHR, is not entitled to absolute privilege because it was originally made at the shareholders' meeting. In any event, the defendants' negative statements about him were a pretext for racial discrimination, which also supports his IIED claims.

The parties agree that our review of the section 2-615 dismissal is *de novo*. "A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face." *Rose v. Hollinger Int'l, Inc.*, 383 Ill. App. 3d 8, 10-11, 889 N.E.2d 644 (2008). "The question presented by a motion to dismiss a complaint for failure to state a cause of action is whether sufficient facts are contained in the pleadings which, if established, could entitle the plaintiff to relief. [Citation.] In making this determination, the court is to interpret the allegations in the light most favorable to the plaintiff." *Quinn v. Jewel Food Stores, Inc.*, 276 Ill. App. 3d 861, 865, 658 N.E.2d 1225 (1995).

Defamation Counts

"To prove defamation, a plaintiff must show that the defendant made a false statement about him, that there was an unprivileged publication to a third party with fault by the defendant, and that the publication damaged plaintiff." *Vickers v. Abbott Laboratories*, 308 Ill. App. 3d

393, 400, 719 N.E.2d 1101 (1999). "A statement is defamatory *per se* if the words used are obviously harmful to the plaintiff's reputation because they impute to the plaintiff *** the lack of ability in a person's performance of his profession or business, or a want of integrity in the discharge of his office or employment." *Id.*, citing *Costello v. Capital Cities Communications, Inc.*, 125 Ill. 2d 402, 414, 532 N.E.2d 790 (1988).

The defendants do not directly challenge the plaintiff's characterization of their statements as defamatory *per se*. Rather, they assert the statements are constitutionally protected as opinion, subject to a conditional privilege as part of an annual evaluation, and capable of innocent construction. The defendants also note, "[t]he preliminary construction of an allegedly defamatory statement is a question of law." *Green v. Rogers*, 234 Ill. 2d 478, 492, 917 N.E.2d 450 (2009).

Because the alleged defamatory statements were made in the course of the 2007 annual evaluation of Mr. Huon's work as an associate with Johnson & Bell by defendants Beatty and Rantis, and defendant Hoyne at the shareholders meeting, we begin with the defendants' assertion that all the statements the plaintiff complains of are entitled to protection under the qualified privilege doctrine.

Qualified Privilege

"The qualified privilege serves to enhance a defamation plaintiff's burden of proof. Where no qualified privilege exists, the plaintiff need only show that the defendant acted with negligence in making the defamatory statements to prevail. [Citation.] However, once a defendant establishes a qualified privilege, a plaintiff must prove that the defendant either

intentionally published the material while knowing the material was false, or displayed a reckless disregard as to the matter's falseness." *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 24, 619 N.E.2d 129 (1993).

The plaintiff contends the circuit court erred in ruling that the context in which the alleged defamatory statements were issued makes the statements subject to a qualified privilege. He contends that the assertion of qualified privilege is an affirmative defense, which cannot be resolved by a section 2-615 motion; rather, it must be resolved by a section 2-619 motion, which, according to his main brief, "[would entitle the plaintiff] to have an evidentiary hearing." See *Missner v. Clifford*, 393 Ill. App. 3d 751, 769, 914 N.E.2d 540 (2009) ("the privileges asserted by [defendant] are true affirmative defenses that may be raised in a section 2-619(a)(9) motion to dismiss a defamation action"). Based on the pleadings in this case, we do not agree.

In *Kuwik*, the supreme court adopted the approach of the Restatement (Second) of Torts to determine whether a conditional privilege exists. "Under the Restatement (Second) of Torts, a court looks only to the occasion itself for the communication and determines as a matter of law and general policy whether the occasion created some recognized duty or interest to make the communication so as to make it privileged." *Kuwik*, 156 Ill. 2d at 27. The Restatement (Second) of Torts divides conditionally privileged communication into three classes: "(1) situations in which some interest of the person who publishes the defamatory matter is involved[;] (2) situations in which some interest of the person to whom the matter is published or of some other third person is involved[; and] (3) situations in which a recognized interest of the public is concerned." *Kuwik*, 156 Ill. 2d at 29. The three classes of privileged communication abrogated

the five factors test announced in *Mittelman. Mittelman v. Witous,* 135 Ill. 2d 220, 244-45, 552 N.E.2d 973 (1989), *abrogated on other grounds by Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 30, 619 N.E.2d 129 (1993). Under the five factor test, the "good faith" of the defendant in making the defamatory statement was a question of law for the circuit court to determine in deciding whether the privilege existed and it fell to the jury to decide whether the defendant abused that privilege by acting in 'bad faith,' i.e., with actual malice." *Kuwik*, 156 Ill. 2d at 26. The approach of the Restatement (Second) of Torts identifies the questions of fact regarding the defendant's conduct in making the defamatory statement. "This approach *** plac[es] factual inquiries, such as whether the defendant acted in good faith in making the statement, whether the scope of the statement was properly limited,*** and whether the statement was sent only to proper parties, into the hands of the jury to be determined as questions of fact as to whether the privilege was abused." *Kuwik*, 156 Ill. 2d at 27.

On the record before us, the defamatory statements attributed to the defendants fall within the first two classes of privileged communication as a matter of law. The defamatory statements were communicated during the 2007 evaluation of associates working for defendant Johnson & Bell, both in writing and at the shareholders' meeting to discuss the evaluations. The interests of each of the defendants was clearly at stake as well as the interests of the other shareholders of defendant Johnson & Bell. The plaintiff himself acknowledges that the very statements he contends establish his defamation claims were made in the course of an annual evaluation by supervising attorneys at the law firm where the plaintiff worked, an occasion "where a misstatement of information should be afforded some degree of protection in order to facilitate

the free flow of correct information." *Kuwik*, 156 Ill. 2d at 30. In fact, the only reasonable inference to draw is that the evaluation in 2007 was much like the annual performance reviews the plaintiff experienced in previous years. The difference in 2007 was that the plaintiff did not receive the high marks he received in previous years when he met or exceeded the expectations of the firm.

Based on the pleadings before us, the circuit court properly ruled the alleged defamatory statements set out in the plaintiff's first amended complaint were subject to a qualified privilege as a matter of law. See *Kuwik*, 156 Ill. 2d at 25. Though affirmative defenses generally are not discernable from the face of a complaint under a section 2-615 analysis, in this case the pleadings made clear that the alleged defamatory statements arose in the context of an employment evaluation process. The adequacy of the complaint was properly subject to review under section 2-615. See *Quinn*, 276 Ill. App. 3d 861 (the defamation complaint was properly dismissed under section 2-615).

Abuse of Privilege

The plaintiff correctly contends that the issue of abuse of a qualified privilege presents a question of fact. See *Kuwik*, 156 Ill. 2d at 25 ("the issue of whether the privilege was abused has been a question of fact for the jury"). Generally, the jury decides those questions that center on whether the privilege has been abused. "[F]actual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in its scope, and whether the statement was sent only to the proper parties, [are placed] into the hands of the jury to be determined as questions of fact as to whether the privilege was abused."

Kuwik, 156 Ill. 2d at 27.

However, just because an issue is generally one for a trier of fact to resolve does not mean that a defamation plaintiff is automatically entitled to present his case to a jury when a qualified privilege applies. A court may determine that as a matter of law insufficient facts are alleged in the complaint to show an abuse of the applicable qualified privilege. See *Quinn*, 276 Ill. App. 3d at 872 (the plaintiff failed to state a cause of action for defamation because he made no showing that the applicable qualified privilege was abused). Thus, the dispositive question before us is whether the plaintiff's complaint alleges sufficient facts to support his claim that the defendants abused the qualified privilege that clearly attached to the statements made in the course of an annual evaluation of the plaintiff's performance as an associate attorney with four years' experience. We agree with the circuit court that he did not.

The plaintiff's complaint is grounded entirely on the 2007 evaluation of his performance as an associate attorney of defendant Johnson & Bell. The plaintiff contends defendants Beatty and Rantis defamed him based on the written evaluation each submitted, which we set out in detail above. The plaintiff contends defendant Hoyne defamed him based on his statement at the shareholders' meeting where the results of the annual evaluations were discussed. The plaintiff contends Johnson & Bell is liable because each of the individual defendants acted as its agent.

In *Kuwik*, our supreme court made clear that in order to make out a claim that an abuse of privileged communication occurred, the plaintiff must allege a "reckless act which shows a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material only to proper parties." *Kuwik*,

156 Ill. 2d at 30. In the case before us, the plaintiff alleges only a bald conclusion that the defendants acted recklessly in making false statements during the evaluation process. We find the plaintiff's first amended complaint entirely barren of any facts that might suggest, much less support, any reckless act on the part of the individual defendants. As the defendants demonstrate in their brief regarding the First Amendment protection accorded to statements of opinions, evaluations are by their very nature subjective. See *Mittelman*, 135 Ill. 2d at 236 ("the law concerning privilege has been 'altered' by first amendment constitutional considerations"); *Imperial Apparel v. Comso's*, 227 Ill. 2d 381, 389, 400-01, 882 N.E.2d 1011 (2008) (reversing appellate court's judgment that allegedly defamatory ad stated "actual facts" rather than opinion), 367 Ill. App. 3d 48, 53-54, 853 N.E.2d 770 (2006).

Mr. Beatty's "Overall Rating" of the plaintiff was that he was "Average to a bit below average based upon expectations for his level of experience." In his "Overall Evaluation," Mr. Beatty rated the plaintiff "Average." Mr. Rantis found the plaintiff "below average" in his "Overall Rating" and his "Overall Evaluation." Whether "average" or "below average," we cannot agree that these evaluations support the plaintiff's claim that the defendants abused the conditional privilege that attached to their 2007 evaluation of the plaintiff. Unlike Garrison Kiellor's Lake Wobegone where everyone can be "above average," law firms, including the defendant Johnson & Bell, must have associates that are evaluated as "average." Nor is malice indicated solely because an employee is evaluated as "below average." Nothing in the plaintiff's complaint supports his claim that the qualified privilege that attached to the 2007 evaluation was abused. See *Mittelman*, 135 Ill. 2d at 238 ("A legally sufficient complaint must set forth factual

allegations from which actual malice may reasonably be said to exist as opposed to a bare assertion of actual malice.").

It is also of no moment that the plaintiff asserts he could prove, if given the opportunity, the falsity of the problems found by defendants Beatty and Rantis in Mr. Huon's work. Mere falsity can be equated with a showing of reckless disregard for the truth. As the circuit court made clear, Mr. Huon was obliged to allege facts to demonstrate bad faith on the part of the defendants to go forward with his contention that an abuse of the conditional privilege occurred. We find no facts in the plaintiff's first amended complaint that show the defendants acted with " 'bad faith,' i.e., with actual malice." *Kuwik*, 156 Ill. 2d at 26. No malice or bad faith on the part of the defendants Beatty and Rantis can be reasonably inferred from the factual allegations in the plaintiff's amended complaint. See *Mittelman*, 135 Ill. 2d at 238.

Nor does the plaintiff's defamation claim against defendant Hoyne based on a statement issued at the shareholders' meeting that the plaintiff was "incompetent" make a showing of abuse of privilege. We find no disagreement between the parties that the shareholders' meeting at issue was held to discuss the 2007 evaluations of associate attorneys. Given the context of that meeting, the plaintiff bore the heightened burden of proof of demonstrating that defendant Hoyne communicated that statement knowing it was false or displayed a reckless disregard as to the communication's falseness. *Kuwik*, 156 Ill. 2d at 24. In other words, defendant Hoyne's statement was entitled to the same qualified privilege as the written evaluations by defendants Beatty and Rantis.

The plaintiff's response that he has adequately alleged the falsity of the statement because

defendant Hoyne "never assigned any substantive legal work to Meanith Huon [in 2007]" simply misses the mark. Taking that claim as true, defendant Hoyne's statement made during the shareholders' meeting to discuss the performance of associates amounted to no more than one person's expression of opinion. "[T]o prove an abuse of discretion, the plaintiff must show ' "a direct intention to injure another, or *** a reckless disregard of [the defamed party's] rights and of the consequences that may result to him." ' " *Kuwik*, 156 Ill. 2d at 30. The plaintiff fails to allege any facts from which the jury could reasonably reach such a conclusion. See *Mittelman*, 135 Ill. 2d at 237 ("requiring a higher mental state before liability is imposed will preserve the vitality of privilege in defamation law"); *Doherty v. Kahn*, 289 Ill. App. 3d 544, 554, 682 N.E.2d 163 (1997) (the plaintiff claimed that defendants told potential customers that "plaintiff was 'incompetent,' 'lazy,' dishonest,' 'cannot manage a business,' and/or 'lacks the ability to perform landscaping services.' ").

In *Doherty*, this court rejected the plaintiff's claim that he made out a sufficient claim for defamation based at least in part on the defendants' characterization that the plaintiff was "incompetent." In addition to faulting the lack of specifics regarding when and to whom the alleged defamatory statements were made, we found the statements attributed to the defendants "were mere expressions of opinion." *Doherty*, 289 Ill. App. 3d at 556. Consistent with *Doherty*, defendant Hoyne's statement that the plaintiff was "incompetent" is an expression of opinion to other shareholders at a meeting held to assess the performance of associates and cannot be actionable as defamatory. A statement that an individual is "incompetent" standing alone is not "capable of objective verification as true or false." *Doherty* 289 Ill. App. 3d at 557.

Even if Hoyne's statement can be interpreted as defamatory as a mixed opinion for purposes of a section 2-615 motion, that statement alone cannot demonstrate an abuse of the qualified privilege when the plaintiff alleges nothing more than the defendant Hoyne made the statement made at the shareholders' meeting to discuss the evaluations of associates. The claim against defendant Hoyne was subject to dismissal for failure to state a cause of action for defamation. *Doherty*, 289 Ill. App. 3d at 556-57.

Finally, the plaintiff's reliance on our supreme court's decision in *Mittelman* is misplaced. In *Mittelman*, the defendant made a defamatory statement against Mittelman at a board of director's meeting to "discuss the firm's serious cash flow problems." *Mittelman*, 135 Ill. 2d at 228. When criticism was directed at the defendant for costs incurred in a losing case, the defendant said the fault was not his, but Mittelman's who "sat on the statute of limitations defense with knowledge of [controlling case law] *** for three years *** without attempting to settle in order to cut the firm's probable losses." *Mittelman*, 135 Ill. 2d at 228. In his complaint for defamation and tortious interference because the defendant's statement caused him to be fired, Mittelman alleged the defendant's statement was "false" and he "knew it was false or had no reasonable basis for believing it to be true." *Mittelman*, 135 Ill. 2d at 228. Mittelman further alleged the "statement was made 'maliciously, with an evil motive to injure [Mittelman] without just cause or excuse.' " *Mittelman*, 135 Ill. 2d at 229. The court, in finding Mittelman's pleadings sufficient to allege actual malice, noted "Mittelman's nonconclusory, factual statement adequate to permit meaningful review." *Mittelman*, 135 Ill. 2d at 231. We find the occasion in which the defamatory statements arose in *Mittelman* to be unlike the evaluation process that gave

rise to the purportedly defamatory statements in this case. That alone is sufficient to distinguish this case from *Mittelman*. On *de novo* review, we agree with the circuit court that the plaintiff's pleadings before us do not contain factual allegations that an abuse of the qualified privilege occurred.

Of course, because the causes of action against the individual defendants do not lie, the counts against Johnson & Bell as the principal cannot survive. *Gramm v. Armour & Co.*, 132 Ill. App. 3d 1011, 1013, 271 N.E.2d 52 (1971).

The circuit court properly dismissed the plaintiff's first amended complaint for failure to state causes of action for defamation against the four defendants based on the qualified privilege of the challenged statements in the absence of any factual allegations showing that the privilege was abused by any of the defendants. Consequently, we do not reach the merits of the defendants' claim that the alleged defamatory statements were also protected on other legal grounds.

Intentional Infliction of Emotional Distress

Mr. Huon claims the defendants' statements made in the course of the evaluation process also constituted extreme and outrageous conduct such that the defendants are liable for IIED.

"[T]o qualify as outrageous, the nature of the defendant's conduct must be so extreme as to go beyond all possible bounds of decency and be regarded as intolerable in a civilized community." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 274, 798 N.E.2d 75 (2003). "In employment situations, personality conflicts, job performance evaluations, or job transfers are unavoidable and often result in stress. However, if such stress formed the basis for the tort of

intentional infliction of emotional distress, virtually every employee would have a cause of action." *Hamros*, 894 F. Supp. at 1180, quoting *Miller*, 181 Ill. App. 3d at 957.

In *Hamros*, the plaintiff alleged in his IIED claim that the defendant terminated his employment when he failed to return after his medical leave period ran out. *Hamros*, 894 F. Supp. at 1180. The plaintiff alleged that a manager for the defendant employer backdated his medical leave application to cause him to fail to return in a timely fashion, resulting in his firing. *Id.* at 1178. Accepting as true the plaintiff's allegation, the court in *Hamros* nonetheless found backdating the application did "not amount to such extreme and outrageous behavior as to go beyond all possible means of decency." *Id.* at 1180. The backdating allegation alone did not meet the heightened showing required to make out a claim for IIED. *Id.* at 1180.

The allegations Mr. Huon highlights as alleged misstatements of his performance while an associate with Johnson & Bell, which he contends were recklessly or deliberately made during the 2007 evaluation process to cause his termination, do not meet the heightened burden to allege a IIED claim under *Miller*. Even assuming the statements the plaintiff complains of were false, the statements do not constitute extreme and outrageous conduct that are beyond the pale of a civilized community. In any event, we are unconvinced that statements made in the course of an annual evaluation, which we found insufficient to make out a claim for defamation, can constitute extreme and outrageous behavior for a claim of IIED. [1]

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[1] We do not consider Mr. Huon's claim that he was discriminated against as providing any support for his IIED claims when he offers not a single fact to demonstrate he was treated differently *because* of his race.

Mr. Huon's IIED claims fail to state a cause of action in the absence of factual allegations that the defendants engaged in extreme and outrageous conduct. The claims were properly dismissed pursuant to section 2-615.

Leave to Amend

Finally, Mr. Huon argues he is entitled to an opportunity to amend his complaint. However, he did not seek leave to amend before the circuit court. When no request to amend is made in the face of a motion to dismiss for failure to state a cause of action, we can only conclude that the plaintiff elected to stand on his complaint. In such circumstances, he forfeits the opportunity to amend the pending complaint. *Cerniglia v. Farris*, 160 Ill. App. 3d 568, 574, 514 N.E.2d 792 (1987) (plaintiff that did not request leave to amend her complaint had "therefore elected to stand on her complaint" and "waived her right to amend").

The circuit court did not deprive the plaintiff of an opportunity to amend his complaint when no such request was ever made.

CONCLUSION

The circuit court properly concluded that a qualified privilege protected the defendants' statements made in the course of an annual evaluation of the plaintiff's performance as an associate attorney working for and with the four defendants. The plaintiff's first amended complaint failed to allege any facts, taken as true, that might show the defendants exhibited a reckless disregard for his rights. The circuit court properly dismissed with prejudice the defamation claims pursuant to section 2-615. Because the plaintiff's intentional infliction of emotional distress claims were based on the same statements made by the defendants in the

evaluation process, the plaintiff's IIED claims fail as a matter of law as well. The circuit court properly dismissed with prejudice the plaintiff's first amended complaint in its entirety.

Affirmed.