Judicial District of New Haven
SUPERIOR COURT
FILED

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| DOCKET NO. CV-19-6096427-S | : | STATE OF CONNECTICUT |
| ORLANDO MARCANO | : | SUPERIOR COURT |
| | : | JUDICIAL DISTRICT OF NEW HAVEN |
| V. | : | AT NEW HAVEN |
| MARK VENDETTO, ET AL. | : | AUGUST 2, 2023 |

# MEMORANDUM OF DECISION
# MOTIONS FOR SUMMARY JUDGMENT (#188), (#193), (#195)

I.

## STATEMENT OF CASE AND PROCEDURAL HISTORY

The plaintiff, Orlando Marcano, commenced this action against the defendants, Mark Vendetto, Frank Ricci, Cherlyn Poindexter and Chief John Alston. In his five count second revised complaint filed on March 1, 2021, the plaintiff alleges the following counts. Counts one and four are against the defendants Vendetto and Ricci for tortious interference with the plaintiff's employment relationship with the New Haven Fire Department. Count two is against the defendant Poindexter for wrongful intrusion upon the plaintiff's seclusion. Count three was stricken by this court on June 2, 2022 (#141.20). Count five is against the defendant Alston for negligent supervision. All three defendants filed motions for summary judgment, which motions are presently before the court. The court heard oral argument on all three motions on April 17, 2023.

*A.*

### *Count One, Mark Vendetto*

In count one, the plaintiff alleges the following relevant facts. At all relevant times, the plaintiff was an Assistant Chief of Administration in the New Haven Fire Department (NHFD)

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and the number two person within the NHFD chain of command. The defendant Vendetto was Assistant Chief of Operations of the NHFD and the number three person with the NHFD chain of command.

On April 21, 2017, Vendetto attended the plaintiff's swearing in ceremony. Subsequently, on May 16, 2017, Vendetto accused the plaintiff of "cheating," "having an unfair advantage," having "a conflict of interest," and/or engaging in "unethical behavior" during a promotional examination for Battalion Chief, based on his prior work as an "assessor" for a private company that administers municipal promotional examinations.

On January 9, 2018, Vendetto accused the plaintiff of denying job assignments and/or transfers. On January 23, 2018, Vendetto met with the plaintiff and the fire chief to discuss the plaintiff's concerns about the department. Nevertheless, before the meeting could begin, Vendetto demanded that witnesses be present at the meeting, which resulted in the fire chief terminating the meeting. Termination of the meeting then led to Vendetto having a meltdown and shouting "this is all due to cronyism!"

During a union meeting on July 11, 2018, both Vendetto and the defendant Ricci stated to union membership that the plaintiff and Vendetto are "equal" and that "there is no number two or number three." On August 29, 2018, Vendetto appeared in a photograph with Ricci on Twitter stating that "Union President holds Fire Department Administrative Chief accountable for betraying taxpayers . . . with monies lost due to uniforms." The plaintiff claimed that it was the fire chief who had approved the expenditure, and based on Vendetto's position as Assistant Chief of Operations, Vendetto knew or should have known of this expenditure and that Vendetto was deliberately indifferent to the truth or falsity of the Twitter post and he took no steps to correct it

or have it removed.

On September 4, 2018, Vendetto told Fire Department members: "We're going to do [to the plaintiff] what we did to [former Chief Ralph Black]."

Vendetto would schedule meetings for himself, the plaintiff, and the fire chief, however the plaintiff would not receive memoranda specifying the correct time, date, and place of the meetings. On October 19, 2018, Vendetto blamed the plaintiff for not moving forward with promotions within the department. Further, on October 20, 2017, and other dates, Vendetto and co-defendants Poindexter and Ricci were photographed together at social functions.

The actions taken by Vendetto were not within the scope of his employment and were done to make the plaintiff appear incompetent, ineffective, and undesirable for promotion, and were done in bad faith, with malice, and/or as an abuse of his authority, and/or abuse of discretion, and/or with an intent to injure the plaintiff by interfering with the plaintiff's employment relationship with the city of New Haven. Vendetto planned to get the plaintiff to resign from his position to make room for Ricci to be promoted to the position of assistant fire chief.

On December 23, 2022, defendants Vendetto and Ricci jointly filed a motion for summary judgment (#193) on several grounds: that their alleged actions were justified as they were made pursuant to their roles as union officials, and as such they did not intend to cause harm to the plaintiff; that this court lacks subject matter jurisdiction as the plaintiff has failed to exhaust available administrative remedies and that his claims against them arise from their acts as union representatives, which must first be brought before the Connecticut State Board of Labor Relations; that the plaintiff has failed to allege and prove an underlying tortious act to

satisfy his claim for tortious interference with a business relationship; and that the plaintiff has failed to present any evidence that he suffered an actual loss resulting from the alleged actions of the defendants. This motion is supported by a memorandum of law and the following evidence: plaintiff's revised complaint (Ex. 1), NHFD organizational chart (Ex. 2), memorandum of understanding (Ex. 3), plaintiff's journal (Ex. 4), letter from Ricci (Ex. 5), administrative investigation report (Ex. 6), April 30, 2020 pension fund meeting minutes (Ex. 7), May 29, 2020 pension fund meeting minutes (Ex. 8), affidavit of Ricci (Ex. 9), Horwitz invoices (Ex. 10), and portions of the plaintiff's deposition transcript.[1]

On February 3, 2022, the plaintiff filed a memorandum in opposition to Vendetto and Ricci's motion for summary judgment. In support of the plaintiff's memorandum in opposition, he submitted his affidavit.

*B.*

*Count Two, Cherlyn Poindexter*

In count two, the plaintiff alleges the following additional facts. The defendant Poindexter was a security analyst assistant in the office of the NHFD headquarters, where the plaintiff and Vendetto worked. On October 24, 2019, Poindexter unreasonably and wrongfully publicized an audio recording of a telephone conversation of the plaintiff that occurred on April 30, 2018. Poindexter gave copies of the audio recording to the arbitrators associated with the Connecticut Department of Labor and the New Haven Board of Alders, and the local newspapers ran stories about the details of the plaintiff's conversation. The private telephone conversation

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[1]Upon request of the court, the defendants Vendetto and Ricci submitted the full transcript of the plaintiff's deposition (#206).

occurred while the plaintiff was in his office with the door closed. The conversation took place on the plaintiff's personal cell phone wherein he made statements and offered opinions regarding his personal feelings and thoughts. The plaintiff alleges that he had a reasonable expectation of privacy and that the conversation would not be intercepted and recorded through unknown means. Upon information and belief, Poindexter gained unwarranted access to his office and used spying instruments to obtain and record the call. On information and belief, the Federal Bureau of Investigation commenced an investigation into the alleged illegal surveillance and recording. On October 29, 2018, Poindexter retired from municipal employment.

On December 23, 2022, Poindexter filed a motion for summary judgment (#195) on the ground that she did not intrude on the plaintiff's seclusion or solitude. This motion is supported by a memorandum of law and includes the following evidence: excerpts of Poindexter's deposition (Exhibit 1), associated exhibits referenced within the deposition (Exhibits A, B and 4-5), and Poindexter's first set of interrogatories (Exhibit 2).

On February 3, 2022, the plaintiff filed a memorandum in opposition to Poindexter's motion. In support of the plaintiff's opposition he submitted the following evidence: the plaintiff's affidavit (Ex. A), GPS data (Ex. A), a screen shot of the plaintiff's calendar/schedule (Ex. A), a cell phone record (Ex. A), an affidavit of attorney Cofrancesco (Ex. B), an Aegis Investigations report (Ex. B), and the transcript of Poindexter's deposition (Ex. C). On April 12, 2023, Poindexter filed a reply to plaintiff's objection.

*C.*

*Count Four, Frank Ricci*

In count four, the plaintiff alleges the following additional facts. The defendant Ricci is a member of the NHFD and a subordinate to the plaintiff. Ricci is also president of the firefighters' union. On May 16, 2017, based on the plaintiff's prior work as an "assessor" for a private company that administered municipal promotional examinations, Ricci accused the plaintiff of "cheating," "having an unfair advantage," having "a conflict of interest," and/or engaging in "unethical behavior" with respect to a promotional examination for battalion chief. On June 30, 2017, Ricci said to the plaintiff that "the number two job is shared," and "I'm formidable, you should be afraid," or words to that effect.

On July 3, 2016, the plaintiff was sworn in as Assistant Chief of Administration for the NHFD. Ricci attended the swearing in ceremony and knew of the employment relationship between the plaintiff and the city of New Haven. The plaintiff alleges that Ricci previously stated to the plaintiff that "I've gotten people fired or made them resign" or words to that effect.

On July 11, 2017, Vendetto and Ricci stated to fire department employees that the plaintiff and Vendetto are equal, and that "there is no number two or number three," or words to that effect. On September 2, 2017, Ricci abused his authority as president of the local firefighters union, by either filing or threatening to file an administrative complaint known as a "Municipal Prohibited Practice" (MPP) complaint with the state of Connecticut against the plaintiff. The plaintiff alleges further abuse by Ricci in his role as union president based on his filing of at least nine grievances against the plaintiff.

On October 11, 2017, Ricci publicly blamed the plaintiff for not resolving grievances of

two firefighters quickly enough. Subsequently, on October 20, 2017, Vendetto, Poindexter, and Ricci were photographed together at social functions. On November 30, 2017, Ricci told the plaintiff, "I have the media I can use as a baseball bat" or words to that effect. Then on August 23, 2018, Ricci appeared in a photograph with Vendetto on a Twitter account that belonged to Ricci. Ricci's Twitter post claimed that: "The Union President holds Fire Department Administrative Chief accountable for betraying taxpayers," from money that was lost due to uniform purchases. The plaintiff alleges that it was the fire chief, Alston, who had approved the expenditure to be used for mayor's staff and, as such, Ricci was deliberately indifferent to the truth or falsity of the Twitter post wherein he appeared and took no steps to correct it or have it removed from the Twitter page.

On September 17, 2018, Ricci issued a press release that the plaintiff went on a "spending spree for city hall staffers." Subsequently, on September 28, 2018, in a union meeting, Ricci told union membership that "[w]e are going to do to the [plaintiff] the same thing we did to Ralph Black" or words to that effect.

On October 9, 2018, Ricci publicly accused the plaintiff of "mishandling two female firefighters and hostile work incidents." These actions by Ricci embarrassed the plaintiff by making him appear incompetent, ineffective, and undesirable for promotions in such a way that Ricci's friend, Vendetto, would be promoted to fire chief. The plaintiff claims that said actions were not within Ricci's scope of employment, nor were they performed within the scope of his office as union president; rather, they were performed in bad faith, performed with malice, an abuse of his authority, and/or performed with an intent for personal profit and/or to injure the plaintiff by interfering with his employment relationship with the city of New Haven.

Lastly, Ricci made a side agreement with the city of New Haven that in exchange for removing Vendetto's position from the local firefighters union, Vendetto could individually negotiate his own pension and retirement benefits and, consequently, Ricci would then be promoted to assistant fire chief and potentially be in a charge of a new unit, and such arrangement would personally benefit Ricci. The plaintiff believes that this deal was a contingency upon removing the plaintiff from his position.

As discussed with respect to count one against Vendetto, Ricci has filed a joint motion for summary judgment with Vendetto. Docket Entry No. 193.

*D.*

*Count Five, John Alston*

The defendant John Alston, Jr. is the Fire Chief of the NHFD. Alston's job duties and requirements as fire chief of the NHFD are promulgated as "M0993." Pursuant to "M0993," the fire chief has "[d]irect responsibilities [including] management and direction of all [F]ire Department personnel, general administration and financial management, as well as efficient operation of the Department," and "supervises and directs all personnel in the Department."

On August 4, 2017, the plaintiff and Alston discussed comments made by Vendetto regarding the claim that there was no such thing as a number two and number three in the chain of command. Ricci, a subordinate of the plaintiff, yelled at him on August 25, 2017, in the presence of Alston, stating: "Who do you think you are? You're nobody!" After these comments were made, Alston took no action and told the plaintiff to take no action.

On October 21, 2017, Ricci accused the plaintiff of being a liar regarding a grievance that was filed. The accusation was heard by Alston who did nothing. On January 9, 2018, the plaintiff

informed Alston that Vendetto had manipulated transfers without authorization. In response, Alston scheduled a meeting but later cancelled it. On August 21, 2018, Alston scheduled a meeting with the plaintiff to discuss the union meddling in the department and undermining his position as Assistant Chief of Administration, but Alston never showed up.

On August 23, 2018, Ricci appeared in a photograph with Vendetto on a Twitter account that belonged to Ricci where the post claimed that "[t]he Union President holds Fire Department Administrative Chief accountable for betraying taxpayers," with respect to money that was lost due to uniform purchases. Nevertheless, the plaintiff alleges, it was the fire chief, Alston, who had approved the expenditure of fire department uniform budget funds to be used for the mayor's staff.

On August 29, 2019, Alston told the plaintiff that he was being "too pure in being offended by Ricci coming after him in the media." Alston did nothing about the media attacks against the plaintiff nor did Alston set the record straight with the union. On September 9, 2018, Alston stated that he would meet with the board of fire commissioners and set the record straight regarding the uniform issue. However, Alston did not meet with the board but instead submitted a written report that did not mention the uniform issue.

On or about September 17, 2018, Ricci issued a press release accusing the plaintiff of a "spending spree" to buy staff members at city hall uniforms. Alston ordered the plaintiff to "stay silent and do nothing." Alston himself remained silent and did nothing as well. On October 19, 2018, Vendetto blamed the plaintiff for not moving with promotions. This led to Alston telling the plaintiff that he would talk to Vendetto, but he never did. Again, on October 23, 2018, Vendetto criticized the plaintiff and Alston regarding the issue of promotions, and again Alston

stated that he would speak to Vendetto but never did.

On December 19, 2018, Alston commented to others in the department that the plaintiff "is always crying." On February 20, 2019, Alston began excluding the plaintiff from meetings that related to the plaintiff's performance of duties.

On November 21, 2022, Alston filed a motion for summary judgment (#188) and a memorandum of law in support on the ground that his actions were discretionary, and thus he is protected from liability by governmental and qualified immunity, and the plaintiff's claim does not fall within any of the exceptions to discretionary immunity. On December 15, 2022, the plaintiff filed a memorandum in opposition to Alston's motion.

The court held a remote hearing on these motions on April 17, 2023.

II.

DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012).

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if

the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414–15, 195 A.3d 664 (2018). "The test [for summary judgment] is whether a party would be entitled to a directed verdict on the same facts." (Internal quotation marks omitted.) *Fernandez* v. *Mac Motors, Inc.*, 205 Conn. App. 669, 673, 259 A.3d 1239 (2021).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle[s] him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the

existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § 380 [now § 17-45]." (Internal quotation marks omitted.) *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, 332 Conn. 93, 101, 209 A.3d 629 (2019).

"[A]lthough, generally, the device used to challenge the sufficiency of the pleadings is a motion to strike; see Practice Book § 10-39; our case law [has] sanctioned the use of a motion for summary judgment to test the legal sufficiency of a pleading" if a party has waived its right to file a motion to strike by filing a responsive pleading. (Internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, supra, 306 Conn. 535 n.10. "[T]he use of a motion for summary judgment to challenge the legal sufficiency of a complaint is appropriate when the complaint fails to set forth a cause of action and the defendant can establish that the defect could not be cured by repleading. . . . [The Supreme Court] has recognized that there are competing concerns at issue when considering the propriety of using a motion for summary judgment for such a purpose. On the one hand, [i]f it is clear on the face of the complaint that it is legally insufficient and that an opportunity to amend it would not [cure that insufficiency], we can perceive no reason why [a] defendant should be prohibited from claiming that he is entitled to judgment as a matter of law and from invoking the only available procedure for raising such a claim after the pleadings are closed. . . . It is incumbent on a plaintiff to allege some recognizable cause of action in his complaint. . . . Thus, failure by [a defendant] to [strike] any portion of the . . . complaint does not prevent [that defendant] from claiming that the [plaintiff] had no cause of action and that [summary judgment was] warranted. . . . [Indeed], [the Supreme Court] repeatedly has recognized that the desire for judicial efficiency inherent in the summary judgment procedure would be frustrated if parties were forced to try a case where there was no

real issue to be tried. . . . On the other hand, the use of a motion for summary judgment instead of a motion to strike may be unfair to the nonmoving party because [t]he granting of a defendant's motion for summary judgment puts [a] plaintiff out of court . . . [while the] granting of a motion to strike allows [a] plaintiff to replead his or her case." (Citations omitted; internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 236-37, 116 A.3d 297 (2015).

*A.*

*Alston's MSJ #188*

Count five of the plaintiff's revised complaint alleges that the defendant Alston was negligent in his supervision of Vendetto, Ricci, and Poindexter, which resulted in harm to the plaintiff. In support of his motion for summary judgment, Alston argues that the alleged negligent acts and omissions claimed by the plaintiff were discretionary, and thus protected from liability by governmental and qualified immunity. Alston argues that the plaintiff does not fall within any of the exceptions to said immunity. More specifically, Alston argues that for the plaintiff to qualify under the exceptions, he would need to have been compelled to work at the NHFD and to serve as an assistant chief, that the harm the plaintiff alleges he suffered would need to have been imminent and apparent to Alston, and that Alston's negligent failure to supervise and/or correct the alleged misconduct of Ricci, Vendetto, and Poindexter would need to have been likely to subject the plaintiff to such imminent harm. Alston argues that, as alleged, the plaintiff merely suffered hurt feelings and a bruised ego and that, therefore, the second and third elements of the identifiable person-imminent harm exception have not been satisfied.

Additionally, Alston argues that the harm alleged by the plaintiff was a different type of harm than what has been recognized by our Supreme Court with regard to the imminent harm

exception. Alston argues that expanding the scope of imminent harm to include emotional harm as an exception for a supervisor's supervisory actions would undermine the very policy upon which the exception is based. Alston argues that an objective physical harm that is caused by some dangerous physical condition or other negligent action is hardly comparable to personal interactions, laden with employees' inevitably subjective perceptions and responses, in the normal course of business, and to expand the exception to include this type of harm is to overrun the exception and its purpose.[2]

The plaintiff in opposition argues that Alston has failed to negate the material allegations of his revised complaint and has failed to offer evidence demonstrating that no disputed facts remain and that he is therefore entitled to judgment as a matter of law. The plaintiff further argues that Alston cannot take the position that he is not an identifiable victim, predicated on the plaintiff not being compelled to be at his job, as it does not make sense to take the position that the city of New Haven does not require the assistant fire chief to be at work during his assigned days and times. The plaintiff argues that it is Alston's burden to demonstrate by way of competent evidence that he was not compelled to be at work, and Alston has failed to put forth such evidence. The plaintiff further argues that he was a foreseeable identifiable victim and that foreseeability is a question of fact for the jury. The plaintiff argues that his allegations, when

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[2]Alston essentially argues that to trigger the imminent harm exception the alleged harm must be physical in nature rather than an emotional harm. Alston has not cited to any authority in support of this argument and the court's independent research reveals none. See *Doe* v. *Petersen*, 279 Conn. 607, 619-21, 903 A.2d 191 (2006) (noting plaintiff's allegations of emotional harm, but not rejecting claims on that basis); *Maselli* v. *Regional School District No. 10*, 198 Conn. App. 643, 654-59, 235 A.3d 599 (same), cert. denied, 335 Conn. 947, 238 A.3d 19 (2020). As the court grants this motion on other grounds, however, it is not necessary for the court to resolve this issue.

viewed in the light most favorable to him, establish that Alston had actual knowledge of the tortious interference by the other defendants and that it was apparent to Alston that the plaintiff would be harmed as a result of that interference. Lastly, the plaintiff argues that the exception to a municipality's governmental immunity is not limited to only physical harm as claimed by the defendant.

"The [common-law] doctrines that determine the tort liability of municipal employees are well established. . . . Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts. . . . Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. . . . The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [a ministerial act] refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion. . . .

"Municipal officials are immunized from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. . . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion. . . . This is because society has no analogous interest in permitting

municipal officers to exercise judgment in the performance of ministerial acts. . . .

"The tort liability of a municipality has been codified in [General Statutes] § 52-557n. Section 52-557n (a) (1) provides that [e]xcept as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . . Section 52-557n (a) (2) (B) extends, however, the same discretionary act immunity that applies to municipal officials to the municipalities themselves by providing that they will not be liable for damages caused by negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . .

"For purposes of determining whether a duty is discretionary or ministerial, [the Supreme Court] has recognized that [t]here is a difference between laws that impose general duties on officials and those that mandate a particular response to specific conditions. . . . A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the act being done. . . . In contrast, when an official has a general duty to perform a certain act, but there is no city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner, the duty is deemed discretionary. . . .

"In accordance with these principles, our courts consistently have held that to demonstrate the existence of a ministerial duty on the part of a municipality and its agents, a plaintiff ordinarily must point to some statute, city charter provision, ordinance, regulation, rule,

policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion. . . . Because the construction of any such provision, including a municipal rule or regulation, presents a question of law for the court . . . whether the provision creates a ministerial duty gives rise to a legal issue subject to plenary review on appeal." (Citations omitted; internal quotation marks omitted.) *Borelli* v. *Renaldi*, 336 Conn. 1, 10-12, 243 A.3d 1064 (2020).

Here, Alston does not offer any evidence detailing his duties as fire chief to support his claim that his actions were discretionary in nature. Instead, Alston relies on the allegation made in the plaintiff's second revised complaint regarding the duties of a fire chief detailed in "M0993" and on the court's previous ruling on his motion to strike that his supervisory duties and the actions alleged were discretionary. See *Marcano* v. *Vendetto*, Superior Court, judicial district of New Haven, Docket No. CV-19-6096427-S (December 14, 2020, *Wilson, J.*) ("[d]evoid from these allegations is any language from which the court could infer that the defendant was required to supervise department personnel in a prescribed manner, or in such a way that would limit the defendant's discretion in deciding how to carry out said duty"). Moreover, in opposition to the motion, the plaintiff does not argue that Alston violated a ministerial duty, but rather that he falls within the exceptions to discretionary act immunity. This argument, therefore concedes that Alston's duties were discretionary. The court therefore need not address whether Alston violated a ministerial duty but will next determine whether the plaintiff falls within the enumerated exceptions to discretionary act immunity.

"Three exceptions to discretionary act immunity are recognized,[3] but only one is relevant here: the identifiable person, imminent harm exception. Pursuant to this exception, liability is not precluded when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . ." (Footnote altered; internal quotation marks omitted.) *St. Pierre* v. *Plainfield*, 326 Conn. 420, 434-35, 165 A.3d 148 (2017).

In count five, the plaintiff alleges that the defendant Alston, during the course of misconduct by the defendants Vendetto, Ricci, and Poindexter, as alleged in counts one, two, three, and four, became aware of problems and misconduct regarding these defendants that indicated a lack of fitness for the positions they held, that the unfitness was likely to cause the sort of harm inflicted upon the plaintiff, and that the defendant Alston failed to take action to prevent the harm suffered by the plaintiff. The plaintiff further alleges that he was an identifiable and foreseeable victim of Alston's acts and/or omissions; that the defendant Alston knew or should have known that his acts and/or omissions would subject the plaintiff to imminent harm; and that Alston, knowing what he knew or what he should have known from the reports by and conversations with the plaintiff, should have anticipated that the harm of the general nature of that suffered by the plaintiff was likely to result by his acts and/or omissions.

"[T]he identifiable person, imminent harm exception to qualified immunity for an

[3]"Liability for a municipality's discretionary act is not precluded when (1) the alleged conduct involves malice, wantonness or intent to injure; (2) a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain laws; or (3) the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . ." (Internal quotation marks omitted.) *St. Pierre* v. *Plainfield*, 326 Conn. 420, 434 n.13, 165 A.3d 148 (2017).

employee's discretionary acts is applicable in an action brought under § 52–557n (a) to hold a municipality directly liable for those acts. . . . The exception requires three elements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm . . . . We have stated previously that this exception to the general rule of governmental immunity for employees engaged in discretionary activities has received very limited recognition in this state. . . . If the plaintiffs fail to establish any one of the three prongs, this failure will be fatal to their claim that they come within the imminent harm exception. . . .

"An allegedly identifiable person must be identifiable as a potential victim of a specific imminent harm. Likewise, the alleged imminent harm must be imminent in terms of its impact on a specific identifiable person. . . . Generally, we have held that a party is an identifiable person when he or she is compelled to be somewhere. See *Strycharz* v. *Cady*, [323 Conn. 548, 575–76, 148 A.3d 1011 (2016)] ('[o]ur decisions underscore . . . that whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims.' [internal quotation marks omitted]). Accordingly, '[t]he only identifiable class of foreseeable victims that we have recognized . . . is that of schoolchildren attending public schools during school hours because: they were intended to be the beneficiaries of particular duties of care imposed by law on school officials; they [are] legally required to attend school rather than being there voluntarily; their parents [are] thus statutorily required to relinquish their custody to those officials during those hours; and, as a matter of policy, they traditionally require special consideration in the face of dangerous conditions.'. . .

"Outside of the schoolchildren context, we have recognized an identifiable person under this exception in only one case that has since been limited to its facts. [See *Sestito* v. *Groton*, 178 Conn. 520, 522-24, 423 A.2d 165 (1979) (prior to the adoption of the current three-pronged identifiable person, imminent harm analysis, Supreme Court concluded that identifiable person subject to imminent harm existed among group of intoxicated individuals who were arguing and scuffling in parking lot when police officer who spotted them failed to intervene until he heard gunshot).] Beyond that, although we have addressed claims that a plaintiff is an identifiable person or member of an identifiable class of foreseeable victims in a number of cases, we have not broadened our definition. See, e.g., *Cotto* v. *Board of Education*, [294 Conn. 265, 267–68, 279, 984 A.2d 58 (2009)] (director of community based summer youth program located in public school was not identifiable person when he slipped in wet bathroom because 'then so was every participant and supervisor in the Latino Youth program who used the bathroom,' and anyone 'could have slipped at *any* time' . . . ); see also *Coe* v. *Board of Education*, 301 Conn. 112, 119–20, 19 A.3d 640 (2011) (student injured while attending middle school graduation dance occurring off school grounds did not qualify as member of identifiable class of foreseeable victims because she was not required to attend dance); *Grady* v. *Somers*, [294 Conn. 324, 328, 355–56, 984 A.2d 684 (2009)] (permit holder injured at refuse transfer station owned by town did not qualify as identifiable person despite being paid permit holder and resident of town); *Durrant* v. *Board of Education*, 284 Conn. 91, 96, 104, 108, 931 A.2d 859 (2007) (mother who slipped and fell while picking up her child from optional after-school day care program run in conjunction with public school did not qualify as member of identifiable class of foreseeable victims because program was optional); *Prescott* v. *Meriden*, 273 Conn. 759, 761–62, 764–65,

873 A.2d 175 (2005) (parent voluntarily attending high school football game to watch his child play was not member of identifiable class of foreseeable victims because he was not compelled to attend, school officials lacked similar duties of care to him as to child given his status as parent, and exception is 'narrowly defined' . . . ); *Evon* v. *Andrews*, 211 Conn. 501, 508, 559 A.2d 1131 (1989) ('[t]he class of possible victims of an unspecified fire that may occur at some unspecified time in the future is by no means a group of "identifiable persons"')." (Emphasis in original; footnotes omitted.) *St. Pierre* v. *Plainfield*, supra, 326 Conn. 420, 435-38.

The court notes that it is not clear whether the plaintiff being compelled to be at the location where and when the plaintiff was injured is a requirement to be considered an identifiable *individual* victim. "To invoke the identifiable person-imminent harm exception, typically an individual must be identifiable either as a member of a narrowly defined class of foreseeable victims or as a specifically identifiable individual. See *Cotto* v. *Board of Education*, supra, 294 Conn. 274. Compulsion is clearly required for an individual to be classified as a member of an identifiable class of foreseeable victims. It is less clear whether an individual must be compelled to be at the location where and when the injury occurred to be classified as an identifiable individual. . . . We note that 'whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims.'. . . *Strycharz* v. *Cady*, [supra, 323 Conn. 575–76]. The compulsion requirement, however, is not without contention: 'At least three members of our Supreme Court recently have observed that the court's application of the identifiable person-imminent harm exception, particularly with respect to the identifiable person prong of the exception, may be doctrinally flawed, unduly restrictive, and/or

ripe for revisiting in an appropriate future case. See *Borelli* v. *Renaldi*, supra, 336 Conn. 59–60 n.20 (*Robinson, C. J.*, concurring); id., 67 (*D'Auria, J.*, concurring); id., 67–113, 146–54 (*Ecker, J.*, dissenting).' *Buehler* v. *Newtown*, 206 Conn. App. 472, 488 n.14, 262 A.3d 170 (2021)." *Ahern* v. *Board of Education*, 219 Conn. App. 404, 415-16 n.10, 295 A.3d 496 (2023).

In the present case, notwithstanding the lack of clarity regarding whether an individual must be compelled to be at the location where and when the injury occurred to be classified as an identifiable individual, under our present Supreme and Appellate Court precedent, the court concludes that compulsion is required in order for a plaintiff to be classified as an identifiable individual for purposes of this exception to governmental immunity. Compulsion, as defined by our Appellate Courts, means that the identifiable individual is legally required to be at the location where the injury occurred. As previously stated: "[o]ur decisions underscore . . . that whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims. . . . The only identifiable class of foreseeable victims that we have recognized . . . is that of schoolchildren attending public schools during school hours because: they were intended to be the beneficiaries of particular duties of care *imposed by law* on school officials; they [are] *legally* required to attend school rather than being there voluntarily; their parents [are] thus *statutorily required* to relinquish their custody to those officials during those hours; and, as a matter of policy, they traditionally require special consideration in the face of dangerous conditions." (Citation omitted; emphasis added; internal quotation marks omitted.) *Strycharz* v. *Cady*, supra, 323 Conn. at 575–76.

In the present case, there is no genuine issue of material fact that the plaintiff was neither

a member of a identifiable class of victims nor an identifiable individual victim. The plaintiff, an assistant fire chief, was not *statutorily* required or *legally* compelled to be where he alleges his injuries occurred. It was the plaintiff's choice to work at the NHFD and to serve as an assistant chief. There is no statute or ordinance compelling his attendance at work, such as there are for school children. Moreover, the plaintiff has not alleged or offered evidence to demonstrate that he was compelled to be at the locations where his alleged harms occurred. Consequently, the identifiable person prong to the doctrine of governmental immunity does not apply in this case. Accordingly, as the plaintiff does not fall within this exception to discretionary immunity, his claim against Alston fails as a matter of law, and therefore summary judgment may be granted as to count five on this basis alone.

Because the court has determined that the plaintiff does not satisfy the identifiable person requirement, the court need not address the remaining two prongs. "We have stated previously that this exception to the general rule of governmental immunity for employees engaged in discretionary activities has received very limited recognition in this state. . . . If the plaintiffs fail to establish any one of the three prongs, this failure will be fatal to their claim that they come within the imminent harm exception." (Internal quotation marks omitted.) *Strycharz* v. *Cady*, supra, 323 Conn. 573–74. Nevertheless, in light of the lack of clarity in the appellate case law regarding the compulsion aspect of the identifiable person element, the court analyzes the imminent harm element as well as an alternative basis for its conclusion that governmental immunity applies as a bar to the plaintiff's claim in count five.

In count five, the plaintiff alleges, in a conclusory manner, that Alston "knew or should have known that his acts and/or omissions would subject the plaintiff to imminent harm." None

of the substantive allegations in the complaint, however, support this legal conclusion. Rather, the plaintiff alleges a series of acts and omissions by Alston in support of his claim that Alston failed to supervise personnel who interfered with the plaintiff's employment relationship with the city. The most specific allegations concerning Alston's alleged failures to act and the plaintiff's alleged harm are the following: "The defendant Alston, during the course of misconduct alleged in Counts One, Two, Three and Four, of the defendants Vendetto, Ricci and Poindexter, became aware of problems and misconduct regarding the aforementioned defendants that indicated a lack of fitness for the positions they held, that the unfitness was likely to cause the sort of harm incurred by the plaintiff, and that the defendant Alston failed to take action to prevent the harm suffered by the plaintiff"; and "[t]he defendant Alston's breach of the aforementioned duty was the cause of the plaintiff's injury and damages . . . ." The operative complaint does not include sufficient allegations to satisfy the imminency requirement.

"In *Haynes* v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014), our Supreme Court reexamined and clarified our jurisprudence with respect to the principle of imminent harm. The court overruled in part its prior holding in *Burns* v. *Board of Education*, 228 Conn. 640, 650, 638 A.2d 1 (1994), to the extent that it appeared to narrow the definition of imminent harm to harms arising from dangerous conditions that were temporary in nature. . . . Instead, it reemphasized its earlier interpretation of imminent harm as stated in its decision in *Evon* v. *Andrews*, [supra, 211 Conn. 501], in which it explained that a harm is not imminent if it could have occurred at any future time or not at all . . . and clarified that it was not focused on the duration of the alleged dangerous condition, but on the magnitude of the risk that the condition created. . . . [W]hen the court in *Haynes* spoke of the magnitude of the risk . . . it specifically associated it with the

probability that harm would occur, not the foreseeability of the harm. . . . In sum, [our] Supreme Court concluded that the proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm. . . .

"In *Williams* v. *Housing Authority*, [159 Conn. App. 679, 705-706, 124 A.3d 537 (2015), aff'd, 327 Conn. 338, 174 A.3d 137 (2017)], this court construed *Haynes* as setting forth the following four part test with respect to imminent harm. First, the dangerous condition alleged by the plaintiff must be apparent to the municipal defendant. . . . We interpret this to mean that the dangerous condition must not be latent or otherwise undiscoverable by a reasonably objective person in the position and with the knowledge of the defendant. Second, the alleged dangerous condition must be likely to have caused the harm suffered by the plaintiff. A dangerous condition that is unrelated to the cause of the harm is insufficient to satisfy the *Haynes* test. Third, the likelihood of the harm must be sufficient to place upon the municipal defendant a clear and unequivocal duty . . . to alleviate the dangerous condition. The court in *Haynes* tied the duty to prevent the harm to the likelihood that the dangerous condition would cause harm. . . . Thus, we consider a clear and unequivocal duty . . . to be one that arises when the probability that harm will occur from the dangerous condition is high enough to necessitate that the defendant act to alleviate the defect. Finally, the probability that harm will occur must be so high as to require the defendant to act immediately to prevent the harm." (Internal quotation marks omitted.) *Ahern* v. *Board of Education*, supra, 219 Conn. App. 422-24.

The plaintiff's allegations do not satisfy the imminent harm requirement. The plaintiff

does not allege any facts to suggest that the probability of the harm suffered by the plaintiff was "so high as to require the defendant to act immediately to prevent the harm." Id. Rather, the plaintiff alleges a series of acts and omissions that failed to address alleged misconduct of others that occurred over a period of more than a year and that generally "undermined and interfered with" the plaintiff's ability to do his job, ultimately undermining his employment relationship with the city. Not only do these allegations fail to clarify the nature of the specific harm the plaintiff suffered as a result of Alston's action and inaction, but these allegations also fail to show how any such harm satisfies the imminency requirement established by our appellate case law. Consequently, this claim fails to meet the identifiable victim, imminent harm exception to governmental immunity for this reason as well, and the defendant Alston's motion for summary judgment as to count five is granted.

*B.*

*Vendetto and Ricci's MSJ #193*

Although Vendetto and Ricci raise several grounds in support of their motion for summary judgment as to counts one and four, which sound in tortious interference with business expectations, the court begins, as it must, by addressing their arguments asserting that the court lacks subject matter jurisdiction. They argue that this court lacks subject matter jurisdiction because the plaintiff has not exhausted available administrative remedies. In support of this argument, Vendetto and Ricci argue that the plaintiff's claims against them are against them in their capacities as union officials, and any claims arising out of their official acts as union representatives must first be brought before the State Board of Labor Relations, which has exclusive jurisdiction over such claims. Vendetto and Ricci argue that the plaintiff was required

to file a municipal employer prohibited practice (MEPP)[4] complaint against the union with the State Board of Labor Relations for acting in bad faith, or by demanding the city file such a complaint on his behalf, and that his failure to do so deprives this court of subject matter jurisdiction.

The plaintiff argues in response that he is suing Vendetto and Ricci in their individual capacities, not in their capacities as union officials, and that, therefore, their argument that the

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[4] General Statutes § 7-472 (b) provides: "Employee organizations or their agents are prohibited from: (1) Restraining or coercing (A) employees in the exercise of the rights guaranteed in subsection (a) of section 7-468, and (B) a municipal employer in the selection of his representative for purposes of collective bargaining or the adjustment of grievances; (2) refusing to bargain collectively in good faith with a municipal employer, if it has been designated in accordance with the provisions of sections 7-467 to 7-477, inclusive, as the exclusive representative of employees in an appropriate unit; (3) breaching their duty of fair representation pursuant to section 7-468; (4) refusing to comply with a grievance settlement, or arbitration settlement, or a valid award or decision of an arbitration panel or arbitrator rendered in accordance with the provisions of section 7-472."

General Statutes § 7-471 provides: "(5) Whenever a question arises as to whether a practice prohibited by sections 7-467 to 7-477, inclusive, has been committed by a municipal employer or employee organization, the board shall consider that question in accordance with the following procedure: . . . (B) If, upon all the testimony, the board determines that a prohibited practice has been or is being committed, it shall state its findings of fact and shall issue and cause to be served on the party committing the prohibited practice an order requiring it or him to cease and desist from such prohibited practice, and shall take such further affirmative action as will effectuate the policies of sections 7-467 to 7-477, inclusive, including but not limited to: (i) Withdrawal of certification of an employee organization established or assisted by any action defined in said sections as a prohibited practice, (ii) reinstatement of an employee discriminated against in violation of said sections with or without back pay, or (iii) if either party is found to have refused to bargain collectively in good faith, ordering arbitration and directing the party found to have refused to bargain to pay the full costs of arbitration under section 7-473c, resulting from the negotiations in which the refusal to bargain occurred. (C) If, upon all of the testimony, the board determines that a prohibited practice has not been or is not being committed, it shall state its finding of fact and shall issue an order dismissing the complaint. (D) For the purposes of hearings and enforcement of orders under sections 7-467 to 7-477, inclusive, the board shall have the same power and authority as it has in sections 31-107, 31-108 and 31-109, and the municipal employer and the employee organization shall have the right of appeal as provided therein."

plaintiff failed to exhaust his administrative remedies fails. Alternatively, the plaintiff argues that even if the alleged actions by Vendetto and Ricci were performed in their capacities as union officials, the plaintiff still has no administrative remedy to exhaust as he has not alleged a "prohibited practice" enumerated in General Statues § 7-470. Further, the plaintiff argues that the city was the only entity who could have filed a MEPP complaint against the union in this instance and that there is no requirement that the plaintiff demand that the city file such a complaint on his behalf.

"Although a motion to dismiss is certainly the preferred means of challenging the court's subject matter jurisdiction, we know of no authority for the proposition that subject matter jurisdiction can *never* be challenged through any other procedural vehicle, most importantly by means of a motion for summary judgment." (Emphasis in original.) *Manifold* v. *Ragaglia*, 94 Conn. App. 103, 119, 891 A.2d 106 (2006).

"Trial courts addressing motions to dismiss . . . pursuant to § 10-31 (a) (1) may encounter different situations, depending on the status of the record in the case. . . . Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . Different rules and procedures will apply, depending on the state of the record at the time the motion is filed." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 650-51, 974 A.2d 669 (2009).

"Because the exhaustion [of administrative remedies] doctrine implicates subject matter jurisdiction, [the court] must decide as a threshold matter whether that doctrine requires

dismissal of the [plaintiff's] claim. . . . [B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, [appellate] review is plenary. . . .

"Under [the] exhaustion of administrative remedies doctrine, a trial court lacks subject matter jurisdiction over an action that seeks a remedy that could be provided through an administrative proceeding, unless and until that remedy has been sought in the administrative forum. . . . In the absence of exhaustion of that remedy, the action must be dismissed. . . . We have recognized that a party aggrieved by a decision of an administrative agency may be excused from exhaustion of administrative remedies if: recourse to the administrative remedy would be futile or inadequate . . . or injunctive relief from an agency decision is necessary to prevent immediate and irreparable harm." (Citation omitted; internal quotation marks omitted.) *Levine* v. *Sterling*, 300 Conn. 521, 528, 16 A.3d 664 (2011).

The court agrees with the plaintiff that he has not failed to exhaust his administrative remedies with respect to his claims against Vendetto and Ricci and that the court, therefore does not lack subject matter jurisdiction over these claims. The plaintiff does not allege a prohibited practice as that term is defined in General Statutes § 7-470 and related statutory provisions. That section prohibits employee organizations or their agents from "(1) Restraining or coercing (A) employees in the exercise of the rights guaranteed in subsection (a) of section 7-468 [i.e., rights to collective bargaining and to fair representation by the union], and (B) a municipal employer in the selection of his representative for purposes of collective bargaining or the adjustment of grievances; (2) refusing to bargain collectively in good faith with a municipal employer, if it has been designated in accordance with the provisions of sections 7-467 to 7-477, inclusive, as the exclusive representative of employees in an appropriate unit; (3) breaching their duty of fair

representation pursuant to section 7-468; (4) refusing to comply with a grievance settlement, or arbitration settlement, or a valid award or decision of an arbitration panel or arbitrator rendered in accordance with the provisions of section 7-472." General Statutes § 7-470 (b). Assuming arguendo that the plaintiff had the power to file a MEPP complaint on his own behalf or to compel the city to do so on his behalf in connection with prohibited practices under § 7-470, a review of the applicable statutes demonstrates that there would be no available administrative remedy for the plaintiff to exhaust in connection with his claims in counts one and four because the administrative procedure at issue does not apply to those claims. Accordingly, as the plaintiff has no available administrative remedy, he has not failed to exhaust such remedy, and the court, therefore, does not lack subject matter jurisdiction on that basis.

Vendetto and Ricci also argue that the plaintiff's claims fail because they did not engage in any underlying tortious conduct to support a claim for tortious interference. Vendetto and Ricci argue that the only possible underlying torts the court could infer from the plaintiff's factual allegations are defamation, intentional infliction of emotional distress, or constructive discharge. Addressing the elements of each of those potential underlying claims, Vendetto and Ricci maintain that the plaintiff is unable to prove the essential elements.[5] They also maintain

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[5]Specifically, regarding Vendetto and Ricci's argument that plaintiff cannot prevail on a claim of defamation, they assert that the plaintiff's own testimony admits that neither of them have stated publicly that the plaintiff cheated or had an unfair advantage. They further argue that their alleged statements were made about the plaintiff as a public figure, and therefore require proof of "actual malice," that is, that the statements were made with knowledge or in reckless disregard to the falsity of thereof, and that the plaintiff cannot provide the requisite proof. Finally, they argue that any such statements are protected by absolute immunity because they were made preliminarily to filing claims on behalf of union members concerning the fairness of the promotional testing process. The plaintiff counters that Vendetto and Ricci have improperly asserted privilege as an unpleaded special defense in their motion for summary judgment. The plaintiff further argues that the litigation privilege asserted by Vendetto and Ricci in their

that the plaintiff has not suffered any actual loss as a result of their alleged conduct. The plaintiff counters that Vendetto and Ricci are improperly pleading a motion to strike in a motion for summary judgment. The plaintiff also argues that Vendetto and Ricci have failed to offer any evidence to negate his claims, and to meet their burden as the parties moving for summary judgment.

"A claim for tortious interference with contractual relations requires the plaintiff to establish (1) the existence of a contractual or beneficial relationship, (2) the defendants' knowledge of that relationship, (3) the defendants' intent to interfere with the relationship, (4) the interference was tortious, and (5) a loss suffered by the plaintiff that was caused by the defendants' tortious conduct. . . .

* * *

"It is well established that, in order for a plaintiff to recover for a claim of tortious

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capacity as union officers is also improper as Vendetto and Ricci do not identify any judicial or quasi-judicial proceeding to which the privilege could attach.

Vendetto and Ricci next argue that the plaintiff has not pleaded sufficient allegations to support a claim for intentional infliction of emotional distress, as the harms alleged by the plaintiff did not rise to the level of extreme and outrageous conduct. Vendetto and Ricci also argue that the plaintiff was not constructively discharged because the time between the last alleged incident of harassment and the plaintiff's retirement is far too distant in time, and because they are not the plaintiff's employers and therefore lacked the authority to discharge him.

Finally, Vendetto and Ricci argue that their alleged actions were justified as they were union officials acting in pursuit of union objectives. Similarly, the plaintiff contends that Vendetto and Ricci have improperly asserted justification as an unpleaded special defense in their motion for summary judgment. Lastly, Vendetto and Ricci argue that the plaintiff has not suffered an actual loss, which is an element for a claim of tortious interference of employment relationship. The plaintiff contends that he did suffer an actual loss, as he alleges that had he continued working he would have made more than his pension, resulting in a net loss.

Because this court determines that Vendetto and Ricci have demonstrated the absence of a genuine issue of material fact that the plaintiff has not suffered a loss as a result of their conduct, it is not necessary for the court to address their arguments concerning each of these hypothetical tort claims that may underlie the plaintiff's claim for tortious interference.

interference, it must establish that, as a result of the interference, the plaintiff suffered actual loss. . . . [P]roof that some damage has been sustained is necessary to [support a cause of action for tortious interference]. . . see also *Goldman* v. *Feinberg*, 130 Conn. 671, 675, 37 A.2d 355 (1944) ('it is essential to a cause of action for unlawful interference . . . that it appear that, except for *the tortious interference of the defendant*, there was a reasonable probability that the plaintiff would have . . . made a profit'. . . ). A major problem with damages of this sort, [however], is whether they can be proved with a reasonable degree of certainty. . . . If the question is whether the plaintiff would have succeeded in attaining a prospective business transaction in the absence of [the] defendant's interference, the court may, in determining whether the proof meets the requirement of reasonable certainty, give due weight to the fact that the question was made hypothetical by the very wrong of the defendant." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, 318 Conn. 847, 864, 873–74, 124 A.3d 847.

Vendetto and Ricci have met their initial burden as the parties moving for summary judgment by showing that the plaintiff has not incurred an actual loss stemming from his retirement. Within the plaintiff's deposition submitted by Vendetto and Ricci, the plaintiff was questioned on whether he was threatened with being fired. See Docket Entry No. 206, pp. 130-32, 215-18. The plaintiff replied with that he was not. Further, the plaintiff testified that he voluntarily retired based on an accumulation of factors and a realization that the city would not support him in a potential investigation over an alleged mishandling of a sexual harassment claim. See Docket Entry No. 206, pp. 182-83, 207-208, 214-15.

Overall, the evidence submitted by Vendetto and Ricci shows that the plaintiff has not

suffered an actual loss as his own deposition testimony demonstrates the absence of a genuine issue of material fact that he voluntarily retired with the maximum amount he can earn from his pension. See Docket Entry No. 206, pp. 15-22, 141-42, 183-85. Because the plaintiff voluntarily retired, he has not suffered an actual loss, and thus he cannot sustain a claim for tortious interference. See *Appleton* v. *Board of Education*, 254 Conn. 205, 757 A.2d 1059 (2000). Our Supreme Court, in *Appleton* v. *Board of Education*, affirmed a ruling on a defendant's motion for summary judgment on a claim for tortious interference of business relations because the plaintiff had not suffered an actual loss, *as she voluntarily retired.* Id., 214. "*Because the plaintiff voluntarily resigned* and was compensated fully until the effective date of her resignation, she has *failed to show any actual loss* that she suffered as a result of the conduct of [the defendants]. The absence of any actual loss is fatal to her claim for tortious interference with contractual relations." (Emphasis added.) *Appleton* v. *Board of Education*, supra, 254 Conn. 214.

Because Vendetto and Ricci have satisfied their burden of demonstrating an absence of a genuine issue of material fact as to the actual loss element of the plaintiff's claims, it is incumbent upon the plaintiff to meet his burden of submitting evidence to show a genuine issue of material fact exists as to this element. Instead, the plaintiff has merely argued that he suffered an actual loss because he was earning $130,000 from his employment and is now earning $109,000 from his pension. Docket Entry No. 206, pp. 15-16, 117. The plaintiff testified at his deposition that he had hoped to continue working until the age of sixty-five. Further, the plaintiff testified at his deposition and stated in his affidavit attached to his objection that he had a reasonable expectation eventually to become chief based on the length of his employment and the praise he had received from Chief Alston. Docket Entry No. 206, pp. 117-18; Docket Entry No.

199, pp. 31 ("That I aspired to continue my career in the New Haven Fire Department (NHFD); That with all the years of experience I had with NHFD, and coming up through the ranks and with Chief Alston calling me the 'hometown hero' or the 'golden child,' I had a reasonable expectation that I would be the next Chief of NHFD."). Nevertheless, viewing the evidence most favorably to the nonmoving party, this evidence of the plaintiff's hopes and expectations are insufficient to demonstrate the existence of a genuine issue of material fact as to whether the plaintiff suffered an actual loss, as these statements are merely predicated on hearsay and his own speculation. Moreover, as noted previously, the undisputed evidence demonstrates that the plaintiff's decision to retire was voluntary.

Accordingly, Vendetto and Ricci's motion for summary judgment as to counts one and four is granted.

*C.*

*Poindexter's MSJ #195*

Poindexter argues that she is entitled to summary judgment on the ground that she did not intrude upon the plaintiff's seclusion or solitude. More specifically, Poindexter argues that the plaintiff's claim of invasion of privacy fails as a mater of law, as the plaintiff has no admissible evidence to establish that Poindexter intruded on his seclusion or solitude but instead bases this claim on unsupported speculation. Poindexter contends it was the plaintiff's own work phone that intercepted the conversation at issue either through the fault of the plaintiff or as a result of a technical issue with the phone system. Poindexter argues that the plaintiff's only admissible evidence to support the allegation that she surreptitiously recorded the plaintiff's phone conversation is that she was in possession of the recording and that the plaintiff merely

speculates that Poindexter eavesdropped through illegal means.

The plaintiff argues that the "viability of this claim [of intrusion upon the seclusion of another] should not be viewed as a matter of law and that there continues to be a genuine issue of material fact." Further, "[t]he plaintiff's Affidavit clearly calls into question the defendant's explanation as to the circumstances under which the tape was generated such that it would be highly offensive to anyone that their private phone conversation would expect to be taped (and then shared publicly)." Docket Entry No. 200, Exhibit A. Additionally, the plaintiff argues that whether he had a reasonable expectation of privacy remains a question of fact. The plaintiff also argues that Poindexter's claim that there was no intent on her part to intrude is ill suited to be disposed of by way of a motion for summary judgment. Lastly, the plaintiff submits an investigation report from Byran Kelly of AEGIS Investigations, which the plaintiff argues "strengthens the plaintiff's claim of wrongful intrusion." The plaintiff in conjunction with this report also offers his own attorney's affidavit to authenticate the report and to speak to the truthfulness of its contents.

"[O]nly evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment. . . . Practice Book § [17-45], although containing the phrase including but not limited to, contemplates that supporting documents to a motion for summary judgment be made under oath or be otherwise reliable. . . . [The] rules would be meaningless if they could be circumvented by filing [unauthenticated documents] in support of or in opposition to summary judgment." (Emphasis omitted; internal quotation marks omitted.) *Nash* v. *Stevens*, 144 Conn. App. 1, 15, 71 A.3d 635, cert. denied, 310 Conn. 915, 76 A.3d 628 (2013).

"[B]efore a document may be considered by the court [in connection with] a motion for

summary judgment, there must be a preliminary showing of [the document's] genuineness, i.e., that the proffered item of evidence is what its proponent claims it to be. The requirement of authentication applies to all types of evidence, including writings . . . . Conn. Code Evid. § 9-1 (a), commentary. Documents in support of or in opposition to a motion for summary judgment may be authenticated in a variety of ways, including, but not limited to, a certified copy of a document or the addition of an affidavit by a person with personal knowledge that the offered evidence is a true and accurate representation of what its proponent claims it to be." (Internal quotation marks omitted.) *New Haven* v. *Pantani*, 89 Conn. App. 675, 679, 874 A.2d 849 (2005).

"It is clear from the Restatement's language that to establish a claim for intrusion upon the seclusion of another, a plaintiff must prove three elements: (1) *an intentional intrusion, physical or otherwise*, (2) upon the plaintiff's solitude or seclusion or private affairs or concerns, (3) which would be highly offensive to a reasonable person. . . . For there to be liability, the defendant's interference with the plaintiff's seclusion must be substantial, must be of a kind that would be highly offensive to a reasonable person, and must be a result of conduct to which a reasonable person would strongly object. . . . In the context of intrusion upon seclusion, questions about the reasonable person standard are ordinarily questions of fact, but they become questions of law if reasonable persons can draw only one conclusion from the evidence. . . .

"As stated previously, the first element of the tort of invasion of privacy by intrusion upon seclusion is an intentional intrusion, physical or otherwise. Although courts often use the phrase 'intentional intrusion,' the Restatement does not define it. A few courts, however, have done so. See, e.g., *O'Donnell* v. *United States*, 891 F.2d 1079, 1082 (3d Cir. 1989). In *O'Donnell*, the plaintiff was a former patient of the Veterans Administration (administration),

who brought an action against the administration for intrusion upon seclusion when it released a summary of his psychiatric treatment to his employer without obtaining authorization to do so. . . . The trial court granted the administration's motion for summary judgment. . . . In reviewing the claim on appeal, the United States Court of Appeals for the Third Circuit defined 'intent' by looking to § 8 of the Restatement (Second) of Torts, which defines the term to mean that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it. . . . Because the Restatement is devoid of any definition for the term 'intrusion,' the court looked to a dictionary for guidance. . . . We follow suit. Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) defines 'intrude' to mean to thrust or force in or upon someone or something especially without permission or welcome. Moreover, the comments and illustrations to § 652B of the Restatement (Second) of Torts suggest that an intrusion upon seclusion claim typically involves a defendant who does not believe that he or she has either the necessary personal permission or legal authority to do the intrusive act. . . . We thus conclude, as other courts have, that an actor commits an intentional intrusion if he believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act." (Citations omitted; emphasis added; internal quotation marks omitted.) *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 172–74, 204 A.3d 717 (2019).

Poindexter has met her burden as the party moving for summary judgment by proffering testimony in her deposition that she did not record the plaintiff's phone conversation. Specifically, she testified at her deposition that the plaintiff called her work phone from his work phone, left her a voice mail message, failed to hang up his phone, and then proceeded to engage in a separate phone conversation that was captured in that same voice mail message. Docket

Entry No. 196, Exh. 1, p 46. It was therefore incumbent on the plaintiff to submit evidence to show that a genuine issue of material fact exists regarding whether any intrusion on the plaintiff's seclusion was intentional. Specifically, the plaintiff needed to provide evidence, be it direct or circumstantial, that Poindexter did intrude upon his seclusion by illegally recording his phone conversation. The plaintiff has not provided any evidence to demonstrate a genuine issue of material fact as to the first element of this claim.

Although the plaintiff argues that there are inconsistencies within Poindexter's deposition testimony that create a genuine issue of material fact, any such inconsistencies do not demonstrate an issue of material fact as to whether there was an intentional intrusion, the alleged illegal phone tapping. The undisputed admissible evidence demonstrates the absence of a genuine issue of material fact that the recording was a result of the plaintiff's own failure to disconnect his call to Poindexter's telephone extension at the conclusion of his intended voice mail message to her. Additionally, the plaintiff's attempt to offer as support an investigation report, created by Bryan Kelly, is unavailing as this evidence is inadmissable. The report itself is hearsay as the plaintiff attempts to offer his own attorney's affidavit to authenticate it. The plaintiff's attorney can only attest to the fact that she retained their services, but not to the truthfulness of the report, its accuracy, or the nature of the work allegedly performed by Bryan Kelly outside of the attorney's presence. Lastly, the report itself is speculative with regard to how the recording may have been obtained. See e.g., Docket Entry No. 200, pp. 27 (the investigation report begins with "[t]his is the working theory").

Accordingly, Poindexter's motion for summary judgment is granted as to count two.

III.

CONCLUSION

For the foregoing reasons, the motions for summary judgment filed by defendants Alston (#188), Vendetto, Ricci (#193), and Poindexter (#195) are granted with respect to counts one, two, four, and five.

Juris No. 421279
Wilson, J.