UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHRISTOPHER ARMSTRONG

Plaintiff,

v.

ANDREW SHIRVELL

Defendant.
_____/

CASE NO. 2:11-cv-11921
HONORABLE ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE
HONORABLE PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

DEMAND FOR JURY TRIAL

DEFENDANT ANDREW SHIRVELL'S MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6) AND MOTION TO STRIKE UNDER FED. R. CIV. P. 12(f), WITH BRIEF IN SUPPORT, AND PRESENTATION OF COUNTERCLAIMS

MOTION TO DISMISS AND MOTON TO STRIKE

1. Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant moves this Court for an order dismissing with prejudice Counts I, II, IV, V, and VI of Plaintiff's complaint for failure to state a claim upon which relief can be granted. In support, Defendant relies on the accompanying brief.
2. Pursuant to Fed. R. Civ. P. 12(f), Defendant moves this Court for an order striking certain paragraphs of Plaintiff's complaint. Specifically, Defendant requests the Court to strike ¶ 6 (in part), ¶ 8-13, ¶ 69 (in part), and ¶ 71 because these paragraphs contain immaterial, impertinent, and scandalous matter. In support, Defendant relies on the accompanying brief.
3. In accordance with E.D. Mich. LR 7.1(a), Defendant sought concurrence from Plaintiff's counsel four days prior to filing the motions and attempted to set-up a conference. However, Plaintiff's counsel indicated to Defendant that she was unavailable to conduct a telephone conference due to an ongoing trial in an unrelated case.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND MOTION TO STRIKE

ISSUES PRESENTED

I. Did Plaintiff fail to plead his defamation claim with specificity?

Defendant answers: Yes.

II. Did Plaintiff establish a prima facie claim of intentional infliction of emotional distress where Defendant's alleged conduct would not arouse the resentment of an average member of the community so much so that he or she would exclaim "Outrageous!"?

Defendant answers: No.

III. Is Plaintiff entitled to recover under a theory of abuse of process where Plaintiff only makes vague allegations concerning Defendant's reporting of a "disturbance" involving a party at Plaintiff's residence?

Defendant answers: No.

IV. Did Plaintiff adequately plead a claim for relief under invasion of privacy: intrusion upon seclusion, solicitude, or private affairs where Plaintiff has failed to show that his job with his "employer" was a "secret and private subject matter" and where Plaintiff has also failed to show that he had a legal right to keep his employment private?

Defendant answers: No.

V. Does Plaintiff's complaint contain factual allegations sufficient to satisfy the elements of criminal stalking?

Defendant answers: No.

VI. Should this Court strike certain allegations from Plaintiff's complaint since those allegations represent immaterial, impertinent, and scandalous matter?

Defendant answers: Yes.

CONTROLLING AUTHORITY

Cases

Bell Atlantic Corp. v. Twombley, 550 U.S. 544 (2007).

Burden v. Elias Bros. Big Boy Rests., 240 Mich. App. 723; 613 N.W.2d 378 (2000).

Dalley v. Dykema Gossett PLLC, 287 Mich. App. 296; 788 N.W.2d 679 (2010).

Doe v. Mills, 212 Mich. App. 73; 536 N.W.2d 824 (1995).

Friedman v. Dozorc, 412 Mich. 1; 312 N.W.2d 585 (1981).

Heike v. Guevara et. al, 654 F. Supp.2d 658 (E.D. Mich. 2009).

Mitan v. Campbell, 474 Mich. 21; 706 N.W.2d 420 (2005).

Roberts v. Auto-Owners Ins. Co., 422 Mich. 594; 374 N.W.2d 905 (1985).

Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc., 197 Mich. App. 48; 495 N.W.2d 392 (1992).

Saldana v. Kelsey-Hays Co., 178 Mich. App. 230; 443 N.W.2d 382 (1989).

Vallance v. Brewbaker, 161 Mich. App. 642; 411 N.W.2d 808 (1987).

Court Rules

Fed. R. Civ. P. 9(g)
Fed. R. Civ. P. 12(b)(6)
Fed. R. Civ. P. 12(e)
Fed. R. Civ. P. 12(f)

Statutes

Mich. Comp. Laws § 600.2911
Mich. Comp. Laws § 600.2954
Mich. Comp. Laws § 750.411h
Mich. Comp. Laws § 750.411i

INTRODUCTION

Plaintiff Christopher Armstrong served as the student body president at the University of Michigan – Ann Arbor, from April 2010 until April 2011. See Complaint, ¶ 5. Defendant Andrew Shirvell is an alumnus of the University of Michigan. Defendant opposed Plaintiff's political agenda. Accordingly, Defendant began protesting Plaintiff and his agenda both online via the internet and in-person, pursuant to his First Amendment rights. Defendant has never engaged in any direct communication with Plaintiff. *Id*. at ¶ 7. Nonetheless, Plaintiff claims that Defendant's actions amounted to defamation (Count I), intentional infliction of emotional distress (Count II), invasion of privacy: false light (Count III), abuse of process (Count IV), invasion of privacy: intrusion upon seclusion, solicitude, or private affairs (Count V), and stalking (Count VI). This Court should dismiss Counts I, II, IV, V, and VI of Plaintiff's complaint for failure to state a claim upon which relief can be granted.

ARGUMENT

A. Standard of Review

Pursuant to Fed. R. Civ. P. 12(b)(6), a party defending against a claim may bring a motion to dismiss for "failure to state a claim upon which relief can be granted." To survive a Rule 12(b)(6) motion to dismiss, the party bringing the claim must plead factual allegations that "raise a right to relief above the speculative level, on the assumption that all of the allegations in the complaint are true." *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544, 545 (2007). If the party bringing the claim fails to plead factual allegations that if proven would raise a right to relief above the speculative level, then dismissal of the claim in question is proper. *Id.*

Pursuant to Fed. R. Civ. P. 12(f), "Upon motion made by a party before responding to a pleading . . . the court may order stricken from any pleading any . . . immaterial, impertinent, or scandalous matter."

B. Count I – For Defamation – Should Be Dismissed

Since Plaintiff has failed to plead his defamation claim with sufficient specificity, it should be dismissed. Claims of libel arising under Michigan law must be plead with specificity. *Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc.*, 197 Mich. App. 48, 52; 495 N.W.2d 392 (1992). "The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication [defamation per quod]." *Mitan v. Campbell*, 474 Mich. 21, 24; 706 N.W.2d 420 (2005) (internal citations omitted). "[W]hen a plaintiff alleges defamation per se, a plaintiff need not allege any special harm because such harm is presumed to have occurred . . . In contrast, when a plaintiff alleges defamation per quod, the plaintiff must specifically allege the special damages that are an element of the claim." *Heike v. Guevara et. al*, 654 F. Supp.2d 658, 674 (E.D. Mich. 2009), citing Fed. R. Civ. P. 9(g) ("If an item of special damage is claimed, it must be specifically stated.").

In his complaint, Plaintiff maintains that all of the countless statements that he attributes to Defendant constitute defamation per se. See Complaint, ¶ 84. However, under Michigan law, defamation per se is expressly limited to words imputing a lack of chastity or the commission of a crime. See Mich. Comp. Laws § 600.2911 and *Burden v. Elias Bros. Big Boy Rests*., 240 Mich. App. 723, 728-29; 613 N.W.2d 378 (2000). As in *Heike*, "Even if the categories of

defamation per se under Michigan law are not limited to only statements regarding unchastity and crimes as Defendant[] contend[s], Plaintiff has not identified a category of defamation per se that encompasses the statements that [he] alleges that Defendant[] made. Thus, there is no justification for concluding that Plaintiff has alleged defamation per se" and, therefore, his claim should be treated as alleging defamation per quod. *Heike*, 654 F. Supp.2d at 676. Here, as in *Heike*, Plaintiff has not sufficiently pled his defamation claim because "Plaintiff has not alleged any specific pecuniary harm resulting from the defamation, nor has [he] explained how any reputational damage translated into economic harm." *Id.* Accordingly, Count I of the complaint should be dismissed.

In the alternative, should the Court not dismiss the defamation claim, Defendant moves for a more definite statement pursuant to Fed. R. Civ. P. 12(e) so that he can answer the defamation allegations as well as the allegations encompassing Count III, invasion of privacy: false light, which is the one count that Defendant is not challenging in his motion to dismiss. Plaintiff's factual allegations do not reference specific dates and times. For example, Plaintiff does not explain when Defendant supposedly "falsely and maliciously represented that Plaintiff is an 'elite pervert.'" See Complaint, ¶ 61. Yet another example is contained within ¶ 76 of the complaint, in which Plaintiff fails to identify where and when "Defendant took an interview on national television." Plaintiff's factual allegations involving both Counts I and III are so vague or ambiguous that Defendant cannot reasonably be required to frame a responsive pleading to them. Therefore, Defendant requests this Court to order Plaintiff to amend his complaint with sufficient detail so as to permit Defendant to construct an appropriate response.

C. <u>Count III – For Intentional Infliction of Emotional Distress – Should Be Dismissed</u>

"To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff

must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff." *Dalley v. Dykema Gossett PLLC*, 287 Mich. App. 296, 321; 788 N.W.2d 679 (2010) (internal quotation and citation omitted). With respect to the first element, a defendant's conduct qualifies as extreme and outrageous when "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!,'" *Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594, 603; 374 N.W.2d 905 (1985) (internal quotation omitted). "Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities do not give rise to liability for intentional infliction of emotional distress." *Dalley*, 287 Mich. App. at 321 (internal quotation and citation omitted).

In *Dalley*, the Michigan Court of Appeals ruled that the state circuit court was correct in dismissing the plaintiffs' intentional-infliction-of-emotional-distress claim for failure to state a claim on which relief can be granted where the plaintiff's allegations "fail[ed] to describe conduct so extreme or outrageous that it surpasses all bounds of decency in a civilized society." *Id*. at 321. In *Dalley*, the court assumed that defendant John Ferroli, an attorney, misled the plaintiff, who was suffering from AIDS (a terminal disease), about the scope of authority that he and his agents had in order to enter the plaintiff's bedroom and remain there for eleven hours while they downloaded personal information from all of the plaintiff's computers.

Here, the accusations regarding Defendant's conduct, which are assumed to be true for purposes of this motion, would not arouse the resentment of an average member of the community so much so that he or she would exclaim "Outrageous!" Plaintiff concedes that Defendant has never met Plaintiff nor spoken with Plaintiff. See Complaint, ¶ 7. In fact, Plaintiff makes no allegation that Defendant has ever directly communicated with Plaintiff

whether through e-mail, instant messaging, phone calls, or other means. Rather, Plaintiff accuses Defendant of posting insults, implied threats, and unflattering information concerning Plaintiff via the social network Facebook and via a blog. *Id*. at ¶ 14-65. Plaintiff also accuses Defendant of going on national television and calling Plaintiff "the real bigot." *Id*. at ¶ 76. Plaintiff also maintains that Defendant made certain representations to Plaintiff's "employer," such as that Plaintiff is a "racist" and is a "viciously militant homosexual activist" – the same allegations that were purportedly included on Defendant's blog. *Id*. at ¶ 44, 47. Plaintiff further accuses Defendant of "lingering" outside Plaintiff's home during a party and while demonstrating against Plaintiff. *Id*. at ¶ 66-67.

As in *Dalley*, "At worst, defendant[] engaged in actions that were annoying and oppressive, but these actions do not rise to the level of outrageousness necessary to establish a claim for intentional infliction of emotional distress." *Dalley*, 287 Mich. App. at 321. Because Defendant cannot be held liable to Plaintiff on the basis of intentional infliction of emotional distress, Count III of the complaint should be dismissed.

D. <u>Count IV – For Abuse of Process – Should Be Dismissed</u>

"To recover upon a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose and (2) an act in the use of process which is improper in the regular prosecution of the proceeding." *Friedman v. Dozorc*, 412 Mich. 1, 30; 312 N.W.2d 585 (1981) (internal citation omitted). Put differently, "A meritorious claim of abuse of process contemplates a situation where the defendant has availed himself of a proper legal procedure for a purpose collateral to the intended use of that procedure . . .." *Dalley*, 287 Mich. App. at 322, quoting *Vallance v. Brewbaker*, 161 Mich. App. 642, 646; 411 N.W.2d 808 (1987). Pleadings alleging abuse of process must be specific concerning the "act committed in the use of process that is

improper in the regular prosecution of the proceeding." *Dalley*, 287 Mich. App. at 322 (internal quotation and citation omitted).

Here, Plaintiff makes a vague allegation that "Criminal investigation and proceedings were instituted or furthered by the Defendant against the Plaintiff." See Complaint, ¶ 109. However, Plaintiff has alleged nothing more in his statement of the facts other than that Defendant "called the Ann Arbor police and reported a disturbance in order to generate a 'newsworthy' event for his blog." *Id*. at ¶ 66. Here, Plaintiff has not met his burden in identifying an act or facts supporting his allegation that Defendant's reporting of a "disturbance" involving a party at Plaintiff's residence amounts to "the use of process which is improper in the regular prosecution of the proceeding."

Moreover, even if Plaintiff had adequately plead the second element of the tort of abuse of process, his claim is still insufficient in that the "ulterior purpose alleged must be more than harassment, defamation, exposure to excessive litigation costs, or even coercion to discontinue business." *Dalley*, 287 Mich. App. at 323 (internal quotation and citation omitted). Here, Plaintiff only pleads that "Defendant abused the legal process by using it for his ulterior motive or purpose to cause vexation, trouble, embarrassment, damage to Plaintiff's reputation." See Complaint, ¶ 110. Therefore, for all the forgoing reasons, Count IV of the complaint should be dismissed.

E. Count V – For Invasion of Privacy: Intrusion Upon Seclusion, Solicitude, or Private Affairs – Should Be Dismissed

"There are three necessary elements to establish a prima facie case of intrusion upon seclusion: (1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that

subject matter through some method objectionable to a reasonable man." *Dalley*, 287 Mich. App. at 306, quoting *Doe v. Mills*, 212 Mich. App. 73, 88; 536 N.W.2d 824 (1995).

With respect to the first element, Plaintiff's complaint fails to set forth facts that show that Plaintiff's job with his employer was a "secret and private subject matter." Plaintiff makes no effort to plead the nature of his "employment." Concerning the second element, again, Plaintiff has failed to set forth any facts that show that he had a right to keep his employment private. Plaintiff only avers that he "maintained privacy concerning details of his professional life." See Complaint, ¶ 116. Assuming that allegation to be true, it is nonetheless insufficient to show that Plaintiff had a right under the law to keep his employment secret from public view. As the Michigan Court of Appeals explained in *Saldana v. Kelsey-Hays Co.*, 178 Mich. App. 230, 234; 443 N.W.2d 382 (1989), the "duty to refrain from intrusion into another's private affairs is not absolute in nature, but rather is limited by those rights which arise from social conditions . . ."

Because Plaintiff cannot meet the first two elements of his invasion-of-privacy-intrusion-upon-seclusion claim, Count V of the complaint should be dismissed.

F. <u>Count VI – For Stalking – Should Be Dismissed</u>

Under Mich. Comp. Laws § 750.411h and 750.411i, an individual who engages in stalking or aggravated stalking is guilty of a crime. Under Mich. Comp. Laws § 600.2954, a victim of stalking may maintain a civil action against "an individual who engages in conduct that is prohibited under section 411h or 411i of the Michigan penal code" regardless of whether that individual has been criminally charged or convicted. Nevertheless, in order to state a viable claim under Mich. Comp. Laws § 600.2954, a plaintiff must plead facts sufficient to satisfy the elements of criminal stalking. Here, Plaintiff's allegations fall far short of making a prima facie

case that Defendant engaged in behavior prohibited under Mich. Comp. Laws § 750.411h or 750.411i.

Criminal stalking means "a willful course of conduct involving repeated or continued harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." Mich. Comp. Laws § 750.411h(1)(d). The statute specifically defines "harassment" as "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress." Mich. Comp. Laws § 750.411h(1)(c). Furthermore, "unconsented contact" is "any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued." Mich. Comp. Laws § 750.411h(1)(e).

As recounted earlier, Plaintiff concedes that Defendant has never met Plaintiff nor spoken with Plaintiff. See Complaint, ¶ 7. In fact, Plaintiff makes no allegation that Defendant has ever directly communicated with Plaintiff whether through e-mail, instant messaging, phone calls, or other means. Rather, Plaintiff accuses Defendant of posting insults, implied threats, and unflattering information concerning Plaintiff via the social network Facebook and via a blog. *Id*. at ¶ 14-65. Plaintiff also accuses Defendant of going on national television and calling Plaintiff "the real bigot." *Id*. at ¶ 76. Plaintiff also maintains that Defendant made certain representations to Plaintiff's "employer," such as that Plaintiff is a "racist" and is a "viciously militant homosexual activist" – the same allegations that were purportedly included on

Defendant's blog. *Id*. at ¶ 44, 47. Plaintiff further accuses Defendant of "lingering" outside Plaintiff's home during a party and while demonstrating against Plaintiff. *Id*. at ¶ 66-67.

Regarding the two aforementioned allegations of conduct, Plaintiff does not allege that Defendant ever entered onto or remained on property owned, leased, or occupied by Plaintiff. See Mich. Comp. Laws § 750.411h(1)(e)(iv). In ¶ 23 of the complaint, Plaintiff does make a general accusation that "Defendant began showing up at Plaintiff's school and residence unannounced and uninvited; Defendant systematically followed Plaintiff and began surreptitiously cataloguing Plaintiff's movements and interactions with others." However, as described above, the only allegation that Plaintiff makes in support of the contention in ¶ 23 is that Defendant was "lingering" outside Plaintiff's home during a party and while demonstrating against Plaintiff soon thereafter. Plaintiff does not specifically allege that Defendant followed or appeared within the sight of Plaintiff during either event. See Mich. Comp. Laws § 750.411h(1)(e)(i). And while Plaintiff does allege that Defendant "snapp[ed] photographs and videotap[ed] attendees of the party," Plaintiff does not allege that Defendant took photographs or videotaped Plaintiff specifically. See Complaint, ¶ 66.

In addition, other than requesting retractions of the alleged "defamatory" statements long after the alleged conduct had occurred, Plaintiff does not aver that he ever requested Defendant to once stop any of the activities that Plaintiff now claims made him feel "harassed." See Mich. Comp. Laws § 750.411h(4).

For all the reasons above, Plaintiff's complaint does not contain factual allegations sufficient to satisfy the elements of criminal stalking. Therefore, Count VI should be dismissed.

G. <u>Paragraphs 6 (in part), 8-13, 69 (in part), and 71 Should Be Stricken</u>

Pursuant to Fed. R. Civ. P. 12(f), the following paragraphs should be stricken from

Plaintiff's complaint. ¶ 6 should be partly stricken because Defendant's occupation and employment are immaterial to the action. With respect to ¶ 8-13, the allegations contained therein represent impertinent and scandalous matter, which are completely immaterial to the action. ¶ 69 should also be partly stricken because Defendant's employment, again, is not at issue here and this represents immaterial matter. Finally, the allegations made by Defendant's former employer as contained within ¶ 71 are immaterial to the action, and, therefore, this paragraph should be stricken as well.

CONCLUSION

As demonstrated above, Plaintiff has failed to state a claim upon which relief can be granted with respect to Counts I, II, IV, V, and VI of Plaintiff's complaint. Therefore, the Court should dismiss those claims against Defendant and award such other relief as it deems appropriate, including costs, attorney fees, and any other available sanctions for having to defend against these meritless claims.

PRESENTATION OF DEFENDANT ANDREW SHIRVELL'S COUNTERCLAIMS

COUNTERCLAIM #1 OF DEFENDANT:
TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP

1. This Court has subject matter jurisdiction of this action under Article III, § 2 of the United States Constitution and 28 U.S.C. § 1332. This counterclaim is a compulsory counterclaim under Fed. R. Civ. P. 13(a). This Court has supplemental jurisdiction over the counterclaim under 28 U.S.C. § 1367(a).

2. Defendant was employed as an assistant attorney general with the Michigan Department of Attorney General (hereafter referred to as the "Department") from May, 2007, until November 8, 2010.

3. Plaintiff was the first openly homosexual student body president at the University of Michigan and served in that position from April, 2010, until April, 2011.

4. Plaintiff was aware of Defendant's employment with the Department as early as May, 2010.

5. On September 13, 2010, Plaintiff filed a meritless request for a personal protection order against Defendant with the Washtenaw County Circuit Court. Plaintiff filed his request even though he had never had any face-to-face conversation or direct communication with Defendant.

6. On the same day that Plaintiff filed his personal protection order request, Washtenaw County Circuit Court Judge Nancy C. Francis denied Plaintiff's request for an *ex parte* issuance.

7. On September 14, 2010, Plaintiff demanded that the University of Michigan Department of Public Safety issue a "trespass warning" to Defendant in order to prohibit Defendant from entering campus and exercising his First Amendment rights to protest Plaintiff and

Plaintiff's agenda. That same day, the Department of Public Safety acquiesced to Plaintiff's demand and barred Defendant from campus.

8. On September 29, 2010, Defendant's boss, Attorney General Mike Cox, appeared on CNN's Anderson Cooper 360 show and defended Defendant's conduct as activity protected by the First Amendment.

9. The next day, on September 30, 2010, Plaintiff, without having served Defendant any notice of the personal protection order request, released his request to the media (along with a multi-page narrative of events), stated that a hearing on the request was scheduled for October 4, 2010, and announced that Defendant had been barred from the University of Michigan campus at Plaintiff's request. During the evening of September 30, 2010, a detective with the Eaton County Sheriff's office served Defendant with notice of the hearing on the request for a personal protection order.

10. The following day, on October 1, 2010, Defendant's employer, the Department, announced that it would conduct an internal investigation of Defendant.

11. On October 4, 2010, Plaintiff, through an attorney provided by the University of Michigan, unilaterally rescheduled the personal protection order hearing for October 25, 2010.

12. On October 8, 2010, Plaintiff met with Defendant's boss, Attorney General Mike Cox, and was subsequently interviewed by attorney general investigator Michael "Mike" Ondejko and another representative of the Department.

13. On October 12, 2010, at Plaintiff's urging, the Michigan Civil Rights Commission issued a resolution condemning Defendant's conduct toward Plaintiff and demanding that Defendant be fired from the Department.

14. On October 18, 2010, at Plaintiff's urging, the Ann Arbor City Council passed a unanimous resolution in support of the Michigan Civil Rights Commission's October 12, 2010 resolution that called for Defendant to be fired from the Department.

15. On October 18, 2010, the Department concluded its internal investigation of Defendant.

16. In a letter dated October 20, 2010, the Department wrote to Defendant to schedule a disciplinary conference for November 5, 2010. The date of the disciplinary conference was leaked to the media and Plaintiff was aware of it by October 25, 2010.

17. On October 25, 2010, the day of the scheduled personal protection order hearing, Plaintiff voluntarily dismissed his request for a personal protection order just hours before the start of the hearing. As a result, Plaintiff became the focus of unfavorable news coverage.

18. On October 28, 2010, Defendant learned through the media that Plaintiff had filed a meritless "harassment" and/or "stalking" complaint with the University of Michigan Department of Public Safety. Two days prior, on October 26, 2010, the Washtenaw County Prosecutor's office had issued a memorandum, in which it refused to file charges against Defendant, finding that Defendant's activity constituted constitutionally-protected speech, as Defendant "has a right to criticize the qualifications, campaign promises, or public views of the student body president."

19. On or about October 26, 2010, Plaintiff retained high-profile attorney Deborah Gordon, a lawyer who typically litigates employment-related matters.

20. On October 26, 2010, the Department re-opened its internal investigation into Defendant.

21. On October 29, 2010, Plaintiff, through his attorney, published and distributed a press release, entitled "President of University of Michigan Student Assembly Seeks Disbarment of Assistant Attorney General." In this press release, issued one week before

Defendant was to appear at his disciplinary conference, Plaintiff and his attorney announced that they had each filed a complaint with the Michigan Attorney Grievance Commission against Defendant.

22. On October 30, 2010, Plaintiff's father, Steve Armstrong (who is an attorney licensed outside of Michigan) posted an entry on the Facebook page "Fire Andrew Shirvell," in which he urged "THE SUPPORTERS OF CHRIS ARMSTRONG" to retrieve and save all pages of Defendant's blog and then send them to him and/or Plaintiff's attorney. Steve Armstrong stated, "THEY ARE ABSOLUTELY CRITICAL TO HAVE WITHIN THE NEXT 24 HOURS TO ASSIST US IN THE NEXT PHASE OF OUR STRATEGY TO NEUTRALIZE SHIRVELL."

23. On November 3, 2010, the University of Michigan modified its trespass warning against Defendant after Defendant threatened to sue the University over the blatant violation of his constitutional rights. But at Plaintiff's urging, the modified ban does not permit Defendant to make physical or verbal contact with Plaintiff or to be in the same place as Plaintiff on campus when Defendant can reasonably anticipate Plaintiff will be present – and if Defendant becomes aware of Plaintiff at Defendant's location while on campus, Defendant must leave that immediate area.

24. In essence, the modified trespass warning/campus ban issued on November 3, 2010 serves as an unconstitutional abridgment on Defendant's First Amendment right to freedom of speech and serves as an extrajudicial, de-facto personal protection order for Plaintiff against Defendant.

25. On Friday, November 5, 2010, Defendant's scheduled disciplinary conference took place. At this time, Defendant learned that the individual assigned to investigate Defendant's

conduct was Michael "Mike" Ondejko, a special agent within the Department's criminal division.

26. Special agent Ondejko, along with three other representatives of the Department, comprised the disciplinary review panel at the November 5, 2010 conference.

27. Upon information and belief, special agent Ondejko knew Plaintiff's attorney, Deborah Gordon, from a prior case involving a lawsuit that Gordon had brought in 2007 against Ave Maria School of Law, Defendant's law school, on behalf of three former professors.

28. Upon information and belief, during the course of her lawsuit against Ave Maria, attorney Gordon learned of some disturbing, embarrassing, and potentially criminal information concerning special agent Ondejko, a key witness for her clients in the case against Ave Maria.

29. Following the conclusion of Defendant's disciplinary conference on November 5th, Defendant was told that the conference would resume the following Tuesday or Wednesday.

30. Instead, Defendant's attorney received a voicemail message from a representative of the Department during the afternoon of Saturday, November 6, 2010, stating that the conference would resume on Monday, November 8th.

31. On November 8, 2010, the disciplinary conference resumed for approximately five minutes and all panel members, except special agent Ondejko, were present. Defendant was summarily fired from his position as an assistant attorney general without explanation.

32. On November 8, 2010, Plaintiff's attorney, Deborah Gordon, appeared on CNN's Anderson Cooper 360 show and praised the Department for firing Defendant. More

specifically, Gordon praised special agent Ondejko as a "solid investigator" and demonstrated that she had inside knowledge of the investigation by saying that the internal investigatory report was over "500 pages" long – a detail that was not released to the public and the media at the time.

33. As a direct and proximate result of Plaintiff's actions, Defendant's employer initiated an internal investigation of Defendant in early October, 2010, which resulted in Defendant being improperly fired from his position on November 8, 2010.

34. Plaintiff pursued his course of conduct against Defendant intentionally and without justification. Plaintiff's course of conduct was politically motivated and intended to make an example out of Defendant in order to deter others from criticizing Plaintiff's homosexual activist agenda.

35. Defendant has suffered significant loss of income, future earnings, and the right to enjoyment of his livelihood as well as emotional distress, humiliation, mortification, embarrassment, sleeplessness, anxiety, and depression as the result of Plaintiff's tortious conduct.

COUNTERCLAIM #2 OF DEFENDANT: DEFAMATION

36. Defendant repeats and re-alleges paragraphs 1 through 35 as if set forth fully herein.

37. In Plaintiff's October 29, 2010 press release, described above, Plaintiff falsely and maliciously represented that Defendant was engaging in "reckless, bullying behavior" with respect to Plaintiff.

38. Specifically, Plaintiff falsely and maliciously stated, "I felt that I could not stand by and let Mr. Shirvell continue his reckless, bullying behavior."

39. The October 29, 2010 press release was widely distributed to the media.

40. The press release – in its entirety – was posted on the website of the *Detroit Free Press*, where potentially thousands of individuals accessed it, on or about October 29, 2010.

41. Plaintiff's defamatory statement concerning Defendant was republished on countless websites and in newspaper articles on or about October 29, 2010.

42. Plaintiff's publication and dissemination of the above false statement were not privileged.

43. Plaintiff, who has never met or spoken to Defendant, published his false statement, negligently, with knowledge of the falsity of the statement, and/or with reckless disregard of its truth or falsity.

44. Plaintiff's statement constituted defamation per quod.

45. Plaintiff's publication of his statement led Defendant's employer to terminate Defendant from his position as an assistant attorney general on November 8, 2010.

46. Additionally, Plaintiff's statement tends to so harm the reputation of Defendant as to lower his reputation in the community or deter third persons from associating or dealing with him.

47. The reputational damage that Defendant has sustained as a result of Plaintiff's statement includes future loss of earnings and the right to enjoyment of his livelihood.

48. The injuries that Defendant sustained as a result of Plaintiff's defamatory statement also include emotional distress, humiliation, mortification, embarrassment, sleeplessness, anxiety, and depression.

COUNTERCLAIM #3 OF DEFENDANT: INVASION OF PRIVACY: FALSE LIGHT

49. Defendant repeats and re-alleges paragraphs 1 through 48 as if set forth fully herein.

50. Plaintiff's statement published on October 29, 2010 was unreasonable and highly objectionable because Plaintiff attributed characteristics, conduct, or beliefs concerning Defendant that were false and placed Defendant in a false position.

51. Plaintiff published his false statement, negligently, with knowledge of the falsity of the statement, and/or with reckless disregard as to the falsity of the publicized matter and the false light in which Defendant was placed.

52. As a direct and proximate result of Plaintiff's conduct, Defendant was fired from his position as an assistant attorney general and has suffered significant loss of income, future earnings, and the right to enjoyment of his livelihood as well as emotional distress, humiliation, mortification, embarrassment, sleeplessness, anxiety, and depression.

WHEREFORE, Defendant Andrew Shirvell demands judgment from Plaintiff Christopher Armstrong in whatever amount he is found to be entitled plus interest, costs, reasonable attorney fees, and such other relief as the Court finds just and equitable.

DEMAND FOR JURY TRIAL

Under Fed. R. Civ. P. 38(b), Defendant demands jury trial of all issues raised by Plaintiff's complaint (to the extent they are not otherwise dismissed by this Court) and Defendant's counterclaims.

Respectfully submitted,

s/Andrew L. Shirvell

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Dated: May 6, 2011

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2011, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Honorable Arthur J. Tarnow
Deborah L. Gordon
Sarah S. Prescott

and I hereby certify that I have also mailed by United States Postal Service the papers to the following individuals:

Honorable Arthur J. Tarnow
United States District Judge
Theodore Levin U.S. Courthouse
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