IN THE DISTRIT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HABIB SADID, an individual,

Plaintiff,

v.

IDAHO STATE UNIVERSITY, ROBERT WHARTON, JAY KUNZE, MICHAEL JAY LINEBERRY, MANOOCHEHR ZOGHI, RICHARD JACOBSEN, GARY OLSON, AUTHUR VAILAS and JOHN/JANE DOES I through X, whose true identities are presently unknown,

Defendants.

Case No. CV-2008-3942-OC

DECISION ON MOTION FOR SUMMARY JUDGMENT

This matter came before this Court for hearing on Defendant's Motion for Summary Judgment on November 2, 2009. The Plaintiff was represented by Sam Johnson. The Defendants were represented by John Bailey. Stephanie Morse was the court reporter. The Court reviewed the documents submitted by the parties, heard oral argument from counsel, and took the matter under advisement. Now, the Court issues its decision **granting** the Defendants' Motion for Summary Judgment.

BACKGROUND AND PROCEDURAL HISTORY

The Plaintiff, Habib Sadid, was an associate professor in the Department of Civil Engineering at Idaho State University ("ISU"). He began working for the University in

1991. In 1993, Sadid was given full tenure and he became an associate professor. In 1999, he became a full professor at ISU.

In 2001, Sadid published a letter to ISU faculty and administrators. The letter criticized the ISU administration for its plan to merge the College of Technology with the College of Engineering. The administration eventually decided not to follow through with the merger for 2001 and the plan did not arise again until 2003.

In 2003, Sadid spoke to the Idaho State Journal about the merger again. Sadid argues that the plan was designed in secret, which is deceptive to the community and to ISU faculty and staff. Some of Sadid's comments were published in the paper and some were published internally by ISU. Sadid contends that ISU retaliated against him for the comments made in 2001 and 2003.

Sadid claims that some of the acts of retaliation are that ISU did not perform its faculty evaluations of him from 2001 to 2006. Sadid alleges that more acts of retaliation came in 2006 when he was not appointed as the chair of the College of Engineering and in 2008 when Michael Lineberry wrote an e-mail which referred to Sadid as a "nut case." Sadid claimed that the Lineberry statement defamed him and that it is part of the retaliation against him. Sadid claims that the 2006 retaliation led to an economic loss suffered by Sadid in the amount of $35,000 per year. On August 24, 2006, Sadid was offered an opportunity to apply for the chair position, however, he declined. The position was eventually given to a candidate outside of ISU. Additionally, Sadid alleges that ISU has further retaliated against him by increasing his salary at the lowest percentage.

On September 29, 2008, Sadid filed a non-verified Complaint against ISU and Lineberry that contains three counts: (1) violation of constitutional rights under 42 U.S.C. §1983; (2) Breach of Employment Contract and the implied Covenant of Good Faith and Fair Dealing; and (3) Defamation of Character. The Prayer for Relief seeks monetary damages, costs, and attorney fees. On August 27, 2009, Sadid filed a Motion to Amend Complaint and attached a proposed amended complaint to the motion. The motion states that it is based upon the grounds that Sadid needed to identify and include additional Defendants and needed to include additional factual allegations based upon discovery ensued to date. The Motion to Amend Complaint was set for hearing on October 5, 2009. The Defendants, ISU and Lineberry, filed a motion for summary judgment based on the original Complaint and set it for oral argument on October 13, 2009. In response to the motion for summary judgment, Sadid filed a motion for additional time under Rule 56(f), which the Court granted. The Court also granted the motion to amend complaint and on October 15, 2009, Sadid filed his First Amended Complaint, which added six more defendants: Robert Wharton; Jay Kunze; Manoochehr Zoghi; Richard Jacobsen, Gary Olson; and Authur Vailas.[1] The amended complaint also added new factual allegations but retained the same three counts: (1) count one – claim under §1983; (2) count two – breach of employment contact and implied covenant of good faith and fair dealing; and (3) count three – defamation. Additionally, the Prayer

[1] Nothing in the record suggests that the added defendants were properly served with the Amended Complaint. However, Defendants' Reply Memorandum re: Defendants' Motion for Summary Judgment states that it is filed on behalf of all defendants. Therefore, it appears that the added defendants have at least voluntarily appeared in this matter.

for Relief in the amended complaint still sought monetary damages, costs, and attorney fees. However, it also sought injunctive relief ordering ISU to instate Sadid as Chair of the College of Civil Engineering. No other relief is sought.

After allowing Sadid the additional time he requested pursuant to IRCP 56(f), oral argument on Defendants' motion for summary judgment occurred on November 2, 2009. The Court deems the summary judgment motion to be against the Amended Complaint and against all defendants.

STANDARD OF REVIEW

Rule 56(c) of the Idaho Rules of Civil Procedure allows that summary judgment "shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996) (quoting I.R.C.P. 56(c)); *see also Idaho Building Contractors Association v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995); *Avila v. Wahlquist*, 126 Idaho 745, 890 P.2d 331 (1995).

The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Finholt v. Cresto*, 143 Idaho 894, 896-97, 155 P.3d 695, 697-98 (2007). Generally, the record is to be construed in the light most favorable to the party opposing summary judgment, with all reasonable inferences drawn in that party's favor. *Id.* If reasonable persons could reach different conclusions or inferences from the evidence, the motion must be denied. *Id.* However,

the nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. The nonmoving party's case must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *Id.*; *Tuttle v. Sudenga Industries, Inc.*, 125 Idaho 145, 868 P.2d 473 (1994).

Summary judgment is properly granted in favor of the moving party, when the nonmoving party fails to establish the existence of an element essential to that party's case upon which that party bears the burden of proof at trial. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530-31, 887 P.2d 1034, 1037-38 (1994); *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126 (1988)). The party opposing the summary judgment motion "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.* (quoting IDAHO R. CIV. P. 56(e); *Nelson v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990)). If the nonmoving party does not come forward as provided in the rule, then summary judgment should be entered against that party. *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 270, 899 P.2d 977, 980 (1995).

DISCUSSION

On or about September 14, 2007, Sadid filed a formal complaint with the Equal Employment Opportunity Commission ("EEOC") and claimed ISU discriminated against him for his national origin and/or religion and also retaliated against him since 2001.

Sadid asserts that claim was filed under Title VII of the Civil Rights Act. He acknowledges that he received a "right to sue" letter from the EEOC and he was informed that he must file a Title VII civil action for illegal discrimination within 90 days of receiving the letter. Sadid admits he abandoned any claim under Title VII and is now pursuing the claims under § 1983 and he claims that the only time barring for filing Section 1983 claim is the statute of limitation as discussed below. Therefore, this matter does not concern Title VII but concerns 42 U.S.C. § 1983, breach of contract law, and the Idaho Tort Claims Act. The Court will first address the § 1983 Claim.

I. Plaintiff's 42 U.S.C. § 1983 Claim

Sadid claims that the Defendants have violated his right to freedom of speech under the First Amendment of the United States Constitution and Article 1 Sections 9 and 10 of the Idaho Constitution along with his property rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 Section 13 of the Idaho Constitution. Sadid seeks relief for these alleged violations under Title 42 Section 1983 of the United States Code.

Sadid alleges that in his capacity as a faculty member and full professor of ISU, he has, from time to time, openly and publicly expressed his views regarding matters of public concern relating to ISU and its standing in the academic and local community. *See, First Amended Complaint, pg. 5, para. 13.* Sadid further specifically identifies two separate incidences in which he claims he exercised his protected right to free speech. First, he alleges that in 2001 he published a letter to his fellow faculty members and to

ISU administrators criticizing ISU's decision to merge the College of Technology with the College of Engineering. *Id., at para. 14.* Second, Sadid alleges that in 2003, he publically spoke out against ISU's renewed plan, designed in secret, to merge the two colleges and that some of his comments were published in the Idaho State Journal while other of his comments were published internally at ISU. *Id., at para. 15.* Sadid claims that the University retaliated against him for the expression of protected speech.

There are five questions the court must answer to determine whether under § 1983 there is a valid First Amendment retaliation claim. *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). The questions are:

1. whether the plaintiff spoke on a matter of public concern;
2. whether the plaintiff spoke as a private citizen or public employee;
3. whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action;
4. whether the state had an adequate justification for treating the employee differently from other members of the general public; and
5. whether the state would have taken the adverse employment action even absent the protected speech.

Id. If the plaintiff did not speak as a citizen on a matter of public concern then the plaintiff does not have a First Amendment cause of action based on his employer's reaction to the speech. *Brewster v. Bd. Of Educ.*, 149 F.3d 971 (9th Cir. 1991). The plaintiff has the burden of proof on the first three tests. That is, Plaintiff has the burden

of showing that: (1) "the speech addressed an issue of public concern"; (2) "the speech was spoken in the capacity of a private citizen and not a public employee"; and (3) "the state took adverse employment action" and the speech "was a substantial or motivating factor in the adverse action." *Jacobson v. Schwarzenegger*, --- F.Supp.2d ----, 2009 WL 2633762 (C.D.Cal. 2009). Only if plaintiff passes these three tests does the burden shift to the defendants to show that the government's interests outweigh the plaintiff's First Amendment rights, or that it would have taken the same action even in the absence of the protected conduct. *Id.*

1. **Matter of Public Concern**. A public employee's speech is protected under the First Amendment only if it falls within the core of First Amendment protection--speech on matters of public concern. *Engquist v. Oregon Dept. of Agr.*, --- U.S. ----, 128 S.Ct. 2146, 2152, 170 L.Ed.2d 975 (2008); *Connick v. Myers*, 461 U.S. 138, 146-47, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The Supreme Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 417, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); *see Connick*, 461 U.S. at 143, 103 S.Ct. 1684; *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

The question of whether the matter was a public concern is a question of law. *Berry v. Dept. of Soc. Servs.*, 447 F.3d 642, 648 (9th Cir. 2006). If the speech in question

does not address a matter of public concern then it is unprotected. *Eng* at 1071. When the speech is a political, social or other concern to the community, then it is a matter of public concern. *Connick v. Myers*, 461 U.S. 128, 103 S.Ct. 1684 (1983). Alternatively, if the speech deals with "individual personnel disputes and grievances" and it is not related to the "relevance to the public's evaluation of the performance of governmental agencies" then it is not a matter of public concern. *McKinley v. City of Eloy*, 705, F.2d 1110, 1114 (9th Cir. 1983). Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. *Connick*, 461 U.S. at 147-148. The plaintiff bears the burden of showing the court that the speech is a matter of public concern. *Eng* citing *Connick*.

Sadid claims that he was speaking of a matter of a public concern. In two of the letters (Exhibit A, written February 9, 2003 and March 9, 2003) the Court infers that Sadid is arguing that this is a matter of public concern because it is an issue of interest to the tax paying public. However, "[t]o presume that all matters which transpire within a government office are of public concern would mean virtually every remark and certainly every criticism directed at a public official would plant the seed of a constitutional case." *Connick* at 149, 103 S.Ct. 1684. Therefore, to simply claim that all matters relating to ISU's plans of department mergers are matters of public concern is overly broad.

The Defendant directed the Court to a case that is similar to this one, *Hong v. Grant*, 516 F.Supp.2d 1158 (C.D. Cal. 2007). In *Hong*, the defendant (among several

others named) was Grant, who was the Chair of the Department of Chemical Engineering and Materials Science at the University of California-Irvine. The plaintiff was Hong, who was an engineering professor at the university. He made several critical statements about the hiring and promotion of other professors. He claimed his First Amendment rights were violated when the university retaliated against his statements by denying him a salary increase. The defendants moved for summary judgment, which the district court granted in their favor.

The district court analyzed whether Hong's statements were matters of public concern and concluded that they were not by stating: "While Hong argues that his statements are of public concern because they exposed government waste and mismanagement, they are more properly characterized as internal administrative disputes which have little or no relevance to the community as a whole." *Id.* at 1169. The court followed the rule set out in *Connick* that a statement by an employee is not the public's concern if it "cannot fairly be considered as relating to any matter of political, social or other concern to the community." *Hong* at 1169 quoting *Connick*, 461 U.S. at 146, 103 S.Ct. 1684.

The *Hong* Court also related its decision to a 7th Circuit case, *Colburn v. Trustees of Indiana University*, 973 F.2d 581 (7th Cir. 1992). In *Colburn*, two professors claimed that they were denied tenure and a promotion because the university retaliated against their claimed protected speech. In the letters that the professors wrote they claimed that the "integrity of the University was being threatened." *Id.* at 586. The court held that

even though the public would have appreciated the knowledge of the alleged wrongdoing of the department, it noted that simply because the matter would be interesting to the public does not make it a matter of public concern. *Id.* As a result, the court granted the defendant's motion for summary judgment against the two professors.

After reviewing the argument of Sadid, the case law, and the entire content, form and context of his letters, the Court disagrees with Sadid's claim that this was a matter of public concern. The Court finds that the letters contain nothing more than personal grievances against ISU regarding matters that relate directly to Sadid's interest in his employment. The content and opinions may in fact be interesting to the public; however, the value of interest alone does not make the matter a public concern. Furthermore, simply because it involves a matter that may have occurred behind close governmental doors does not make it a public concern. Sadid's statements go more to matters of an internal administrative dispute than a matter of public concern. Here, Sadid has failed to show that the statements made were a public concern. He cannot pass the 1st test under *Eng.* As a result, Sadid does not have a valid First Amendment claim for protected speech.

2. **Speaking as a Public Employee or Private Citizen.** When a person enters the government employee workforce, by necessity, he must accept certain limitations on his freedom. *Waters v. Churchill*, 511 U.S. 661, 671, 114 S.Ct. 1878 (1994). Government employers need a significant degree of control over their employees' words and actions, much like private employers do. *Connick* at 143, 103 S.Ct. at 1684. If the government

employer did not have control "there would be little chance for the efficient provision of public services." *Id.*

> To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Arnett v. Kennedy, 416 U.S. 134, 168, 94 S.Ct. 1633, 1651, (1974). Also, governmental employees "often occupy trusted positions in society" and therefore, when they speak out in public "they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Id.*

Sadid asserts that he was speaking as a private citizen when he wrote the articles for the newspaper.[2] He argues that because his job description does not mention anything to the fact of a duty to write newspaper articles that critique the ISU administration is evidence that he was speaking as a citizen. The Court disagrees with Sadid's argument. Whether his job description requires him to write articles is not the determining factor of him being in the role of a citizen or a public employee. After reviewing Sadid's letters that were published, the Court finds that the tone of the letters is that of an employee of ISU. Additionally, Sadid should understand that he has limitations of his speech that he accepted when becoming a state employee. Furthermore, Sadid continuously argues in his brief and even in the published article itself that he was speaking as a private citizen,

[2] This argument is directly contrary to his assertion in the Amended Complaint that he spoke in "his capacity as a Faculty Member and Full Professor of ISU".

yet in both of the published articles he identifies himself as an ISU employee. Therefore, due to the tone and language of the letter the Court finds that Sadid was speaking as an employee and not as a private citizen. As a result, Sadid has also failed to meet the 2nd test under *Eng*.

3. **Whether the Protected Speech was a Substantial or Motivating Factor in ISU's Action.** As found in the discussion above, the Court finds in favor of the Defendants on this issue for two reasons: 1) the letters written by Sadid were not protected speech and 2) nothing in the evidence provided by the Plaintiff proves that ISU had any motivation for not hiring Sadid as the Chair. In fact, the Court finds that there is nothing in the record to suggest that Sadid even applied for the position of Chair. Without such an application, Sadid could have no reasonable expectation that he would be hired for the position. Sadid has failed to meet the 3rd test under *Eng*.

In light of the foregoing analysis, Sadid's First Amendment claim fails each of the first three questions under the *Eng* test and the Court finds that there is not a valid First Amendment claim. Therefore, Defendants are granted summary judgment on Count One.

II. Breach of Contract and Implied Warranty

Sadid alleges, in Count Two of his Amended Complaint, that ISU breached his employment contract and breached the implied warranty of good faith and fair dealing associated with that contract. Specifically, Sadid alleges that ISU and its employees failed to perform annual evaluations of Sadid for the years 2001 through 2006 and that this failure constitutes a breach of ISU policy and his employment contract. Defendants

allege, in their motion for summary judgment, that they are entitled to summary judgment on Count Two because the contract claim is time barred, plaintiff has failed to establish a breach, plaintiff has failed to establish any damages, and because he failed to follow the grievances procedures set forth in the Faculty Handbook.

In response to defendants' summary judgment motion as to Count Two, Sadid argues that breaches occurring in 2003 through 2006 are not barred by the five year statute of limitations and breaches occurring in 2001 and 2002 are not time barred because they are "captured" by the continuing violation doctrine. Additionally, Sadid argues that he did file a grievance under the Faculty Handbook and that it was denied.

1. Whether The Contract Claim Is Time Barred. An action for a written contract must be brought within five years. *I.C. § 5-216.* The statutory time period does not begin to run until a cause of action has accrued. *Saddlehorn Ranch Landowner's, Inc. v. Dyer*, 146 Idaho 747, 750, 203 P.3d 677, 680 (2009); *citing Simons v. Simons*, 134 Idaho 824, 830, 11 P.3d 20, 26 (2000). Sadid is claiming that ISU had a contractual obligation to perform annual evaluations and ISU breached the contract because from 2001 until 2006 ISU did not complete his annual evaluations.

Sadid argues that because the Complaint was filed on September 29, 2008, the five year statute of limitations allows the Court to look back to September 29, 2003, for any alleged breach of contract. Sadid further argues that the "continuing violation" doctrine applies to his breach of contract claim and would allow him to attach the 2001 and 2002 alleged breaches. Sadid did not provide any law that supports the argument that

the "continuing violation" doctrine applies to contract actions as opposed to § 1983 actions or state tort actions. The Court did not find any law that states that the doctrine relates to claims of breach of contract, similar to this situation.

In the absence of any case law on this issue, this Court finds that each incidence – each time an evaluation was not performed – constitutes a separate breach and not an ongoing breach. To find otherwise would effectively render the limitation period for any cause of action alleging failure to perform meaningless when the performance is to be done on a regular basis. The purpose of a statute of limitations is to bar stale claims and avoid problems of proof arising from stale memories. Accepting Sadid's continuing violation theory on a breach of contract claim would hinder and frustrate the ultimate aim of limitations periods. The breach of contract claim does not involve an ongoing breach but multiple separate breaches. Therefore, the statute of limitations bars any alleged breach occurring more than five years prior to the filing of the Complaint. Sadid cannot purse a breach of contract claim for any event occurring prior to September 29, 2003.

2. Whether Plaintiff Has Shown a Breach of Contract. Sadid claims that the failure of ISU to do the evaluations caused him damages because he did not receive an annual salary increase or the Chair position. Sadid directs the Court to section (B)(1) of the ISU Handbook, which states:

> Each year the chair of a department must submit to the Dean of the Chair's college an evaluation of each faculty member in that department...the evaluation, together with the opinion of higher administrators, will be used as one (1) basis for the final recommendation relative to reappointment, nonreappointment, acquisition or tenure, or as other personnel action, whichever is appropriate.

FACULTY/STAFF HANDBOOK, Part 4, Section IV, (B)(1). The Defendants argue that (B)(7) actually applies, which states:

> It is the policy of the Board that at intervals not to exceed five (5) years following the award of tenure to faculty members, the performance of tenured faculty must be reviewed by members of the department or unit and the department chairperson or unit head. The review must be conducted in terms of the tenured faculty member's continuing performance in the following general categories: (a) teaching effectiveness, (b) research or creative activities, (c) professional related services, (d) other assigned responsibilities, and (e) overall contributions to the department.

FACULTY/STAFF HANDBOOK, Part 4, Section IV, (B)(7). Overall, after reviewing the ISU faculty handbook provisions that counsel has provided, the Court does not agree with Sadid's argument of a breach of contract by ISU by failure to conduct an annual evaluation of Sadid. The Court recognizes that Defendant Kunze acknowledged that he had a responsibility to conduct faculty evaluations and that he did not complete the performance evaluation process with Sadid on an annual basis. *Kunze's Deposition, Exhibit A to the Affidavit of Counsel, p. 46, Ll. 11-22; p. 49, Ll. 9-14; p. 56, Ll. 1-10; p. 62, Ll. 2-22.* However, Sadid received his tenure in 1993, and according to the ISU Faculty Handbook, annual evaluations of a tenured professor are not required. What matters in this case is whether Sadid received an evaluation every 5 years after receiving tenure. For the five year period immediately preceding the filing of the Complaint Sadid testified that he did not receive an evaluation in 2003, 2004, 2005, and 2006. *See, Affidavit of Plaintiff in Opposition to Defenndants' Motion for Summary Judgment, para. 5.* There is nothing in the record relating to 2007 or 2008. If Sadid received an

evaluation in either of these years, his breach of contract claim fails. Sadid, as plaintiff, carries the burden of proof on the issue of breach of contract. His failure to provide any evidence that ISU failed to evaluate him at any time during the five years immediately preceding the filing of his Complaint warrants summary judgment against him on the breach of contract claim.

Alternatively, the Court does not need to determine whether or not the evaluations were completed at least every five years for a tenured professor because Sadid did not provide any evidence that shows he had a contract for a yearly salary increase. Additionally, at the hearing for this motion, Sadid did not rebut the Defendant's claim that he could not receive the Chair position simply because he did not apply for the position. Sadid's contract does not guarantee annual evaluations, yearly salary increases, or the Chair position. He has not shown any injury from the alleged breach of contract.

The Court grants Defendants summary judgment on Count Two of the Amended Complaint, the breach of contract claim, on the grounds that the statute of limitations has terminated any claim for breach occurring prior to September 29, 2003, and that the Plaintiff has not shown that ISU failed to evaluate him at any time within the five years immediately preceding the filing of the Complaint. Alternatively, Sadid has not shown a contractual requirement that in which the parties agreed to assign Sadid the Chair position, a yearly salary increase, or an annual evaluation. ISU did not breach the contract. Defendants are granted summary judgment on Count Two.

III. The Defamation Claim

Sadid alleges, in Count Three of his Amended Complaint, that Lineberry and ISU defamed him. This is a tort claim under state law. Specifically, Sadid alleges that Lineberry sent an e-mail on the ISU email system on August 1, 2008, and it addressed matters regarding the operation of the College of Engineering. Also in the e-mail was a statement about Sadid that referred to him as a "nut case." Sadid alleges that the contents of the email were defamatory to his character and that the e-mail constituted retaliation. Lineberry and ISU moved for summary judgment on Count Three on the grounds that Sadid failed to file a Notice of Tort Claim prior to commencing litigation, that defendants are entitled to immunity under I.C. § 6-904(3), and that no defamation occurred.

In response to Defendants' motion for summary judgment as to Count Three, Sadid argues that his Notice of Tort Claim was timely filed because it was filed before the filing of the Amended Complaint, that Lineberry was not acting within his official capacity at ISU when he made the "nut-case" statement, and that Lineberry acted with malice such that the immunity under I.C. § 6-904(3) does not apply.

1. Whether the Plaintiff's Defamation Claim is Barred by the Idaho Tort Claim Act. Sadid filed his original Complaint on September 29, 2008. He served the Complaint and Summons on ISU and Lineberry on October 15, 2008. *See, Affidavit of Service signed by Eric Hansen and filed on October 31, 2008, and Affidavit of Service signed by Jamie Hansen and filed on October 31, 2008.* Two copies of the Summons and Complaint and Demand for Jury Trial were served on the Attorney General on October 6,

2008. *See, Affidavit of Service signed by Tri-County Process Serving and filed on October 15, 2008.* Defendants ISU and Lineberry filed a Motion to Dismiss on November 26, 2008, alleging that Plaintiff had not properly served the Secretary of State as required by the ITCA. On December 3, 2008, Plaintiff served the Summons, Complaint and Notice of Tort Claim on the Secretary of State. *See, Affidavit of Service signed by Tri-County Process Serving and filed on December 8, 2008.*[3] Sadid filed his Amended Complaint on October 15, 2009. It alleges that "A written Notice of Tort Claim has been filed in compliance with the Idaho Tort Claims Act, with the Secretary of State for the State of Idaho pursuant to Idaho Code § 6-905 and § 6-907." *See paragraph 32 of the Amended Complaint.*

Lineberry's e-mail that Sadid claims is defamatory was sent in August 2008. Whether his defamation claim is barred is an issue that "can be decided as a matter of law *via* the notice requirement of the Idaho Tort Claims act." *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987).

Idaho Code § 6-905 reads:

> All claims against the state arising under the provisions of this act and all claims against an employee of the state for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the secretary of state within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.

[3] The Notice of Tort Claim is not in the Court's file. However, the Affidavit of Plaintiff in Opposition to Defendants' Motion for Summary Judgment states that "A written Notice of Tort Claim has been filed in compliance with the Idaho Tort Claims Act, with the Secretary of State for the State of Idaho pursuant to Idaho Code § 6-905 and § 6-907." *See paragraph 20 of the Affidavit.*

I.C. §6-905. The statutory period begins to run at the occurrence of the wrongful act even if the full extent of damage is unknown. *McQuillen, 113 Idaho, at 722.* "Knowledge of facts which would put a reasonably prudent person on inquiry is the equivalent to knowledge of the wrongful act and will start the running of the 120-day period." *Id.* The ITCA states that the claim must be "presented and filed within the time limits." I.C. § 6-908. The State or its employee has 90 days to respond to the claim. I.C. § 6-909. If the claim is denied, the claimant may institute an action in the district court. I.C. § 6-910. Compliance with the Idaho Tort Claims Act's notice requirement is a mandatory condition precedent to bringing suit, the failure of which is fatal to a claim, no matter how legitimate." *McQuillen* (citing *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982); I.C. § 6-908). The notice requirement is in addition to the applicable statute of limitations. *Id.*

In the original Complaint filed on September 29, 2008, the Plaintiff did not allege the he had filed a written notice in compliance with the Idaho Tort Claims Act. The Plaintiff argues that this was remedied by his Amended Complaint filed on October 15, 2009, which does note the filing of the notice with the Secretary of State. *Plaintiff's First Amended Complaint And Demand For Jury Trial, p. 9.* However, the Plaintiff's argument is misleading, whether the Amended Complaint corrects the problem is irrelevant. The focus should be that the Plaintiff filed suit ***before*** he filed the notice with the Secretary of State, which is a mandatory condition precedent to bringing the suit.

In *Euclid Ave. Trust v. City of Boise,* 146 Idaho 306, 193 P.3d 853 (2008), Euclid filed a Complaint, Petition for Judicial Review and Request for Jury Trial on December 12, 2005. The pleading sought judicial review of the City's actions, a declaration that an emergency ordinance was invalid, mandatory relief and civil damages. A few days after the complaint was filed, Euclid filed a tort claim. Euclid filed an amended complaint in January, adding a due process claim. The City filed a motion to dismiss and a motion for summary judgment. The trial court granted the City summary judgment and Euclid appealed. On appeal, the Idaho Supreme Court recognized that the trial court had granted summary judgment to the City on Euclid's claim under the ITCA because Euclid did not comply with the notice requirements of the ITCA. The Supreme Court affirmed the summary judgment without any discussion of whether the amended complaint cured the failure to file the notice before filing suit.

Plaintiff, in effect, asks the Court to ignore the filing of the original complaint and to look only to the filing of the amended complaint to determine if notice was timely given. However, plaintiff also argues that for purposes of deciding the statute of limitations issues, the filing of the amended complaint relates back to the date of filing of the original complaint. These are inconsistent positions. A plaintiff cannot "cure" a failure to give proper notice prior to filing suit by giving such notice after filing suit. To do so defeats the purpose of the notice requirement. Sadid's original Complaint alleged a claim for defamation. This claim clearly falls under the ambit of the ITCA. ISU and Lineberry had the right to receive a notice of this claim before litigation began. ISU and

Lineberry had the right to have 90 days to decide whether to accept or reject the claim before litigation began. Those rights, granted under the ITCA, were denied when Sadid served the notice of tort claim with the complaint on the Secretary of State. By then, the complaint for defamation had been filed and the purposes for the notice requirement frustrated.

The purposes of the notice of claim requirement under the ITCA are to: (1) save needless expense and litigation by providing opportunity for amicable resolution of differences among parties, (2) allow authorities to conduct a full investigation into the cause of the injury in order to determine the extent of the state's liability, if any, and (3) allow the state to prepare defenses. *Driggers v. Grafe,* --- P.3d ----, 2009 WL 4067998 (Ct. App. 2009). Therefore, using its discretion, the Court finds that the alleged defamation claim is barred by the Idaho Tort Claim Act as to any claim against ISU or against Lineberry alleging he acted within the scope of his official capacity at ISU.[4]

In reaching this conclusion, the court is aware of *Madsen v. Idaho Dept. of Health and Welfare,* 114 Idaho 624, 759 P.2d 915 (Ct. App. 1988), in which the Court of Appeals suggested that a plaintiff could dismiss his complaint without prejudice, serve his notice under the ITCA, and then file a new complaint – if the time period for serving notice had not yet expired. However, Sadid did not dismiss his Complaint but merely filed an Amended Complaint, thus frustrating the purposes of the notice requirement. Sadid even filed a Notice of Intent to Take Default prior to the filing of the Amended

[4] These are the only two defendants against whom the defamation claim is asserted.

Complaint and within 90 days of the time he claims the notice of tort claim was served on the Secretary of State. Obviously, Sadid had no intent to stay litigation while the State investigated his claim or the other purposes of the notice requirement were met.

2. Whether Immunity Applies. Defendants argue that even if the defamation action is not barred by the notice requirements of the ITCA, they have immunity under I.C. § 6-904(3). That statute states:

> A government entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:
>
> . . . .
>
> 3. Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Plaintiff's Amended Complaint asserts that Lineberry acted with malice when he sent the e-mail. Sadid further argues in opposition to summary judgment that Lineberry did not act within his course and scope of employment when he sent the e-mail. I.C. § 6-903(a) states that the State is only liable for wrongful acts of its employees if they were acting within the course and scope of employment. Therefore, Sadid cannot bring this defamation action against ISU. Lineberry, on the other hand, cannot claim the immunity afforded by I.C. § 6-904(3) for conduct falling outside the scope of his employment and done with malice.

3. Whether Defamation Occurred. If the comments do not harm the reputation of the plaintiff in the community or deter third parties from associating with him then they are not defamatory comments, even if they are derogatory. *Rubenstein v. University*

of Wisconsin Bd. Of Regents, 422 F.Supp. 61, 64 (E.D. Wis. 1976). Additionally, if comments are not made to the general community then the community cannot "lower its estimation" of the plaintiff. *Id.* In *Rubenstein*, the plaintiff filed a claim of defamation for the defendant's comment of "old biddy" referring to the plaintiff, along with an additional opinion that the plaintiff was not suitable for the promotion at issue and also commenting that the plaintiff was "just out to make trouble." *Id.* The court dismissed the plaintiff's defamation claims because the remarks did not harm her reputation. *Id.*

The issue of defamation in this case is much like that of *Rubenstein*. Sadid claims that the comments made by Lineberry were defamatory and resulted in him not getting the Chair position. The e-mail was not sent to the general public and therefore it could not affect his reputation in the community or deter any third parties from associating with him. Furthermore, Sadid has failed to provide any evidence that any opinion of Sadid was affected by the email. Therefore, the Court finds that even though the e-mail's language is derogatory, the term "nut case" is not defamatory because Sadid's reputation was not affected. Lineberry is entitled to his opinion.

Defendants are entitled to summary judgment on Count Three.

CONCLUSION

Defendants are entitled to summary judgment on each count in the Amended Complaint. Both parties raised issues not addressed in this decision; however, those issues were not addressed because the above issues are dispositive. Defendants are hereby granted summary judgment in this matter. Defense counsel is instructed to submit

a proposed final judgment. Plaintiff's counsel will have three days to file any objection to the proposed judgment.

IT IS SO ORDERED.

DATED: December 18, 2009.

DAVID C. NYE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of December, 2009, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

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