

AUG 18 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

THOMAS H. RUDWALL,  
  
Plaintiff - Appellant,  
  
v.  
  
BLACKROCK, INC.,  
  
Defendant - Appellee.

No. 06-17372

D.C. No. CV-06-02992-MHP

MEMORANDUM \*

Appeal from the United States District Court  
for the Northern District of California  
Marilyn H. Patel, District Judge, Presiding

Submitted August 14, 2008\*\*  
San Francisco, California

Before: SILER \*\*\*, McKEOWN and CALLAHAN, Circuit Judges.

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

\*\*\* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

Thomas Rudwall sued his employer, BlackRock, Inc., for libel and intentional and negligent infliction of emotional distress. The district court granted BlackRock's motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure and dismissed Rudwall's claims with prejudice. We review de novo a dismissal under Rule 12(c). Turner v. Cook, 362 F.3d 1219, 1225 (9th Cir. 2004). We affirm the district court's dismissal.

BlackRock made the allegedly libelous statements in Rudwall's 2005 performance review. These statements are protected by California's common interest privilege. See Cal. Civ. Code § 47(c). There is no case law or statutory basis for Rudwall's contention that the 1994 amendment limited the common interest privilege to responses to inquiries by prospective employers.

Statements in a performance review are actionable if they are made with malice. Id. However, Rudwall's allegations that the performance review was motivated by ill-will are conclusory. In addition, the two-year time lapse between when he was asked to sign the non-competition agreement and the performance review fails to support an inference that the performance review was retaliatory. Cf. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir. 2002) (stating that to show retaliation in a Title VII case the adverse employment event must happen "fairly soon" after the protected act) (quoting Paluck v. Gooding Rubber Co., 221 F.3d 1003, 1009-10 (7th Cir. 2000)).

The district court did not abuse its discretion in denying Rudwall leave to amend his complaint. See Platt Elec. Supply, Inc. v. EEOF Elec., Inc., 522 F.3d 1049, 1054 (9th Cir. 2008) (applying an abuse of discretion standard to the denial of leave to amend on the ground of futility). In California, a statement is actionable only if it “falsely accuses an employee of criminal conduct, lack of integrity, dishonesty, incompetence or reprehensible personal characteristics or behavior.” Jensen v. Hewlett-Packard Co., 14 Cal. App. 4th 958, 965 (1993). The statements in Rudwall’s performance evaluation fail to meet this standard. At most, the statements accuse Rudwall of exaggerating his role in various business matters. Rudwall’s emotional distress claims are based on the same facts as his libel claim. Under California law, “[w]hen claims for invasion of privacy and emotional distress are based on the same factual allegations as those of a simultaneous libel claim, they are superfluous and must be dismissed.” Couch v. San Juan Unified Sch. Dist., 33 Cal. App. 4th 1491, 1504 (1995). The district court properly dismissed the emotional distress claims with prejudice.

**AFFIRMED.**