UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

BRENT A. BRASS and RODERIC R. RUSSELL, Plaintiffs, vs. INCORPORATED CITY OF MANLY, IOWA; and STEVEN L. REINDL, Individually and as Mayor of Manly, Iowa; Defendants.	No. **C02-3004-PAZ** **MEMORANDUM OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT**

TABLE OF CONTENTS

This case involves a series of disputes between the Mayor of a small town and the Chief of Police, leading up to the firing of the Chief of Police and one of his deputies. The Chief of Police and the deputy have brought this action against the town

and the Mayor to redress numerous grievances arising out of the termination of their employment.

This matter is before the court on the defendants' motion for summary judgment (Doc. No. 7), filed January 23, 2003.[1] The motion is supported by a memorandum of law (Doc. No. 8), a statement of undisputed facts (Doc. No. 9), and an appendix (Doc. No. 10). On March 7, 2003, the plaintiffs filed a memorandum of law resisting the motion (Doc. No. 15), and a response to the defendants' statement of undisputed material facts (Doc. No. 14). On March 19, 2003, the defendants filed a reply brief. (Doc. No. 17) The court held a telephonic hearing on the motion on April 4, 2003. Randall Nielsen represented the plaintiffs, and Joel Yunek represented the defendants. The court now is prepared to address the issues raised in the defendants' motion.

I. INTRODUCTION

On January 17, 2002, the plaintiffs Roderic R. Russell ("Russell") and Brent A. Brass ("Brass") filed a five-count complaint against the defendants City of Manly, Iowa ("Manly," or "the City"), and Steven L. Reindl ("Reindl"). The plaintiffs sued Reindl both in his individual capacity and as Mayor of Manly. (Doc. No. 1)

Russell alleges that on or about January 19, 2000, he was terminated from his position as Chief of Police for the City because of alleged "conduct unbecoming of a city employee." (*Id.*, ¶¶ 7-8) Brass alleges that on or about February 16, 2000, he was terminated from his position as a Manly patrol officer because he allegedly had failed to perform his duties, had a poor attitude, had failed to fill out log sheets properly, and had disrespected a superior officer. (*Id.*, ¶¶ 9-10)

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[1] The defendants have not moved for summary judgment on the portion of Count I of the Complaint that relates to the plaintiffs' section 1983 claim against the defendants for deprivation of an associational interest under the First Amendment. Therefore, the defendants' motion is only for partial summary judgment, rather than for summary judgment on all claims.

On April 17, 2000, at the request of Russell and Brass, the Manly City Council conducted a hearing on the termination of Russell's and Brass's employment, but no action was taken by the City Council to overturn the terminations.

In their complaint, the plaintiffs assert five separate causes of action. In Count I, they allege the defendants deprived them of liberty or due process interests, or both, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and further deprived them of their "associational" rights under the First Amendment. (*Id.*, ¶¶ 18-19) They allege the deprivation of these rights was under color of state law. (*Id.*, ¶ 20) They further allege that statements published by Reindl during and after the City Council hearing were intentional, reckless, willful, wanton, and without regard for the plaintiffs' rights and privileges, or the potential for damage and injury to the plaintiffs. (*Id.*, ¶ 23.) For these alleged violations, the plaintiffs seek damages from the defendants under 42 U.S.C. § 1983.

In Count II, the plaintiffs allege Reindl made statements attacking their personal integrity and moral character and exposing them to public hatred, contempt, and ridicule, depriving them of the benefits of public confidence and injuring their careers. They further allege Reindl's statements were intentional, reckless, willful, wanton, and without regard for the plaintiffs' rights and privileges, or the potential for damage and injury to the plaintiffs. (*Id.*, ¶ 27) The plaintiffs seek damages from Reindl for these allegedly defamatory acts.

In Count III, the plaintiffs allege Reindl, in both his personal and official capacities, and other unnamed official representatives of the City, knew the plaintiffs might wish to seek future employment as police officers, and made statements about them for the purpose of interfering with such potential future employment. (*Id.*, ¶¶ 31-32) They seek damages from the defendants for interference with prospective business relationships.

In Count IV, the plaintiffs allege statements made by the defendants "unreasonably placed the plaintiffs in a false light before the public" (*id.*, ¶ 36), and therefore constituted an invasion of privacy. They seek damages from the defendants for these alleged acts.

In Count V, the plaintiffs allege their discharge was "in retaliation for performing important and socially desirable acts, exercising statutory rights, and/or refusing to commit unlawful acts" (*id.*, ¶ 39), and therefore, their discharge was in violation of public policy, entitling them to damages from the defendants.

The plaintiffs seek actual damages, attorney fees, expenses, and interest. (*Id.*, ¶ 41) They also seek punitive damages from Reindl, in his personal capacity. (*Id.*)

On March 8, 2002, the defendants answered the complaint, denying most of the substantive allegations and asserting five affirmative defenses. (Doc. No. 3)[2]

In their resistance to the motion for summary judgment, the plaintiffs state they do not resist summary judgment on many of their claims, and counsel for the plaintiffs confirmed this fact during the April 4, 2003, hearing. Excluding the claims that have been abandoned by the plaintiffs, the following claims remain:

Count I.	Russell's section 1983 claim against both defendants for the deprivation of liberty under the Fifth and Fourteenth Amendments to the United States Constitution.
	Russell's and Brass's section 1983 claim against both defendants for the deprivation of an associational interest under the First Amendment to the United States Constitution.
Count II.	Brass's defamation claim against Reindl.
Count V.	Brass's claim against both defendants for retaliatory discharge in violation of public policy.

[2]On March 19, 2003, Reindl filed a motion for leave to amend his Answer (Doc. No. 16), seeking to add a "qualified privilege" defense with respect to statements he made that are the basis of claims by the plaintiffs. The court notes Reindl has failed to comply with Local Rules 7.1(k) and LR 15.1 in connection with his motion. However, because the plaintiffs have not resisted the motion, the motion is **granted**.

Summary Judgment is hereby **granted** against the plaintiffs on all other claims asserted in the complaint.

II. FACTUAL BACKGROUND

The following facts are not in dispute.[3] Manly, Iowa, is an incorporated city of less than 15,000 in population. Russell was hired as Chief of Police by the Mayor of Manly on December 29, 1998, and started work on January 14, 1999. Brass was hired as a part-time patrolman and reserve officer on June 15, 1999. Russell and Brass were employed at the discretion and under the supervision of the Mayor, subject to removal under the provisions of Iowa Code section 372.15.[4]

The Manly Police Department had a policy manual that required police officers to do the following: obey lawful orders of superiors; be courteous and civil to the public; refrain from using profane language; be punctual in attending court; treat prisoners fairly; attend court at times required; and keep hair short enough not to touch the collar of the shirt. The manual also contained a police code of ethics, which required loyalty to supervisors.

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[3]These facts are taken from the defendants' statement of undisputed facts (Doc. No. 9), and the plaintiffs' responses (Doc. No. 14).

[4]Section 372.15 provides:

> Except as otherwise provided by state or city law, all persons appointed to city office may be removed by the officer or body making the appointment, but every such removal shall be by written order. The order shall give the reasons, be filed in the office of the city clerk, and a copy shall be sent by certified mail to the person removed who, upon request filed with the clerk within thirty days of the date of mailing the copy, shall be granted a public hearing before the council on all issues connected with the removal. The hearing shall be held within thirty days of the date the request is filed, unless the person removed requests a later date.

In March 1999, Russell began making purchases of equipment for the police department and materials for Manly's DARE[5] program. On March 26, 1999, Russell, as Chief of Police of the Manly Police Department, made an offer, on City letterhead, to purchase a DARE vehicle from the City of Northwood. He did not ask permission from anyone from the City of Manly before making these purchases.

On about June 26, 1999, Russell, while off duty and operating his own personal vehicle, made a traffic stop of a citizen outside the jurisdiction of the Manly. On August 19, 1999, Russell reported to a prisoner exchange at the Casey's store in Manly, wearing off-duty clothing and carrying a weapon. During the prisoner exchange, Russell told the prisoner to "shut the 'F___' up."

On one occasion, Brass made a traffic stop in Mason City, outside the jurisdiction of Manly. On another occasion, he took his girlfriend to lunch in his patrol car. He also refused to testify in a court case, stating he was not willing to drive his own car out of town to testify in that case, or any future cases.

When Russell was hired as Chief of Police, the defendant Steven Reindl was a member of the Manly City Council. After a City election in November 1999, Reindl was appointed Mayor. On November 23, 1999, Reindl issued notice to all City departments that a purchase request form, approved by the Mayor, was required for purchases of items costing over $25.00. The defendants allege that after the notice was issued, Russell made unauthorized purchases of items costing over $25.00. Russell counters that all such purchases were made either with personal funds or with DARE funds, and did not require prior approval by the Mayor.

On January 5, 2000, Reindl met with Russell, Brass, Officer Jeff LaBarge, and Officer Steve Miller. At this meeting, several employment issues were discussed. On January 19, 2000, the Manly Police Department Committee, consisting of Tim O'Keefe,

[5]"DARE" stands for "Drug Abuse Resistance Education."

Tom Young, and Reindl, met with Russell. Following the meeting, Reindl terminated Russell's employment. City Councilman Thomas R. Young prepared the following memorandum of the reasons for the termination:[6]

> 1.) DARE car purchase from the City of Northwood without the City of Manly's approval to do so. The City of Northwood had received a bid from Rod on behalf of the City of Manly to purchase the vehicle on the city's behalf. We as council members had no knowledge of this what so ever [sic] until just recently. This is misrepresentation of the City of Manly, and inappropriate use of City funds.
>
> 2.) Purchase of magnets without the City's knowledge of him doing so. Was to be a pitch for the DARE program, but there was no mention of DARE on the magnets. We feel he had these made for his own ego boost. Cost for the 500 or so magnets is well over $300.
>
> 3.) Rod had a meeting in his basement on New Years Eve with him and the other officers. He told them that they need to stick together, especially Officer Miller, because a new Mayor is taking over and he is out to get Officer Miller. He was telling Officer Miller that the Mayor was going to fire him. The Mayor in no way said anything of the such [sic].
>
> 4.) Their [sic] was a 911 call at the acreage about 1 mile north of Manly, where the trailer house sits next to the 1 1/2 story home, on the west side of Hwy. 9.
>
> 5.) The exchange of a prisoner at Caseys.
>
> 6.) Simply asking the Chief to get a hair cut because it was getting very long. Rod told the Mayor, "We are going to have a problem with that."
>
> 7.) Chief leaving town for a length of time and not informing the Mayor of his whereabouts, nor for how long. We felt it would have been appropriate for the Chief to do so in case of any type of police emergency, that way the Mayor could account for his whereabouts. Rod did not feel it was necessary to do so.
>
> 8.) His intimidation of his own officers as mentioned above.

[6]There is no evidence in the record that this memorandum was disseminated to anyone.

9.) When asked for the last 3 months of scheduling, he was very upset, because he didn't feel the Mayor should have to be involved in this.

10.) Would not follow directives. Goes along with some of the above mentioning.

11.) The Police Dept. Radios. Mayor will explain this.

12.) Pulling over Jamie Lutz in his own vehicle, "Dare blazer." This was done on June 26th between 4-6 p.m. It was done on his day off on Hwy. 18 about 2 miles West of Nora Springs.

13.) We as a police Dept. committee feel that with the above mentioned items and several not mentioned, that we could not let this go on any longer. He was getting very much out of hand and wanted things done only his way. We felt that we could also no longer trust him and his actions.

Many other reasons not mentioned

(Signed: Thomas R. Young, City Councilman
1-10-2000)

(Doc. No. 7, Ex. 20)

In a letter dated March 6, 2000, Reindl, as mayor of Manly, wrote the following to Russell:

> The Manly City Council has discharged you as Chief of Police effective January 19, 2000. You have been terminated for conduct unbecoming of a city employee. You are further notified that pursuant to Section 5.09 of the Code of Ordinances, Manly, Iowa, that you have the right to a public hearing before the City Council if you file a request in writing with the Manly City Clerk within 30 days of the date of this letter.

(Doc. No. 14, Ex. 22)

On February 16, 2000, Reindl terminated Brass's employment. In a letter dated March 6, 2000, Reindl, as Mayor of Manly, wrote the following to Brass:

> The Manly City Council has discharged you as Patrol Officer February 16, 2000. You have been terminated for the following reasons:
>
> 1. Failure to Perform duties.
> 2. Poor Attitude.
> 3. Failure to properly fill out log sheets.
> 4. Disrespecting a superior officer.
>
> You are further notified that pursuant to Section 5.09 of the Code of Ordinances, Manly, Iowa, that you have the right to a public hearing before the City Council if you file a request in writing with the Manly City Clerk within 30 days of the date of this letter.

(Doc. No. 14, Ex. 100)

A public hearing on the terminations was held on April 17, 2000, but no evidence was presented, and no one made any statements concerning Russell, Brass, or their terminations. The City Counsel took no action to overturn the terminations.

On September 11, 2000, Russell took a job as Chief of Police of the City of Donnellson. On January 29, 2001, Brass took a job as a full-time patrolman for the City of Sheffield.

III. LEGAL ANALYSIS

A. Standards for Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment and provides that either party to a lawsuit may move for summary judgment without the need for supporting affidavits. Fed. R. Civ. P. 56(a) & (b). Rule 56 further states that summary judgment

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, 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 judgment as a matter of law.

Fed. R. Civ. P. 56(c). "A court considering a motion for summary judgment must view all the facts in the light most favorable to the nonmoving party, . . . and give [the nonmoving party] the benefit of all reasonable inferences that can be drawn from the facts." *Lockhart v. Cedar Rapids Comm. Sch. Dist.*, 963 F. Supp. 805, 814 (N.D. Iowa 1997) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)).

The party seeking summary judgment must "'inform[ ] the district court of the basis for [the] motion and identify[ ] those portions of the record which show lack of a genuine issue.'" *Lockhart*, 963 F. Supp. at 814 (quoting *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). A genuine issue of material fact is one with a real basis in the record. *Lockhart*, 963 F. Supp. at 814 n.3 (citing *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1355-56). Once the moving party has met its initial burden under Rule 56 of showing there is no genuine issue of material fact, the nonmoving party, "by affidavits or as otherwise provided in [Rule 56],[7] must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e); *Lockhart*, 963 F. Supp. at 814 (citing *Matsushita*, 475 U.S. at 586, 106 S. Ct. at 1356).

Addressing the quantum of proof necessary to successfully oppose a motion for summary judgment, the United States Supreme Court has explained the nonmoving party must produce sufficient evidence to permit "'a reasonable jury [to] return a verdict for the nonmoving party.'" *Lockhart*, 963 F. Supp. at 815 (quoting *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)). Furthermore, the Court has held the trial court must dispose of claims unsupported by fact and determine whether a genuine issue exists for trial, rather than "weigh the evidence and determine the

[7] *I.e.*, by "affidavits . . . supplemented or opposed by depositions, answers to interrogatories, or further affidavits." Fed. R. Civ. P. 56(e).

truth of the matter." *Lockhart*, 963 F. Supp. at 815 (citing *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2510-11; *Celotex*, 477 U.S. at 323-24, 106 S. Ct. at 2552-53; *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1355-56).

The Eighth Circuit recognizes "summary judgment is a drastic remedy and must be exercised with extreme care to prevent taking genuine issues of fact away from juries." *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1238 (8th Cir. 1990) (*citing* Fed. R. Civ. P. 56(c)). The Eighth Circuit, however, also follows the principle that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Id*. (quoting *Celotex*, 477 U.S. at 327); *Hartnagel v. Norman*, 953 F.2d 394, 396 (8th Cir. 1992).

Thus, the trial court must assess whether a nonmovant's response would be sufficient to carry the burden of proof at trial. *Hartnagel*, 953 F.2d at 396 (citing *Celotex*, 477 U.S. at 322). If the nonmoving party fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden of proof, then the moving party is "entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323; *Woodsmith*, 904 F.2d at 1247. However, if the court can conclude that a reasonable jury could return a verdict for the nonmovant, then summary judgment should not be granted. *Anderson*, 477 U.S. at 248; *Burk*, 948 F.2d at 492; *Woodsmith*, 904 F.2d at 1247.

Keeping these standards in mind, the court now will address the defendants' motion for summary judgment.

B. Russell's Section 1983 Claim for Deprivation of Liberty Interest

Russell claims he had a constitutionally protected liberty interest in his employment with the City, which was violated because the defendants leveled accusations against him that were "so damaging as to make it difficult for [him] to escape the stigma of those charges." (Doc. No. 15, p. 2, citing *Winegar v. Des Moines Indep. Comm. Sch. Dist.*, 20

F.3d 895 (8th Cir. 1994)) Russell claims he was discharged based on allegations of criminal activity, and he therefore was entitled to due process before his employment could be terminated. He alleges he was denied the following four procedural rights:

> (1) Clear and actual [notice] of the reasons for termination in sufficient detail to enable [him] to present evidence relating to them.
>
> (2) Notice of both the names of those who have made allegations against [him] and the specific and factual nature [of] those charges.
>
> (3) A reasonable time and opportunity to present testimony on his own behalf.
>
> (4) A hearing before an impartial board [or] tribunal.

(Doc. No. 15, p. 4, citing *Agarwal v. Regents of Univ. of Minn.*, 788 F.3d 504, 508 (8th Cir. 1986)).

Russell cites *Winegar v. Des Moines Independent Community School District*, 20 F.3d 895 (8th Cir. 1994), in support of his claim. In *Winegar*, the plaintiff, a high school teacher with an unblemished record, was involved in an altercation with a student. The plaintiff was hit in the chest by the student, fell down, and then kicked and struck the student. In accordance with its policy, the school district placed the plaintiff on paid suspension, and conducted a "Level I" investigation. The investigator concluded an incident of physical abuse of a student likely had occurred, and referred the matter for further investigation.

A private investigator was retained to conduct a "Level II" investigation. He concluded the plaintiff had physically abused the student, without justification. The school's principal and two district administrators reviewed the investigative reports, conducted further investigation, and ultimately suspended the plaintiff for four days without pay, and transferred him to another school. The committee's findings were upheld on

administrative review, and the plaintiff's request for a hearing before the school board was refused.

The plaintiff filed suit in federal court alleging "deprivation of property in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution," and "injury to his reputation." *Winegar*, 20 F.3d at 898. In granting the school district's motion for summary judgment, the district court held that although the plaintiff's four-day unpaid suspension entitled him to procedural due process protection, the fact that he had been allowed to present his version of the events "afforded him all the process he was due." *Id.*

The Eighth Circuit Court of Appeals reversed, holding:

> An employee's liberty interests are implicated where the employer levels accusations at the employee that are so damaging as to make it difficult or impossible for the employee to escape the stigma of those charges. The requisite stigma has generally been found when an employer has accused an employee of dishonesty, immorality, criminality, racism, and the like. We find that allegations of unjustified child abuse are sufficiently stigmatizing to a teacher's reputation, honor, and good name in the community to implicate liberty interests. [FN3]
>
> [FN3] The School District also argues that Winegar cannot assert a liberty interest for the reason that the stigmatizing information was not "published," citing our holding in *Hogue v. Clinton*, 791 F.2d 1318, 1322 (8th Cir.), *cert. denied*, 479 U.S. 1008, 107 S. Ct. 648, 93 L. Ed. 2d 704 (1986). In that case we held that a finding of publication is a prerequisite to demonstrating a liberty interest, but noted that a personnel file replete with wrongdoing may be a sufficient publication if the file were made available to prospective employers. *Id.* at 1322 and n.7. Here, the evidence shows that th stigmatizing information was disseminated to the point that an outside private investigator was hired and students were interviewed. We find the information has been sufficiently disseminated to satisfy the publication requirement.

Winegar, 20 F.3d at 899 & n.3 (citations omitted). Russell argues the "very creation" of the memorandum of reasons for his termination (Ex. 20, quote above) constituted the requisite publication because the memorandum accuses Russell of criminal activity, and he "was affected by the stigmatizing statements of the Mayor and other City council members." (Doc. No. 15, p. 3)

The defendants respond that to establish a due process claim for the loss of a liberty interest, "the claimant must prove that in connection with his termination, the employer published false and stigmatizing charges, which were denied by the claimant and which seriously damaged his employment opportunities or standing or associations in the community, all without notice or opportunity to be heard in a name-clearing hearing." (Doc. No. 8, pp. 5-6, citing *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); *Mercer v. City of Cedar Rapids*, 104 F. Supp. 2d 1130 (N.D. Iowa 2000); *Bennett v. City of Redfield*, 466 N.W.2d 467, 470 (Iowa 1992)).

In *Hill v. Hamilton County Public Hospital*, 71 F. Supp. 2d 936 (N.D. Iowa 1999), Chief Judge Mark W. Bennett discussed the requirements for procedural due process claims under the Fourteenth Amendment of the United States Constitution, as follows:

> Due process claims are generally subjected to a two-part analysis: (1) is the asserted interest protected by the due process clause; and if so, (2) what process is due? [Citations omitted.] In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the Supreme Court wrote, "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews*, 424 U.S. at 332, 96 S. Ct. 893; *Demming v. Housing Redev. Auth.*, 66 F.3d 950, 953 (8th Cir. 1995) (quoting *Mathews*). The possession of a protected life, liberty, or property interest is thus a "condition precedent" to the government's obligation to provide due process of law, and where no such interest exists, there is no due process violation. *Movers Warehouse, Inc. v. City of Little*

> *Canada*, 71 F.3d 716, 718 (8th Cir. 1995); *Zenco Dev. Corp. v. City of Overland*, 843 F.2d 1117, 1118 (8th Cir. 1988) (observing "[a] discussion of whether a party has a right to procedural due process must start with the question fo whether the party has a property interest in the thing taken away.").
>
> Protected interests "are created and their dimensions are defined" not by the Constitution but by an independent source, such as state or federal law. *Movers Warehouse*, 71 F.3d at 718 (citing *Craft v. Wipf*, 836 F.2d 412, 416 (8th Cir. 1987))); *Zenco Dev. Corp.*, 843 F.2d at 1118. . . .
>
> In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), the Supreme Court made clear that the "process due" public employees with a property interest in continued employment is a pre-termination hearing. *Loudermill*, 470 U.S. at 547-48, 105 S. Ct. 1487; *see also Gilbert*, 520 U.S. at 924, 117 S. Ct. 1807 (considering process due employee facing suspension without pay and observing that in *Loudermill*, "we concluded that a public employee dismissible only for cause was entitled to a very limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing."). . . . Under *Loudermill*, . . . it is apparent that tenured public employees are entitled to (1) oral or written notification of the charges against them; (2) an explanation of the employer's evidence; and (3) an opportunity to present their side of the story. [Citations omitted.]

Hill, 71 F. Supp. 2d at 944-45.

In *Mercer v. City of Cedar Rapids*, 104 F. Supp. 2d 1130 (N.D. Iowa 2000), Chief Judge Bennett held, "[A] public employee's liberty interest, the basis for a due process claim, is impinged when, in connection with the employee's discharge, a government official makes [public] accusations that seriously damage the employee's standing in the community or foreclose other employment opportunities." *Id.*, 104 F. Supp. 2d at 1148 (internal quotes deleted). Judge Bennett further noted, "A public employee is [therefore]

entitled to notice and a name-clearing hearing when fired under circumstances imposing a stigma on [the employee's] professional reputation." *Id.*

In the present case, the parties agree the only "published" comments concerning the termination of Russell's employment were those made at the April 17, 2000, hearing, and those contained in a newspaper article published after the meeting. At the hearing, Reindl started to read into the record a letter he had written to Russell, as follows: "I'll start this meeting. I want to start with this letter sent to Mr. Russell. It says Dear Mr. Russell, the Manly City Council have discharged you as Chief of Police. You have been terminated for conduct unbecoming as a city employee. We have the evidence . . . ." At this point, Reindl was cut off by Russell's attorney. No other comments were made about Russell at the hearing.

The newspaper article reported that Russell had been terminated for "conduct unbecoming a city employee." Reindl was quoted as saying, "Both (officers) didn't act in the best interests of the city. They were separate issues. I did what was right for the people." Reindl also was quoted as stating he was not worried about possible litigation against the City, and "No matter what they do, we did what's best for the people." Other City Council members were quoted as stating the reasons for the dismissals were "big issues," and one City Council member stated, "It was a major deal."

There is nothing in the record to show any of these statement were false, or that they stigmatized Russell in any way. The record also belies any claim that Russell's other employment opportunities were seriously damaged. Russell argues, however, that Reindl also was quoted in the newspaper article as stating most of the town knew of the reasons for Russell's termination. Russell asserts those reasons included allegations of criminal activity, as set forth in Exhibit 20. He argues this amounts to "publication" of a false and stigmatizing charge. (Doc. No. 15, p. 3, citing *Winegar*, 20 F.3d at 899 n.3, which is quoted above)

Winegar is distinguishable on its facts. In that case, the defendant school district had implemented an investigation that included interviews with students, parents, and other witnesses. Here, there is no evidence the defendants did anything to communicate to the public that Russell had engaged in criminal activity. In fact, the only evidence reflecting the reasons for Russell's termination is the January 19, 2000, memorandum (Ex. 20, quoted above), which appears to reflect that Russell was discharged because of a personality conflict between Russell and Reindl, not because of any alleged criminal activity. There is no indication in the record that Russell was accused, privately or publically, of dishonesty, immorality, criminality, racism, or the like. In fact, nothing in the record reflects precisely what the public accusation was, by whom it was made, or the damage the alleged public accusation caused to Russell's standing in the community or to his future employment opportunities.

Furthermore, Russell arguably was given a name-clearing hearing, but he did not exercise his right to present his position on any of the matters surrounding the termination of his employment.

The court finds Russell has failed to show his liberty interest was impinged by any actions taken by Reindl or the City. Accordingly, the defendants' motion for summary judgment on Russell's 1983 claim for deprivation of liberty is **granted**.

C. Brass's Defamation Claim

Brass claims Reindl committed the tort of defamation when members of the Manly City Council told the newspaper the City had terminated Brass's employment because of "big issues," that were a "major deal." (*See* Doc. No. 15, p. 5) Brass also claims Reindl committed defamation when he told the newspaper, "most people in town know what precipitated the firings." As with Russell's due process claim, there is nothing in the record to reflect precisely what defamatory remarks allegedly were made by Reindl, when, or to whom.

In *King v. Sioux City Radiological Group*, 985 F. Supp. 869 (N.D. Iowa 1997), Chief Judge Bennett explained the tort of defamation as follows:

> The law of defamation consists of the twin torts of libel and slander, and the gist of a defamation action is the publication of written or oral statements that tend to injure a person's reputation and good name. *Taggart [v. Drake Univ.]*, 549 N.W.2d [796,] 802 [(Iowa 1996)] ("Defamation is the invasion of another's interest in reputation or good name," . . . and consists of libel and slander); . . . Slander generally consists of the oral publication of defamatory matter. . . . Libel in Iowa is the "malicious publication, expressed either in printing or in writing, or by signs and pictures, tending to injure the reputation of another person or to expose [the person] to public hatred, contempt, or ridicule or to injure [the person] in the maintenance of [the person's] business." *Vinson v. Linn-Mar Community Sch. Dist.*, 360 N.W.2d 108, 115 (Iowa 1984). As the Iowa Supreme Court recently explained, to establish a *prima facie* case of defamation, a plaintiff must show that the defendant "(1) published a statement that was (2) defamatory (3) of and concerning the plaintiff." *Taggart*, 549 N.W.2d at 802. . . . [Citations omitted.]
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> In order to prevail on a defamation claim, a plaintiff must ordinarily prove that the statements were made with malice, were false, and caused damage. *Vinson*, 360 N.W.2d at 115 (citing *Vojak v. Jensen*, 161 N.W.2d 100, 104 (Iowa 1968)). However, some statements, in a special category of defamation "per se," are actionable without proof of malice, falsity, or special harm. *Lara [v. Thomas*, 512 N.W.2d [777,] 785 [(Iowa 1994)]; *Vinson*, 360 N.W.2d at 115-16; *Kelly v. Iowa State Educ. Ass'n*, 372 N.W.2d 288, 295 (Iowa. Ct. App. 1985). Words are defamatory *per se* if they are of such a nature, whether true or not, that the court can presume as a matter of law that their publication will have libelous effect. *Vinson*, 360 N.W.2d at 116 (citing *Haas v. Evening Democrat Co.*, 252 Iowa 517, 107 N.W.2d 444, 447 (1961)). Among such statements are defamatory imputations affecting a person in his

> or her business, trade, profession, or office. *Lara*, 512 N.W.2d at 785; *Vojak v. Jensen*, 161 N.W.2d 100, 104 (Iowa 1968); *Galloway v. Zuckert*, 447 N.W.2d 553, 554 (Iowa. Ct. App. 1989), *cert. denied*, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

King, 985 F. Supp. at 877.

Brass cites to nothing in the record to support his defamation claim. Brass's defamation claim is against Reindl only. The comments in the newspaper article that Brass was discharged because of a "major deal" and as a result of "big issues" were comments made by other members of the City Council, not by Reindl.[8] Reindl apparently did tell the newspaper that "most people in town know what precipitated the firings," but this comment, by itself, was not defamatory.

Brass alleges in his brief that Reindl made defamatory statements "far beyond expression of an opinion in an appropriate setting. . . . In this case, there were no qualifications by Mayor Reindl or the other council members, indicating that these were simply their opinions. They made broad, hard-hitting statements indicating that the reasons for the Brass dismissal were significant and 'a major deal.'" (Doc. No. 15, p. 6.) Nowhere in the record, however, are the statements themselves identified. Not only is there no evidence in the record that Reindl made malicious, false, or damaging statements concerning Brass, there is no evidence of *any* potentially defamatory statements by Reindl. In the absence of such evidence, Brass cannot maintain a cause of action for defamation. *See Vinson v. Linn-Mar Community Sch. Dist.*, 360 N.W.2d 108, 115 (Iowa 1984).

[8]Even if Reindl had made these comments, the court does not believe they would constitute defamation. There is nothing in the record to show what the "big issues" were; what was said, privately or publically, about the"big issues"; or that anything said about the "big issues" was false.

Reindl also claims a qualified privilege in connection with any statements he allegedly made concerning Brass's termination.[9] It is impossible to determine whether this defense applies to the present claim because Brass has failed to identify with any particularity the communications he alleges were defamatory. Assuming the communications were made in connection with the deliberative process surrounding the termination of Brass's employment, the privilege likely would apply. However, the court does not need to reach this issue, because Brass has failed in the first instance to support his claim for defamation.

For these reasons, Reindl's motion for summary judgment on Brass's claim for defamation in **granted**.

D. Brass's Retaliatory Discharge Claim

Brass claims the defendants discharged him in violation of public policy because he repeatedly asked that he be sent to the law enforcement academy prior to his one-year employment anniversary, as required by the Iowa Administrative Code.[10] He claims "substantial evidence" exists to show he "was terminated because of his willingness to investigate compliance with Iowa law requiring his attendance at the law enforcement academy." (Doc. No. 15, p. 8)

Brass has submitted an affidavit in support of his claim, in which he states the following:

> 5. I was never told that my job was in jeopardy until I was informed that I was being terminated.

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[9] For a thorough discussion of the requirements to invoke the qualified privilege defense, *see King*, 985 F. Supp. at 879-80.

[10] Section 501-3.1 of the Iowa Administrative Code provides, "All law enforcement officers must be certified through the successful completion of training at an approved law enforcement training facility in order to remain eligible for employment. . . . Officers must be certified within one year of their employment.[.]" (*See* Doc. No. 14, Ex. 102)

* * *

> 9. At the February 1, 2000, City council meeting, a member of the City council asked Mayor Reindl about sending me to the Law Enforcement Academy. Mayor Reindl responded by saying that, "We will see how it goes, it's a lot of money." My first anniversary was approaching in the summer of 2000, and, under Iowa law, it was necessary for me to attend the police academy before I had worked as a police officer for one year. I had previously asked Mayor Reindl during a meeting about being sent to the police academy, and he had assured me that those arrangements would be made.
>
> 10. From the importance Mayor Reindl placed upon his objections to me associating with Rod Russell, and the Mayor's failure to make any arrangements for me to attend the Law Enforcement Academy, it was my conclusion that my termination was based substantially upon my association with Rod Russell after he was terminated as Chief of Police and upon my request for the City of Manly to arrange to send me to the Law Enforcement Academy to comply with Iowa law.

(Doc. No. 14, Ex. 101)

Brass argues he "engaged in public policy conduct by inquiring as to the status of his attendance at the Law Enforcement Academy." (Doc. No. 15, p. 9) He points to section 70A.29 of the Iowa Code, which Brass describes as "specifically prohibit[ing] discharge when a public employee expresses opinions regarding potential law violations or mismanagement." (*Id.*) Brass's description of the statute is conveniently simplistic, and overstates the scope of the statute, which does not protect an employee's "opinions."

Section 70A.29 actually provides, in pertinent part, as follows:

> A person shall not discharge an employee from . . . a position in employment by a political subdivision of this state as a reprisal for a disclosure of any information by that employee to a member or employee of the general assembly, or an official of that political subdivision or a state official or for a disclosure of information to any other public official or law enforcement agency if the employee reasonably believes the

> information evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Iowa Code § 70A.29(1). The legislative history indicates the purpose of the statute is "to protect public employees from personnel actions as reprisals for providing information to legislators or public officials or disclosing waste, mismanagement, or violations of law." *Id.*, *Historical & Statutory Notes*. Thus, the statute prohibits the unauthorized disclosure of confidential records (not relevant here), and also acts as protection for "whistle-blowers" who disclose wrongful actions to public officials. This is not a whistle-blower claim. *See Smuck v. Nat'l Management Corp.*, 540 N.W.2d 669, 672 (Iowa 1995) ("Iowa's whistle-blower statute, Iowa Code section 70A.29, applies only to public employees who report violations of law to law enforcement officials.") Brass is not claiming he was terminated because he refused to violate a state or federal law, *see id.*, or because he disclosed wrongdoing on the part of the City.

Brass indicates he "asked" the Mayor about sending him to the law enforcement academy, and at a different City Council meeting, a Council member asked again about sending Brass to the academy. This falls far short of the type of "disclosure" of wrongful actions contemplated by the statute. *See id.*; *Mercer*, 104 F. Supp. 2d at 1177 n.10 (no reliance on whistle-blower statute where plaintiff did not try to contact superiors to discuss allegedly wrongful actions by employer; citing *Smuck*).

Brass argues further that his objection to driving his personal vehicle to court appearances falls within the type of disclosure contemplated by the statute. The record indicates the City would have reimbursed Brass for any expenses he incurred in driving his personal vehicle, but Brass believed his liability insurance would not cover him in such a situation. Brass failed to file any type of complaint, or otherwise to bring the issue to the attention of the City Council or other appropriate authority for resolution. Instead, he simply refused to comply with the request, and caused a court case to be dismissed. Again,

Brass has failed to show his actions were protected under the terms of the whistle-blower statute. *See id*.

Brass offers nothing more than pure conjecture that his discharge was in retaliation for his relationship with Russell, and his request that the City send him to the law enforcement academy. The court finds Brass has failed to generate a genuine question of fact as to whether he suffered a retaliatory discharge in violation of public policy, and **grants** the defendants' motion for summary judgment on this issue.

IV. CONCLUSION

The court finds the plaintiffs have not shown the existence of any genuine issue of material fact concerning the claims that are the subject of the defendants' motion for partial summary judgment. Based upon the foregoing analysis, **the defendants' motion for partial summary judgment is granted**.[11]

IT IS SO ORDERED.

DATED this 17 day of April, 2003.

_____
PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[11]This leaves in the case only the plaintiffs' claims in Count I of their Complaint for the deprivation of an associational interest under the First Amendment.