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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MARIE ANDERSEN, Plaintiff, v. CITY OF MISSOULA and JOHN DOES 1-10, Defendants.	Cause No. 9:13-cv-154-DLC **DEFENDANT CITY OF MISSOULA'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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Plaintiff Marie Andersen ("Andersen") claims Defendant City of Missoula ("City") is liable to her under a variety of theories because Municipal Court Judge Jenks chose not to renew Andersen's appointment as the part-time assistant municipal court judge. Andersen does not have sufficient evidence to support any of her claims and even if she did, they would be barred by judicial immunity and the statute of limitations.

I. FACTUAL BACKGROUND

Andersen was first appointed part-time assistant municipal court judge in 2006, by Municipal Court Judge Louden. Def.'s Stmt. Undisputed Facts ("SUF"), ¶¶ 1-2. When Louden retired mid-term five years later, Andersen sought appointment as his replacement. *Id*. at ¶ 4.[1]

The City Council appointed Kathleen Jenks ("Judge Jenks") as municipal court judge. *Id*. at ¶ 5. On December 2, 2011, Judge Jenks appointed Andersen as her part-time assistant judge. *Id*. at ¶ 8. The oath of office Andersen signed states the appointment was for a term of one year. *Id*., ¶¶ 9-10. Likewise, a "Notice of Appointment," signed and sealed by City Clerk Marty Rehbein and submitted to the Supreme Court of Montana Commission on Courts of Limited Jurisdiction, describes Andersen's term as beginning on December 2, 2011 and ending on December 2, 2012. *Id*., ¶ 11.

Judge Jenks' goals upon taking office were to make it easier and less time consuming for members of the public to appear and pay their fines in municipal court and to improve the court's caseload management system. *Id*., ¶ 7. Judge

[1]In the course of the application process, Andersen was asked about the assistant judge position, including what criteria she would use to choose an assistant. SUF at ¶ 55.

Jenks had ultimate authority for the operation of Municipal Court. *Id*., ¶ 6.

Over a 10-month period of working with Andersen, Judge Jenks became dissatisfied with Andersen's performance and professionalism and frustrated by what she perceived as Andersen's reluctance to cooperate with her and other court staff. *Id*., ¶¶ 12- 13. For example, Municipal Court maintains a computerized database system to track its cases, but Andersen didn't know how to use the system, because according to her, "it wasn't part of what [she] was responsible for." *Id*., ¶ 29. Instead, Andersen tracked defendants by "writing on the back of their ticket" until she started doing written sentencing orders. *Id.* And when Andersen issued written orders, Judge Jenks sometimes had to comment on them and seek clarification. *Id*., ¶¶ 14-15. For example, Judge Jenks had to remind Andersen that orders are more than "just notes" and should include a defendant's first and last names. *Id*. But there too, Andersen denied responsibility, claiming the court administrator told her she didn't have to use first and last names in her orders. *Id*., ¶ 16.

Similarly, Andersen denied responsibility for tracking defendants referred to the jurisdiction of Co-Occurring Court even though she presided over that court at least one day a month and was the only Municipal Court employee involved in the program.[2] *Id*., ¶¶ 34- 35, 39. Judge Jenks asked Andersen for the names of defendants who had been referred to Co-Occurring Court and to describe the procedure for how they were referred, but Andersen could not provide that

[2]Co-Occurring court is under the umbrella of the Montana 4th Judicial District Court and is a court that monitors intensive treatment for criminal defendants referred by District Court, Justice Court or Municipal Court. The defendants referred to Co-Occurring Court have one or more chemical or mental health issues.

information. *Id*., ¶¶ 36-37.

Moreover, Andersen understood it was important that Co-Occurring Court did not maintain jurisdiction over defendants longer than Municipal Court would have had jurisdiction of them, but Andersen didn't know if that ever happened and never implemented a procedure to insure it didn't. *Id*., ¶ 38. When Judge Jenks asked Andersen for information concerning these issues, Andersen deferred the questions to Brenda Desmond, a District Court employee. *Id*., ¶ 39.

Judge Jenks and Court Administrator Tina Schmaus ("Schmaus") were further frustrated by what they perceived to be Andersen's refusal inform the court of her work schedule and unwillingness to make herself available to staff for court-related questions. *Id.* ¶¶ 31-32. Availability to court staff seemed to be an issue with Andersen even under Louden. *Id*., ¶ 33. In 2010, Andersen e-mailed the court administrator at the time to complain that "a clerk came into my office and woke me up to ask a question." *Id*. Andersen described the clerk's behavior as "disrespectful," "flippant," and "unbelievable" then informed the court administrator that clerks could no longer come into her office or even knock on her door. *Id*. In 2012, Andersen proposed a schedule wherein she would be available to court staff for only a designated 15 minutes per day. *Id.*, ¶ 32. And when Judge Jenks asked Andersen to work Mondays instead of Fridays, Andersen complained the change was "arbitrary" in part because Andersen says her court schedule impacts no one but herself. *Id*.[3]

[3]In her deposition, Andersen repeatedly stated, "I don't know," when asked if her failure to be in court on a particular day or time would affect how other City employees, such as City prosecutors or police officers, scheduled their own time to be in court. *Id.*

Judge Jenks was also concerned about matters involving Andersen she believed created the appearance of impropriety. *Id*., ¶ 17. For example, Andersen presided over cases involving contested parking tickets, but would periodically park illegally – even though she had her own reserved parking space near City Hall – then ask her clerk to "take care of" her parking tickets. *Id*., ¶¶ 18-20. When Judge Jenks learned of Andersen's practice, she informed Andersen she could no longer park illegally and expect the City to take care of her tickets. *Id*., ¶ 21. And even after Andersen's employment with the City had ended, she demanded the City pay or waive her parking tickets. *Id*., ¶ 22.

In another instance, Andersen spontaneously asked an attorney who was waiting in the courtroom to appear with a defendant to take the bench and preside over jail court. *Id*., ¶ 25. The attorney was not certified as a substitute judge. *Id*., ¶ 26. Judge Jenks asked Andersen not to do anything like that again, but Andersen did not consider it a problem, stating "I don't see that as a performance issue, because in the past that would have been a normal thing to do, and so I was just doing what was normal." *Id*., ¶¶ 26-27.

All of these and similar concerns precipitated Judge Jenks' decision not to renew Andersen's appointment. *Id*., ¶ 41. On October 11, 2012, Judge Jenks met with Andersen to communicate that decision and to discuss a guest editorial that had been published in the newspaper that day. *Id*. The editorial criticized Judge Jenks' decision to discontinue participation in Co-Occurring Court and attributed it to an unwillingness to help the mentally ill. *Id*. According to Andersen, Judge Jenks blamed Andersen for the editorial and told her, "you can't be here anymore." *Id*., ¶ 43. Andersen told Judge Jenks that she did not have anything to do with the

Missoulian article but Judge Jenks responded, "it doesn't matter anymore." *Id.* Andersen admits Judge Jenks never told her she was "fired" but says that's how she took it. *Id.*, ¶ 42.

Judge Jenks testified she felt she would need to publicly respond to the editorial to answer questions about discontinuing participation in Co-Occurring Court and believed the explanation would reflect poorly upon Andersen because she would need to explain her concerns about the way Municipal Court defendants were handled under Andersen's participation in the program. *Id.*, ¶ 43. Judge Jenks testified it put her in the untenable position of criticizing her own assistant judge while allowing her to continue to preside over cases. *Id.*

Immediately following the October 11, 2012 meeting, Andersen called her attorney, wrote a letter telling Judge Jenks to direct all future communication to her attorney, and went home. *Id.*, ¶ 45. Judge Jenks subsequently reiterated that Andersen was not "fired" and that she would continue to be paid through the end of her term on December 2, 2012. *Id.*, ¶¶ 42-43.

The following Saturday, Andersen cleaned out her office. *Id.*, ¶ 48. Schmaus and two police officers were present. *Id.* Schmaus testified that she had asked someone from the police department to come into the court because she understood she was supposed to have another person present, the human resources director was running late, and the court and police departments are in the same building. *Id.*, ¶ 49.

Even though Judge Jenks requested she work on a warrant quashing project, Andersen never returned to work. *Id.*, ¶ 45. Nor did Andersen file a grievance with the City. *Id.*, ¶ 51. Instead, she filed this lawsuit. Doc. 1-1.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. A party moving for summary judgment who does not have the burden of persuasion at trial must produce evidence which either: (1) negates an essential element of the non-moving party's claim, or (2) shows that the non-moving party does not have enough evidence of an essential element to ultimately carry his burden at trial. *Nissan Fire & Marine Ins. Co. Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

If the moving party makes the requisite showing, the burden then shifts to the party opposing summary judgment to "set forth specific facts showing that there is a genuine issue for trial." *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 923 (9th Cir. 1987). And the Court's ultimate inquiry is to determine whether the "specific facts" set forth by the non-moving party, coupled with the undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence. *T.W. Elec. Serv., Inc. v. Pacific Elec.Contractors Ass'n,* 809 F.2d 626, 630, 631 (9th Cir. 1987).

III. ARGUMENT

Andersen's own allegations and testimony demonstrate that each of her seven claims fail as a matter of law. Further, even if summary judgment were not appropriate on one or more of her claims, judicial immunity or the statute of limitations bars them.

A. Andersen's Wrongful Discharge Claim Fails.

Andersen's wrongful discharge claim fails because the WDEA does not apply to her, and, even if it did, the City had "good cause" not to renew her one-year appointment.

The WDEA does not apply to an employee covered by a contract for a specific term, instead, employers have discretion to non-renew specific term contracts without a showing of good cause. Mont. Code Ann. § 39-2-912, *Farris v. Hutchinson*, 838 P.2d 374, 378 (Mont.1992). Here, Andersen was appointed to a one-year term and signed an oath of office reflecting as much. SUF, ¶¶ 9-11.

Further, even if the WDEA applied, Andersen's claim would fail because Judge Jenks had "good cause" for her decision. Further, an employer has the right to "exercise discretion" over whom "it will employ and keep in employment," particularly when the individual holds a sensitive, management-level position. *Sullivan v. Contl. Const. of Montana, LLC*, 299 P.3d 832, 835 (Mont. 2013).

Moreover, the WDEA does not require the employer to prove "the truth of the allegations of bad behavior against [an employee.]" *Id.* Rather, it is enough that the employer had legitimate concerns the employee could jeopardize its operation. *Id.*

Here, regardless of whether Andersen's behavior was considered "normal" under Louden, she cannot dispute Judge Jenks expressed dissatisfaction with her performance. SUF at ¶¶ 12-14, 17, 21, 25, 27, 30-31, 36, 40. Andersen held a position that was undoubtedly as "sensitive" as the managerial position described in *Sullivan*, 299 P.3d at 834-835. Judge Jenks thought Andersen's performance unsatisfactory. SUF at ¶¶ 12-14, 17, 21, 25, 27, 30-31, 36, 40. Just as in *Sullivan*,

the City need not prove every underlying fact. *Sullivan*, 299 P.3d at 837. Rather, the appropriate inquiry is simply whether or not Judge Jenks had a "business reason that was not arbitrary or capricious" not to renew Andersen. *Id.*

The undisputed facts demonstrate that Judge Jenks was dissatisfied with Andersen's performance. Judge Jenks' concerns were logically related to "the needs of the [court]," and were not "false, whimsical, arbitrary or capricious." SUF, ¶¶ 113. Thus, even if the WDEA applied to Andersen, the City had "good cause" for the non-renewal. Additionally, Montana law vests the municipal court judge with authority to appoint the assistant judge and to administer the court in the manner he or she deems most effective. Mont. Code Ann. § 3-6-201, see also Mont. Code Ann. § 3-1-113.

Andersen also claims the City violated the WDEA by terminating her in violation of its own express personnel policies. Doc. 1-1 at ¶ 36. Yet when asked which particular policy was violated, Andersen could not identify one. SUF at ¶ 114.

The WDEA is inapplicable to Andersen, and the undisputed facts demonstrate no rational jury would return a verdict in her favor even if it were.

B. Andersen's Violation of Civil Rights Claim Fails.

Andersen claims her constitutional rights were violated in violation of 42 U.S.C. § 1983 because she was not afforded due process prior to being notified her appointment would not be renewed. Andersen's claim fails because she had no written guarantee her employment would continue beyond the expiration of her one-year term and without that, she had no property interest which would entitle her to due process.

The purpose of 42 U.S.C. § 1983 "is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights." *Valley Bail Bonds v. Budeski*, 2014 U.S. Dist. LEXIS 102055, 2014 WL 3732632 (D. Mont. July 25, 2014) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)). The statute itself does not create rights but merely serves as a vehicle for enforcement of clearly established constitutional rights. *Id.*

To establish a right to due process before termination of employment, there must be a property interest in continued employment for a certain term. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). A "'property interest' is not created by the Constitution but exists in employment only if some written contract, state law, or regulation ... states or otherwise provides a specified term of employment.'" *Boreen v. Christensen*, 884 P.2d 761, 770 (Mont. 1994).

Here, Andersen fulfilled the one-year term Judge Jenks appointed her to pursuant to § 3-6-201, MCA, and she has not identified any other contract, statute or regulation that clearly establishes she was entitled to the position beyond that term. Thus, Andersen had no property interest.

Further, Andersen's claim would fail even if she could establish a property interest. Municipal liability under § 1983 attaches only where it has a policy that amounts to "deliberate indifference" to a constitutional right and that policy caused the violation complained of. *Oviatt by and through Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992), *Miller v. City of Red Lodge*, 65 P.3d 562, 568-569, *Valley Bail Bonds*, 2014 U.S. Dist. LEXIS 102055, 2014 WL 3732632 (D. Mont. July 25, 2014), *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. Cal. 2011).

Andersen has not alleged that the City had a policy that amounted to "deliberate indifference" of her constitutional right or that such a policy caused her appointment not to be renewed. As such, Andersen's civil rights claim fails as a matter of law.

C. Andersen's Tortious Interference With Economic Advantage Claim Fails.

Tortious interference with economic advantage requires action by a "malicious interloper." *Flagstone Dev., LLC v. Joyner*, 2011 U.S. Dist. LEXIS 133987, 2011 WL 5837013(D. Mont. Nov. 21, 2011). To establish the claim, a plaintiff must prove: 1) the interloper's acts were intentional and willful; 2) the acts were calculated to cause damage to the plaintiff in his or her business; 3) the acts were done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor; and 4) that actual damages and loss resulted. *Emmerson v. Walker*, 236 P.3d 598, 605 (Mont. 2010). Here, Andersen alleges the City damaged her by tortiously interfering with her City employment. SUF at ¶ 59. Essentially, Andersen alleges the City was a "malicious interloper" between her and itself. *Id.* Further, Andersen cannot prove her non-renewal was "without right or justifiable cause." *Id.*, ¶¶ 11-40.

Moreover, Andersen's tortious interference claim is derivative of her wrongful discharge and civil rights claims and cannot survive if those predicate claims fail. *See Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990). Such allegations are insufficient for Andersen to carry her burden on this claim at trial.

D. The City Did Not Defame Andersen.

The threshold question in a defamation claim is whether the defendant's statement satisfies the statutory elements of slander or libel. *Anderson v. City of Troy*, 68 P.3d 805, 807 (Mont. 2003). Slander is a false and unprivileged publication other than libel which: (1) wrongfully charges a person with crime; (2) imputes the present existence of an infectious, contagious, or loathsome disease; (3) tends directly to injure him in respect to his office or profession (4) imputes impotence or want of chastity; or (5) by natural consequence causes actual damage. *Id*. (citing Mont. Code Ann. § 27-1-803). Libel is "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation." Mont. Code Ann. § 27-1-802.

The plaintiff in a defamation case carries a heavy burden of proof and the defamation test is "stringent." *Wainman v. Bowler*, 576 P.2d 268, 271 (Mont.1978), *McConkey v. Flathead Electric Cooperative*, 125 P.3d 1121, 1130 (Mont. 2005).

If the plaintiff does not allege special damages suffered as a result of the allegedly defamatory words (defamation *per quod*), the claim must be reviewed as one for defamation *per se*. *Wainman v. Bowler*, 576 P.2d 268 at 270 (1978). Under defamation *per se*, it is for the court to decide, as a preliminary matter, whether the alleged defamatory statement is "capable of bearing a particular meaning; and ... whether the meaning is defamatory." *McConkey*, at 1129.

To be defamatory, the words must be more than unpleasant or annoying so as to affect the plaintiff's feelings. *Wainman*, 576 P.2d at 271. Instead, they must be injurious on their face and must specifically refer to the plaintiff. *Id*. at 270-271. Moreover, "[i]f the language is not slanderous *per se* it cannot be made so by innuendo." *Id*. at 270. When the words are incapable of bearing a defamatory meaning, the court need not even reach the question of whether the allegedly defamatory statements were false. *McConkey*, 125 P.3d. at 1129.

Further, "a basic principal in the law of defamation is that an expression of opinion generally does not carry a defamatory meaning and is thus not actionable." *Id*., ¶ 49. The First Amendment protects statements that "cannot reasonably be interpreted as stating actual facts about an individual" or which cannot be proven true or false. *Roots v. Montana Human Rights Network*, 93 P.2d 638, 640 (Mont. 1996).

Certain statements, such as those made in the proper discharge of an official duty, in a judicial or other official proceeding, or in response to an inquiry by an interested person, are privileged. Mont. Code Ann. § 27-1-804, see also, *Nye v. Dept. of Livestock*, 196 Mont. 222, 227 (Mont. 1981), *Bond v. Bon, Inc.*,1998 U.S. App. LEXIS 26947 (9th Cir. Mont. Oct. 16, 1998), *Skinner v. Pistoria*, 194 Mont. 257, 261 (1981).

Here, Andersen has not alleged that she suffered any special damages as a result of the City's allegedly defamatory statements. See SUF at ¶¶ 60-89. Therefore, Andersen's claims must be analyzed to determine if they are defamatory *per se*. Her claim is based upon the following statements:

1. In an October 18, 2012 Missoulian article regarding a police watch or escort when employees are clearing out their offices upon termination of employment with the City, Chief Administrative Officer Bruce Bender stated, "***certain circumstances require that***." SUF at ¶ 61.

That statement does not refer to Andersen specifically and cannot be proven true or false.

2. In a December 4, 2012 Missoulian article regarding appointment of Sam Warren as assistant municipal court judge, Judge Jenks stated he "***worked very hard and is willing to accept the changes***." *Id*. at ¶ 64.

Andersen alleges this statement regarding Sam Warren implied she didn't work hard and wasn't willing to accept changes. *Id.* at ¶ 65. However, this statement doesn't refer to Andersen or assert anything Andersen can prove is false.

3. In a January 28, 2013 Missoulian article regarding the Mayor's rationale for sending a letter to Andersen on October 13, 2011, Mayor Engen was quoted as saying he "***didn't want to see a non-elected judge bring in sweeping changes to the court***." *Id.* at ¶ 66.

Andersen alleges the Mayor statement is defamatory but admits she does not know whether the statement true or false. *Id.*, ¶ 67. Moreover, the statement does nothing more than detail Mayor Engen's opinion.

4. Judge Jenks is alleged to have made an unspecified statement to attorney Michael W. DeWitt to the effect that "***Andersen was an unethical judge***" because she took a victim/witness into her office and coerced her to testify at a trial. *Id.*, ¶ 69.

This unspecified comment, even if proven, is an opinion statement.

5. Schmaus or Bruce Bender are alleged to have told Louden that "***Andersen had Louden's computer checked for pornography***." *Id.*, ¶ 71.

Andersen has no direct evidence Schmaus or Bender made such a statement, and, even if they did, it doesn't carry a defamatory meaning and is privileged as a statement made in the proper discharge of their official duties.

6. Schmaus is alleged to have made an unspecified statement to Jodine Tarbert to the effect that Andersen was "***unfit to be appointed to replace Judge Louden because of her health.***" *Id.*, ¶ 73.

Even if Andersen could prove Schmaus made that statement, it isn't defamatory and is an opinion statement.

7. In a letter or e-mail Schmaus sent to members of the Commission of Courts of Limited Jurisdiction Committee ("COCLJC") regarding the subject of Municipal Court not filing notices of appointment for judges serving in the court, Schmaus stated she was "***bringing it to light***." *Id.*, ¶ 76.

This statement is not defamatory. It cannot be proven true or false, doesn't refer to Andersen individually and does not carry a defamatory meaning.

8. In a letter to Anne Guest, the director of the Missoula Parking Commission, Schmaus is alleged to have made an unspecified statement "***implying corrupt/ion (sic) and dishonesty because of the old court policy regarding judges' parking tickets***."

Schmaus's e-mail to Anne Guest stated:

> Hi Anne,
> Can you give me a call when you have a minute?
> I wanted to discuss any "historical" conversation that may have taken place between Municipal Court Judges and or staff regarding Judge's parking tickets.
> We are going to pay Judge Andersen's parking ticket fines so she does not get a boot on her car, but it seems like there was an understanding in the past with the Parking Commission that I am not aware of, so I just wanted your input.
> THANK YOU!!
> Tina

Decl. Jenks at Ex. 2.

The e-mail does not carry a defamatory meaning and does not say anything that can be proven true or false.

9. Schmaus is alleged to have told employees in the City's Human Resources Office that Andersen was "***leaving work when [Andersen] was scheduled to be there and leaving the court in a bad position without a judge***." *SUF* at ¶ 78.

Even if Andersen could prove Schmaus made that statement, it doesn't carry a defamatory meaning, and, even if it did, it would be privileged as made to fellow City employees in Schmaus's official capacity as court administrator.

10. Mayor Engen, Bruce Bender, Jim Nugent and Schmaus are alleged to have made general statements to city council members regarding Andersen's "***absenteeism***" and "***alleged efforts to take over the court***." *Id.*, ¶ 79.

These statements do not carry a defamatory meaning, would have been made in the course of the Mayor, Bender, Nugent and Schmaus carrying out their official duties or made without malice in response to an inquiry by an interested party.

11. Assistant City Prosecutor Gary Henricks is alleged to have commented online regarding Andersen's application to be appointed municipal court judge with an unspecified negative statement regarding Andersen's job performance. *Id.*, ¶ 80.

Andersen has not produced a copy of Hendricks' alleged defamatory statement and does not know whether he made it in his official capacity as an assistant City prosecutor. *Id.*, ¶ 81. Andersen has not alleged Hendricks said anything false and concedes Hendricks' comment was made on a website for public comment regarding the Council's appointment of a new municipal court judge. *Id*., ¶ 82. Although, Hendricks' comment may have hurt Andersen's feelings, that falls short of defamation.

12. Schmaus and Judge Jenks are alleged to have made unspecified remarks regarding Andersen's "***cooperation, etc.***," to Judge Perry Miller and Judge Larry Carver. *Id., ¶ 84.*

Such alleged statements are not defamatory in nature and would be considered constitutionally-protected statements of opinion.

13. Schmaus is alleged to have made unspecified remarks regarding Andersen's "***absenteeism,***" and "***how much she was costing the Court***" to Municipal Court staff, staff and attorneys in City Attorneys' Office, and various other individuals. *Id*., ¶ 86.

Such alleged statements are not defamatory in nature and would be considered opinion statements.

14. Judge Jenks is alleged to have made unspecified remarks regarding Andersen's "***lack of cooperation, unethical behavior, absenteeism, etc.***" to Municipal Court staff, staff and attorneys in City Attorneys' Office, Bruce Bender, John Engen, and other various individuals. *Id*., ¶ 88.

Such alleged statements are not defamatory in nature, would be considered opinion and would be privileged as statements Judge Jenks made in carrying out her official duties. Further, Andersen admits she was just "guessing" when she made this allegation. *Id*., ¶ 89.

The statements detailed above do not meet the statutory requirements of slander or libel and do not rise to the "stringent test" or "heavy burden" established in *Wainman* or *McConkey*. *Wainman*, 576 P.2d at 271, *McConkey*, 125 P.3d. Further, many of the statements are privileged or protected statements of opinion. See Mont. Code Ann. § 27-1-804, *Roots*, 93 P.2d at 640.

E. Andersen's Negligence Claims Fail.

Andersen's Complaint alleges the City breached duties established in the City's personnel policies, the state's defamation and open meetings laws, and the constitution. Doc. 1-1, ¶¶ 56-64. Thus, Andersen's negligence and negligence *per se* claims are derivative of her wrongful discharge and civil right claims and must be dismissed because those claims fail. *Unelko Corp.*, 912 F.2d at 1057-58 (9th Cir. 1990).[4]

[4]In discovery, Andersen said her negligence claim is based on disclosure of information regarding her medical condition and her pending worker's compensation claim. SUF, ¶ 90. However, Andersen has not identified a particular duty or detailed how she was damaged from the alleged breach of such a duty. In the absence of those allegations, her negligence claim based upon those allegations would also fail. See *Gaudreau v. Clinton Irrigation Dist.*, 30 P.3d

F. Andersen's Emotional Distress Claim Fails.

The undisputed facts demonstrate the City is entitled to judgment as a matter of law on Andersen's emotional distress claim because Andersen lacks the evidentiary support to demonstrate the City's actions were "extreme and outrageous," and the distress Andersen says she suffered is exaggerated and unreasonable in light of the circumstances.

The independent tort of negligent or intentional infliction of emotional distress requires not only a threshold showing of severe emotional distress but proof the emotional distress was a "reasonably foreseeable consequence of the defendant's intentional act or omission." *Sacco v. High Country Independent Press, Inc*., 896 P.2d 411, 425-428 (1995). With regard to an intentional act or omission, the Court held the act must be "extreme and outrageous conduct," as described in the Restatement (Second) of Torts:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which 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!"

Czajkowski v. Meyers, 172 P.3d 94, 101 (Mont. 2007).

Further, "severe emotional distress" does not arise from "transient and trivial emotional distress" but must be extreme and "so severe that no reasonable man could be expected to endure it" and must be severe in intensity and duration. *Id*. The distress must also "be reasonable and justified under the circumstances."

1070, 1073-74 (Mont. 2001).

Feller v. First Interstate Bancsystem, Inc., 299 P.3d 338, 344 (Mont. 2013). There can be "no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress." *Id*.

The Montana Supreme Court has held the "serious or severe" standard was not met in cases involving the death of an adult child or in a case where the plaintiff testified she suffered physical symptons as a result of her bank's actions when it failed to return money in her account and caused her to be interviewed by the FBI. *Id*. at 344-346.

Where the emotional distress claim lacks sufficient evidentiary support, summary judgment is appropriate. *White v. State ex rel. Montana State Fund*, 305 P.3d 795, 805-06 (Mont. 2013).

Here, Andersen claims she suffered severe emotional distress as a result of the City's defamation and the following allegedly "outrageous" acts:

1. During a meeting with Mayor Engen and Chief Executive Bruce Bender on October 14, 2011, Andersen was "reprimanded for trying to proactively handle bad warrants that had been issued" and then given a letter reflecting the content of the meeting.
2. Schmaus wrote a letter to the COCLJ "without Andersen's knowledge."
3. Sometime between October 2011 and March 2012, Schmaus "began contacting the Co-Occurring Court coordinator Teresa Connelly" and requesting information regarding Co-Occurring Court.
4. On November 18, 2011, Schmaus "met with Councilman John Wilkins in her office the Friday before the appointment process."

5. In mid-December 2011, during the office Christmas party, Councilman John Wilkins "stated in the context of a discussion about the recent judicial appointment and Andersen's failure to be appointed that 'Engen hates Andersen, that's why she did not get the appointment.'"

6. Schmaus wrote a letter to the Missoula Parking Commission regarding Andersen's parking tickets that Andersen believes was intended to make her look like she was doing something wrong.

7. Andersen alleges that between January 30, 2011 and October 8, 2012, Judge Jenks and Schmaus "[c]ontinually told Andersen that she was 'never there' and that Andersen created problems for her because she was not there...and was simultaneously badgered not to accrue comp time."

8. Andersen overheard Schmaus make references about the promiscuity of one of the court staff.

9. In April 2012, when Andersen was attending judge school in Helena, Andersen emailed court staff requesting they send her some court files, but no one responded to her.

10. In April 2012, while attending judge school, "though Judge Jenks was right behind Andersen in the lunch line, texting, Judge Jenks looked up, saw that she was right behind Andersen and went to the end of the line."

11. On May 18, 2012, Schmaus was upset with Andersen for leaving work at 1:00 on Friday when there was no court coverage.

12. On May 22, 2012, Judge Jenks told Andersen she "should have told them that she needed to leave at 1:00 on that Friday earlier in the week," and then Judge Jenks subsequently changed Andersen's schedule.

13. In May 2012, Judge Jenks failed to respond to an email from Andersen asking about how long her new schedule for Fridays would be in effect.

14. Between May and June 2012, Judge Jenks failed to respond to another email from Andersen inquiring about her new schedule.

15. On June 18, 2012, Schmaus did not call in a sub-judge to fill in for Andersen.

16. On June 21, 2012, during a dispute between court staff and the court administrator, Judge Jenks told Andersen "part of the problem [is] that you're not here." Judge Jenks went on to say that "part of the perception that Andersen was 'not here' came from the flexibility she had given Andersen's schedule."

17. On July 17, 2012, during a meeting about Co-Occurring Court with Andersen, Judge Jenks, Leslie Halligan and Brenda Desmond in attendance, Judge Jenks was "rude, demeaning, disrespectful, and constantly interrupting Andersen when she spoke."

18. In July 2012, Judge Jenks informed Andersen and Brenda Desmond that Municipal Court would be pulling out of Co-Occurring Court.

19. In July or August, 2012, Judge Jenks "asked Andersen why Andersen had a conflict with a certain case" and then complained how court

staff failed to make a proper notation about the conflict in the system.

20. A police officer was present when Andersen cleaned out her office in October 2012.

SUF at ¶¶ 93-112.

Andersen's claim fails as a matter of law. The behavior described above is not "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Czajkowski*, 172 P.3d at 101.

Further, even if we accept as true that Andersen suffered emotional distress as a result of these actions, it could not be so severe in intensity and duration or so serious that "no reasonable person could be expected to endure it." *Feller*, 299 P.3d at 344. Andersen's "major depression and post traumatic stress disorder" that has allegedly occurred as a result these acts are "transient and trivial" and "unreasonable and exaggerated" in light of the circumstances. *Id*.

Andersen's own allegations demonstrate the City cannot be liable to her for infliction of emotional distress.

G. Andersen's State Law Claims are Barred by Judicial Immunity.

Even if Andersen's state law claims had enough factual or legal support to survive summary judgment, they are barred by judicial immunity.

In federal common law, judicial immunity is recognized as necessary to the proper administration of justice. *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004), *Valley Bail Bonds v. Budeski*, 2014 U.S. Dist. LEXIS 124548 (D. Mont. Sept. 5, 2014). The immunity applies to judicial acts "even when such acts are in excess of [the court's] jurisdiction, and are alleged to have been

done maliciously or corruptly." *Id.* (citing *Stump v. Sparkman*, 435 U.S. 349, 356 (1978)). The immunity is inapplicable only where the actions taken were not done in the judge's judicial capacity or the judge has acted "in the 'clear absence of all jurisdiction.'" *Id.*

Montana law also recognizes judicial immunity and the doctrine (which is codified in § 2-9-112, MCA) clothes courts with "inherent and statutory powers to do all that is necessary to render their jurisdiction effective." *Mead v. McKittrick*, 727 P.2d 517, 519 (Mont. 1986). The Montana statute affords the judiciary "absolute immunity," even in cases where the judge acted in error or in excess of his authority unless the judge's action was taken in "'the clear absence of all jurisdiction'" ***and*** the act itself was a function not normally performed by a judge. *Hartsoe v. Tucker*, 309 P.3d 39, 41 (Mont. 2013) (quoting *Stump v. Sparkman*, 435 U.S. 349, 356-62 (1978)). The immunity flows to a municipality when it is sued "for acts or omissions of the judiciary." *Silvestrone v. Park County*, 170 P.3d 950, 953 (Mont. 2007) (citing § 2-9-112, MCA), *Mead*, 727 P.2d at 518-519.

In evaluating whether personnel actions are judicial in nature, the Montana Supreme Court has held the appointment and removal of key court employees whose duties are "intimately related to the functioning of the [judicial] process" are considered "judicial actions of the court" to which immunity applies. *Id.* In *Mead*, Cascade County was sued when Judge McKittrick terminated his predecessor's personal secretary in favor of appointing his own. *Mead*, 878 P.2d at 518. The Montana Supreme Court upheld dismissal of the secretary's wrongful discharge claim on judicial immunity grounds. *Id.* at 518-519. The Court noted that where jurisdiction is conferred on a court or judicial officer by the constitution or "any

statute," § 3-1-113, MCA grants the judicial offer general powers and "all the means necessary for the exercise of such jurisdiction." *Id*. at 518.

Here, Judge Jenks had ultimate authority to provide for the efficient management of the court, including specific authority to "supervise and control the court's personnel and the administration of the court." Mont. Code Ann. § 3-6-201(5). Judge Jenks was also authorized by statute and by the Missoula City Council to appoint an assistant judge. Mont. Code Ann.§ 3-6-201(6). She acted within her jurisdiction and authority in December 2011, when she appointed Andersen again in October 2012, when she elected not to re-appoint her.

Andersen's state law claims for wrongful discharge, tortious interference with economic advantage, negligence, negligence *per se* arise from Judge Jenks' decision not to renew Andersen's appointment. Judicial immunity bars those claims because Judge Jenks was acting in her judicial capacity when she decided not to renew Andersen.

H. The Statute of Limitations in § 27-2-212, MCA, Bars Any Claim For Lost Wages and Benefits.

"Any action for the recovery of salary or other emoluments of office by any person having alleged to been wrongfully or illegally removed from office must be brought within 6 months." Mont. Code Ann. § 27-2-212. Andersen brought her claim on June 26, 2013, more than six months after she alleges she was terminated on October 11, 2012. Doc. 1-1. As such, if Andersen were entitled to recovery of lost wages or benefits under her wrongful discharge or civil rights claim, the statute bars such recovery.

CONCLUSION

Andersen's claims must be dismissed because the undisputed facts demonstrate the City is entitled to summary judgment as a matter of law.

DATED this 27th day of October, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2), I certify that excluding caption, certificate of compliance and table of contents and authorities this brief contain 6,392 words according to the WordPerfect counting tool.

/s/ Jill Gerdrum
Jill Gerdrum