

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LARRY R. SAVAGE,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
CONNECTICUT GENERAL LIFE INSURANCE, COMPANY,	:	
	:	
Defendant.	:	NO. 96-1709

MEMORANDUM

Reed, J.

September xx, 1997

Plaintiff Larry R. Savage ("Savage") brings this action against defendant Connecticut General Life Insurance Company ("CGLIC") for violations of the Employee Retirement Income Security Act ("ERISA") and state law. This court has jurisdiction over the ERISA claims pursuant to 28 U.S.C. § 1331 and over the state law claim pursuant to both 28 U.S.C. § 1332 and 28 U.S.C. § 1367.

Currently before the Court is motion of CGLIC for summary judgment (Document No. 18), and all responses thereto. For the following reasons, the motion will be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

The following facts are based on the evidence of record viewed in the light most favorable to Savage, the nonmoving party, as required when considering a motion for summary judgment. See Carnegie Mellon Univ. v. Schwartz, 105 F.3d 863, 865 (3d Cir. 1997). Savage was employed by CGLIC in various positions from June 1969 until his termination from employment in July 1995. At the time of his termination, Savage was employed as the General Manager and President of CIGNA Healthcare of Pennsylvania, New Jersey, and Delaware. All general managers reported to the CIGNA Senior Management Team ("SMT"). By December 5, 1994, the SMT reviewed Savage's "1995 Plan" submission and indicated in a memorandum its intention to meet with Savage to routinely discuss several topics regarding Savage's 1995 strategy. A meeting took place between Savage and the SMT on January 10, 1995 to discuss these topics.

On February 10, 1995, CIGNA issued a memorandum describing the process to address serious performance concerns pertaining to General Managers. Before implementing a two-part process composed of an improvement plan and probation, the memorandum stated that the SMT mentor should conduct counseling meetings and issue verbal warnings to identify performance problems in the early stages. If the desired results are not achieved through these verbal interactions, a SMT mentor should then proceed to develop a "Performance Improvement Plan." This is to include specific objectives and regular meetings with the General Manager to

assess progress. If the General Manager has not improved performance by the end of ninety days, the General Manager is placed on probation for another ninety days. Failure to reach the results outlined during the probation period may result in discharge. In lieu of probation, however, a General Manager may request a special severance agreement at this time.

CGLIC maintains three severance pay plans for certain employees whose employment is terminated by the company: (1) for employees whose jobs are eliminated because of reorganization, consolidation, department or office closing, or work-force reduction ("Schedule I"); (2) for employees whose employment is terminated following a change of control of CIGNA ("Schedule II"); and (3) for employees whose employment is terminated for poor performance, pursuant to a special severance agreement ("Schedule III"). Bradley C. Arms ("Arms"), a Senior Vice President, was assigned as Savage's mentor/liaison to act as an intermediary between the general manager and the SMT. As his mentor, Arms was required to be present at all SMT meetings where Savage was discussed. On February 17, 1995, Arms sent a memorandum to Savage discussing the SMT's review of Savage's performance. This memorandum constituted a written performance improvement plan pursuant to CGLIC policy. According to the memorandum, the SMT had specific performance concerns of Savage's performance in three areas: growth, strategy, and management.¹ The memorandum identified specific sales goals to be met by Savage by June 30, 1995 in five categories: target market firms, total firms, X & Y premium, CHMO Members, and CDH subscribers. During this time period, Savage presented a strategy update memorandum for reducing resources expended in the

1. On February 17, 1995, Arms sent a memorandum to Savage discussing the SMT's review of Savage's performance. This memorandum constituted a written performance improvement plan pursuant to CGLIC policy. According to the memorandum, the SMT had specific performance concerns of Savage's performance in three areas: growth, strategy, and management.¹ The memorandum identified specific sales goals to be met by Savage by June 30, 1995 in five categories: target market firms, total firms, X & Y premium, CHMO Members, and CDH subscribers. During this time period, Savage presented a strategy update memorandum for reducing resources expended in the

Philadelphia market, which included, among other things, eliminating his position, the General Manager. The SMT rejected most of the recommendations contained in Savage's strategy.

On July 11, 1995, Arms again sent a memorandum on behalf of the SMT to Savage informing him that he was to be placed on probation for failing to meet the set goals. And, failure to meet the goals outlined in the probation period from July 12, 1995 to September 30, 1995, which were identical to sales goals set forth in the February 17, 1995 memorandum, would result in his discharge. Arms also informed Savage of his option to receive a "Special Severance Agreement" if he chose severance within the first seven days of his probation period.

Upon his request, a copy of the "Special Severance Agreement" was sent to Savage. The "Special Severance Agreement" offered to Savage was in accordance with the Schedule III plan. Savage did not sign the agreement. Savage expressed to Arms and another member of the SMT his belief that the probation memorandum was a sham and that it was impossible to meet the goals expected of him. He also indicated that he would not be going through the probation process but instead would have his legal counsel work with CIGNA regarding a special severance package. He also inquired as to how long he should remain physically present at the office. In response, CIGNA suggested that Savage should vacate his office after he completed his current project. Savage informed CIGNA that his last day of work would be either July 19 or 20, 1995. Savage claims that he is entitled to the more lucrative severance package in Schedule I and that the salary used to calculate the amount of severance should not have been his base salary, but his average salary for the past three years. As a participant in the CIGNA employee benefit plan, Savage pursues these claims pursuant to Sections 502 and 511 of ERISA.

Savage also claims that, in a meeting that took place over five months after his departure from the company, a CIGNA General Manager, Harris Brooks ("Brooks") and the CIGNA lawyer, Ed Potanka ("Potanka"), made defamatory statements about Savage to representatives of Best Healthcare.

Savage filed a complaint consisting of three Counts on March 5, 1996. CGLIC thereafter filed a motion to dismiss. This Court by Memorandum and Order dated July 31, 1996 (Document No. 9) denied the motion with regard to the ERISA claim in Count I, granted the motion with regard to the breach of contract claim in Count II, and dismissed without prejudice the defamation claim in Count III to the right of Savage to file an amended complaint. Savage filed an amended complaint. After discovery in this matter was complete, CGLIC filed a motion for summary judgment now before the Court.

II. LEGAL STANDARD

III. DISCUSSION

A. Section 502 of ERISA

Savage claims that the CGLIC administrator abused its discretion when it denied him eligibility for the Schedule I severance package and used the wrong salary base to calculate his severance payments. Section 502 provides that a "civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of plan."

Where the ERISA plan delegates discretionary authority to an administrator to

determine eligibility for benefits, a court reviews the decision of the administrator under an abuse of discretion standard, also referred to as an "arbitrary and capricious" standard. See Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). The parties do not dispute that plan at issue here delegated discretionary authority to an administrator. Thus, an "arbitrary and capricious" standard of review is appropriate. The scope of review is narrow and deferential and the court may not substitute its own judgment for that of the administrator in determining eligibility for plan benefits. Abnathy v. Hoffman-La Roche, Inc., 2 F.3d 40, 45 (3d Cir. 1993) (check props). The decision of the plan administrator must be upheld so long as it is rational and not contrary to the plain language of the plan. Moats v. UMW of Am. Health and Retirement Fund, 981 F.2d 685, 687 (3d Cir. 1992) (check props.) "The written terms of the plan documents control." In re Unisys Corp. Retiree Med. Ben. "ERISA" Lit., 58 F.3d 896, 902 (3d Cir. 1996). Thus, I will begin my analysis by a review of the relevant provisions of the Severance Pay Plan (hereinafter "Plan") offered by CGLIC.

The Plan states that "[s]everance pay is generally based on your regular or base salary rate in effect on your on your *termination of employment date*, which is the date your employment with CIGNA officials ends." Def. Exh. A (Plan at J-15) (emphasis original). The Plan defines three different kinds of severance package, only two of which are at issue here. Under Schedule I, an employee is eligible for benefits only if he or she has "received formal written notice that your employment with CIGNA is being terminated because your job has been eliminated as a result of a reorganization, consolidation, department or office closing, or a work-force reduction program." Def. Exh. A (Plan at J-16). Under Schedule III, benefits are provided "if your employment is terminated because you cho[se] not to go through a period of probation because of your work performance" Def. Exh. A (Plan at J-19). Savage was offered the Schedule III severance package, yet he claims that he was entitled to the Schedule I package. In his amended complaint, Savage alleges that certain allocated resources necessary for Savage to improve sales performance in the current local market were eliminated, thus effectively eliminating his position with the company. Amended Complaint ¶¶ 31, 39, 44. Savage has presented no evidence that his job position was eliminated. To the contrary, once Savage left CGLIC, his position was taken over by Scott and then by Brooks. See Def. Exh. A (Dep. of Savage at 107-08); Def. Exh. D (Dep. of Brooks at 23-24); Def. Exh. J (Declaration of Cassidy at ¶ 5); Def. Exh. K (Declaration of Brooks at ¶ 2)

Savage argues that the plan administrator applied the Plan inconsistently, and thus the decision with regard to Savage's severance was arbitrary and capricious. In support of this contention, Savage argues that three out of four similarly situated employees received severance payments outside the Severance Pay Plan. See Pl. Exhs. Q and R. While it is true that these employees received payments outside the Plan, it is not accurate to view them as similarly situated to Savage. Unlike with Savage, there is no evidence that any of these four employees received notices of probation for poor sales performance. Because the record does not show that these employees were similarly situated to Savage, I cannot say that the differing treatment of them by CGLIC was arbitrary and capricious.

Savage points to the fact that CGLIC had a different method for determining the severance pay for sales personnel, which was not based on a regular salary, but on the average of the last three years of total compensation (base salary plus bonus). See Pl. Exh. P (Sales Severance Determination memorandum). Savage argues that, despite the voluminous sales

responsibilities of Savage, CGLIC did not follow this calculation. Savage was promoted to the position of General Manager in December 1993. Accordingly, CGLIC used his base salary, and not his total compensation, to compute his severance payment. See Def. Exh. E (Dep. of Kensel at 90-92); Def. Exh. J. (Declaration of Cassidy at ¶ 6). I find the determination of the CGLIC plan administrator that Savage was not eligible for the sales personnel calculation was not an arbitrary and capricious decision. Moreover, the CGLIC plan administrator's decision does not conflict with the express provision of the Plan that the base salary rate is generally used in determining severance payments.

Given the highly deferential standard of review, I cannot say that a reasonable jury could conclude that CGLIC's decision to offer Savage the Schedule III severance package was not rationally related to the Plan. Savage was placed on probation due to his poor sales performance, thereby making him eligible for Schedule III. Moreover, he never received a formal written notice that his job had been eliminated, which is a prerequisite for Schedule I. See Def. Exh. A (Dep. of Savage at 134). Therefore, I conclude that the decision to offer a Schedule III severance package to Savage, and not Schedule I, was not arbitrary and capricious. Thus, I affirm the decision of the CGLIC plan administrator in determining the appropriate severance payment to Savage. Accordingly, I will grant summary judgment in favor of CGLIC and against Savage on the Section 502 ERISA claim.

B. Section 510 of ERISA - Discrimination

Section 510, in applicable part, makes it "unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140.

The Court of Appeals for the Third Circuit has provided that parties alleging violations of § 510 of ERISA must meet the same burdens of proof as in the context of employment discrimination under Title VII. Gavalik v. Continental Can Co., 812 F.2d 834, 852 (3d Cir.), cert. denied, 484 U.S. 979 (1987). "A plaintiff must . . . demonstrate that the defendant had the specific intent to violate ERISA. Proof of incidental loss of benefits as a result of termination will not constitute a violation of § 510." Id. at 851 (citations and internal quotations omitted).² The employee must show that the employer made a conscious decision to interfere with the employee's attaining of pension benefits. Turner v. Schering-Plough Corp., 901 F.2d 335, 347 (3d Cir. 1990)

In most cases, because specific intent to discriminate cannot be proved by direct, "smoking gun" evidence, the evidentiary burden may be satisfied through circumstantial evidence. Gavalik, 812 F.2d at 851. The McDonnell Douglas³ burden-shifting mechanism

² The Court of Appeals for the Third Circuit recently dodged the question whether specific intent is an essential element of a Section 510 cause of action. See Kowalski v. L & F Prods., 82 F.3d 1283, 1291 (3d Cir. 1996). Court of Appeals from other Circuits have held that specific intent to interfere with ERISA rights is a required element. See Abbott v. Pipefitters Local Union No. 522, 94 F.3d 236, 242 (6th Cir. 1996); Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 761 (5th Cir. 1996); Lehman v. Prudential Ins. Co. of Am., 74 F.3d 323, 330 (1st Cir. 1996).

³ McDonnell Douglas Corp. v. Greer, 411 U.S. 792 (1973).

applies to case proved by circumstantial evidence. Id. at 853. First, the employee must make out a prima facie case of discrimination. Once the employee establishes a prima facie case, the burden shifts to the employer to introduce admissible evidence of a legitimate, nondiscriminatory reason for its challenged actions. If the employer carries its burden of production, the employee must point to some evidence, direct or circumstantial, from which the factfinder could either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an individual's discriminatory reason was more likely than not the reason for the discharge. Kowalski v. L & F Prods., 82 F.3d 1283, 1289 (3d Cir. 1996).

1. Prima Facie Case

To establish a prima facie case under ERISA § 510, an employee must demonstrate that (1) he belonged to a protected class, (2) he was qualified for the position involved, and (3) was discharged under the circumstances that provide some basis for believing that the prohibited intent was present. Turner, 901 F.2d at 347. The requirements for making out a prima facie case are not stringent. Id.

_____Applying these standards, I find that Savage has established a prima facie case of ERISA discrimination. Savage, as a potential recipient of a pension, was in the protected class. He was a General Manager at the time he left CGLIC, and as such, was qualified for that position. Having satisfied the first two factors, it is now necessary to determine whether the evidence shows a greater likelihood of pension-base animus in this case than in every case in which an employee is discharged by an employer with an ERISA plan. Id.

Savage argues that the improvement and probation process was a sham and structured in a way that made it impossible for him to reach the stated goals. He also argues that CGLIC failed to follow its own procedures in this matter. Savage points to the fact that he never received any verbal warning or counseling prior to the written performance plan sent to him on February 17, 1995, which was inconsistent with the policy of CGLIC described in its Human Resources Manual. See Pl. Exh. B (Dep. of Arms at 96, 97); Pl. Exh. F (Dep. of Kensel at 40, 44). He also provides evidence that the sales goals set forth in the performance improvement plan and in the probation period were virtually unattainable. Vince Sobocinski, a Sales Manager for the Philadelphia sales office who had worked for Savage, testified that the sales performance goals for were "very aggressive," while the "X & Y premium" goal was not attainable. Pl. Exh. G (Dep. of Sobocinski at 67, 70, 71. Arms testified that, one month after writing the February 17, 1995 memorandum setting forth these goals, he had come to believe the "X & Y premium" goal was unattainable and that the other goals "would be very difficult to achieve." Pl. Exh. B (Dep. of Arms at 122-23). In terms of the goals set forth in the probation memorandum, Arms also testified that "these goals would be almost impossible to achieve." Pl. Exh. B (Dep. of Arms at 143-44); see also id. at 148.

Based on this evidence, Savage maintains that he may have received a more lucrative severance package than the Schedule III package offered to him if he was not subject to CHLIC's unfair improvement and probation process, thereby interfering with his rights to attain severance benefits. Under the liberal burden requirements of the prima facie case, I find that the evidence proffered by Savage regarding the improvement and probation process is sufficient to demonstrate a basis for believing that the prohibited intent was present.

2. Legitimate, Nondiscriminatory Reason

_____The articulation of a legitimate, nondiscriminatory reason has been characterized as a

relatively light burden. Kowalski, 82 F.3d at 1289. CGLIC proffers evidence demonstrating that the Savage was placed on probation and offered Schedule III severance benefits due to his unsatisfactory sales performance in 1994 as well as SMT's concerns for his strategy and management team for 1995. See Def. Exh. C (Dep. of Sobocinski at 40, 43); Def. Exh. H (Dep. of Arms at 72, 90-92, 94, 102, 103, 112; Def. Exh. A (February 17, 1995 memorandum); Def. Exh. A (July 11, 1995 memorandum). In light of this evidence, I find that CGLIC has satisfied its burden.

3. Evidence of Pretext

Given that CGLIC was able to proffer a legitimate, nondiscriminatory reason for terminating Savage, to avoid summary judgment, Savage must present evidence from which a court could find that there is a genuine issue of material fact as to whether CGLIC's reasons were pretextual. Kowalski, 82 F.3d at 1289. To do this, Savage must "demonstrate such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence, and hence infer that the employer did not act for [the asserted] nondiscriminatory reasons." Id. (quoting Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994)).

In an attempt to demonstrate the presence of prohibited intent, Savage first proffers CGLIC monthly reports that rank the offices by general managers according to their actual sales results compared to their sales plan. According to these reports, Savage ranked eleven out of fifteen as of April 1995, eight out of seventeen in May 1995, and eight out of eighteen in June 1995. See Pl. Exh. S. As of July 1995, Savage's year to date rank was thirteen out of eighteen general managers. See Pl. Exh. S. Savage argues in his memorandum that these reports demonstrate that he "was not the worst general manager in terms of sales performance" nor the "lowest ranking general manager," bearing in mind that Savage was in charge of Philadelphia, one of the most competitive markets for CGLIC. Response Mem. of Pl. at 36, 37.

In addition to sales ranking reports, Savage next points to the discrepancy between the testimony of Arms and that of Jennifer Kensel ("Kensel"), who is the Vice President of Human Resources at CHLIC. Kensel testified that she consulted with Arms about waiving the verbal warning requirement with regard to Savage, while Arms stated that he was not involved in the verbal warning aspect of Savage in any way. Pl. Exh. F (Dep. of Kensel at 59-60); Pl. Exh. B (Dep. of Arms at 96-97).

Savage further points to the fact that Arms and another member of the SMT agreed with Savage's strategy update about evaluating the ability of CGLIC to compete successfully in the Philadelphia market, including the elimination of the General Manager position. Pl. Exh. B (Dep. of Arms at 151, 154). Despite this agreement and despite Arm's recognition that the stated goals were unattainable at this point, Arms still sent the probation letter to Savage. Def. Exh. A (July 11, 1995 memorandum).

Finally, Savage argues that another contradiction regarding CGLIC's reasons for the probation involves the management team under Savage. He points to evidence demonstrating that while the SMT was concerned about the about his management team, especially with the performance of Sobocinski and Dr. Norm Scott ("Scott"), SMT never took any disciplinary action with either of those individuals. To the contrary, Scott was actually appointed as interim general manager once Savage left the company. Pl. Exh. B (Dep. of Arms at 116-17, 130-31); Pl. Exh. C (Dep. of Langenus at 56-57).

The evidence presented by Savage does not show the pretextual nature of the reasons produced by CGLIC. I find that the sales reports proffered by Savage are not inconsistent with the reasons articulated by CGLIC, and thus a reasonable jury could not find that such articulated reasons are pretextual. The reports demonstrate that, for whatever reason, the sales performance in the Philadelphia market over which Savage was in charge, was inferior.⁴

_____ The discrepancy between Kensel and Arms as to whether the verbal counseling and warning was waived for Savage is also not a sufficient basis to overcome a motion for summary judgment. It demonstrates nothing more than a miscommunication and misunderstanding as to interactions that occurred prior to the implementation of the written improvement plan. The fact that CGLIC failed to follow precisely its process for management improvement by not delivering a verbal warning or counseling to Savage prior to the written plan does not contradict or weaken the proffered reason of CGLIC that Savage's sales performance was unsatisfactory. This is especially true in light of the testimony of Kensel that it was possible to waive a step in the performance management process and that the Human Resources Department at CGLIC supported the decision of the SMT to place Savage into the performance improvement plan stage of the process, without confirming whether he had previously received any verbal warning or counseling. Pl. Exh. F (Dep. of Kensel at 42-43).

_____ The fact that Arms and at least one other member of the SMT agreed with the Savage's strategy update regarding the Philadelphia market does not create a genuine issue that reasons articulated by CGLIC regarding Savage's inferior sales performance are pretextual. There is evidence that another member of the SMT disagreed with Savage's strategy and did not want to give up the Philadelphia market because he believed that there was still a chance for success. Pl. Exh. B (Dep. of Arms at 153). Without knowing the decisionmaking process of the SMT as to accepting or rejecting a General Manager's strategic recommendation, a reasonable factfinder could not infer whether Arm's support of Savage's recommendations had any bearing on the SMT's ultimate decision to place Savage on probation. Thus, I find that no reasonable jury could find that the Arm's support of Savage's strategy demonstrates that the reasons stated by CGLIC are pretextual.

The evidence submitted by Savage that the "X & Y premium" goal in the improvement plan and the goals in the probation process were unattainable, while sufficient to establish a prima facie case, does not demonstrate an inconsistency or implausibility as to CGIC's stated reason for placing Savage on probation. At the time he developed the improvement plan, Arms did not believe that any of the goals stated therein were unattainable. Pl. Exh. B (Dep. of Arms at 122-23). Moreover, only the "X & Y" premium goal was deemed unattainable. While there is evidence that the four other goals were aggressive, there is no evidence that they were unattainable. Absent evidence that the goals established in the improvement plan were created for the purpose of ensuring Savage's failure, evidence of aggressive goals in the improvement plan or unattainable goals in the probation period will not poke a hole in CGLIC's articulation that Savage's sales performance was inferior, thus warranting his probation.

⁴ In fact, the April 1995 CHMO report shows that the Philadelphia, under Savage, ranked last. Pl. Exh. S.

[Judge Reed: I struggled with whether the unattainable sales goals create an implausibility with CGLIC's proffered reasons. Let's discuss.]

_____ And, lastly, the fact that the two members of Savage's management team were not admonished or disciplined for their poor performance does not create a genuine issue that CGLIC's proffered reasons are pretextual. The SMT was evaluating the overall performance of Savage, including how he oversaw his management team. Comparisons to other non-similarly situated employees will not render the preferred reasons of CGLIC pretextual.

In light of the evidentiary record, I conclude that Savage has not demonstrated, through either direct or circumstantial evidence, that CGLIC had the requisite intent to interfere with Savage's attainment of severance benefits. Accordingly, I will grant the motion of CGLIC for summary judgment on the Section 510 ERISA discrimination claim.

_____ C. Defamation

Savage also brings a state law claim for defamation. In his amended complaint, Savage claims that the alleged defamatory statements were made in a meeting on January 24, 1996 between Brooks and Patanka with representatives of Best Healthcare, namely Dr. Donald Balaban, CEO of Best Healthcare, and Greg Warshaw, CFO of Best Healthcare. The purpose of this meeting was to resolve contract disputes that had arisen through the joint venture between Best Healthcare and CGLIC. Savage had been in charge of the joint venture during his employ at CGLIC. Specifically, Potanka stated that Savage "ceased to be an employee in July," and that he left the company with "ill feeling" and that his departure was "not a voluntary separation." Amended Complaint ¶ 59. In this same meeting, Brooks stated, "No one in their right mind would have paid [client Best Healthcare's] invoice." Amended Complaint ¶ 61.

"Under Pennsylvania law, a plaintiff has the burden of proving the defamatory character of the communication, its publication by the defendant, its application to the plaintiff, and the understanding by the recipient of its defamatory meaning." Burns v. Supermarkets Gen'l Corp., et al., 615 F. Supp. 154, 157 (E.D. Pa. 1985) (citing 42 Pa. Cons. Stat. Ann. § 8343(a)). Whether the challenged statement is "capable of defamatory meaning." is a question of law to be determined by the court in the first instance. Kryeski v. Schott Glass Techs., Inc., 626 A.2d 595, 600 (Pa. Super. 1993). A statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or deter third persons from dealing with him. Maier v. Maretti, 671 A.2d 701, 704 (Pa. Super. 1995). The court must examine the alleged defamatory statement in its factual context. Wendler v. DePaul, 499 A.2d 1101, 1103 (Pa. Super. 1985) (check xx). The nature of the intended audience is a critical factor in making this determination. Id. If the court determines that the statement is not capable of not capable of defamatory meaning, there is not basis to proceed to trial. Maier, 671 A.2d at 704.

Truth is a complete defense to a claim for defamation. U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 923 (3d Cir.), cert. denied, 111 S. Ct. (1990) (check xx). It is uncontraverted that Savage was no longer employed after July 1995, that he left the company with an ill-feeling, and that his departure was not voluntary. See Def. Exh. A (Dep. of Savage at 153-55). Therefore, I find that the statements made by Potanka were true and thereby incapable of defamatory meaning. I note that Savage does not mention or argue in his opposition to the summary judgment motion these statements by Potanka.

Savage does contend that the statement made by Brooks, "No one in his right mind would have paid invoices" is defamatory. The factual context in which this statement was

made involves a joint venture between CGLIC and Best Healthcare to develop a proposal for state Medicaid, whereby Best Healthcare submitted invoices to CGLIC. CGLIC argues that Brooks, who had replaced Savage, made this alleged defamatory statement when questioning the nature of one particular invoice, which contained only a monetary amount, with no further documentation.

I find that this statement, and the other statements allegedly made by Brooks at this meeting, are not capable of defamatory meaning. I draw this conclusion from the plethora of case law on this subject whereby far more offensive characterizations were found to be non-defamatory. See, e.g., Parano v. O'Connor, 641 A.2d 607, 609 (Pa. Super. 1994) (statements referring to person as "adversarial," "uncooperative," and "less than helpful" are not defamatory); Kryeski v. Schott Glass Technologies, Inc., 626 A.2d 595, 600-01 (Pa. Super. 1993) (statements that person was "crazy" and "emotionally unstable" do not rise to level of defamation); Gordon v. Lancaster Osteopathic Hosp. Ass'n, 489 A.2d 1364, xx (Pa. Super. 1985) (statements that they lacked confidence in person's work and performance and lacked trust in person were not defamatory). But see Agriss v. Roadway Express, Inc., 483 A.2d 456, xx (Pa. Super. 1984) (statements that person was opening company's mail was defamatory because it implied person was committing a crime). Unlike in Agriss, the statement that "No one in his right mind would have paid invoices" in no way implies that Savage had committed a crime.

Furthermore, Pennsylvania case law requires the court to consider the nature of the audience in determining whether the statement is defamatory. Maier, 671 A.2d at 705.

opinion
audience

D. Right to Jury Trial

Because I will grant summary judgment on all ERISA related claims as well the defamation claim, I need not reach the issue briefed by parties on the right to a jury trial under ERISA.

IV. CONCLUSION

In light of the foregoing, I conclude that Savage has failed to present evidence sufficient to demonstrate that the CGLIC plan administrator's decision to offer Savage Schedule III severance payments was arbitrary and capricious or that CGLIC interfered with the attainment of his benefits. Accordingly, I will grant summary judgment in favor of CGLIC and against Savage on all ERISA related claims. I will also grant summary judgment for CGLIC on the state law claim for defamation.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LARRY R. SAVAGE,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
CONNECTICUT GENERAL LIFE	:	
INSURANCE, COMPANY,	:	
	:	
Defendant.	:	NO. 96-1709

ORDER

_____ **AND NOW**, on this xxth day of September, 1997, upon consideration of the motion of defendant Connecticut General Life Insurance, Company for summary judgment (Document No.18) pursuant to Federal Rule of Civil Procedure 56(c), and all responses of parties thereto, and having considered all depositions, affidavits, declarationsxxx, and for the reasons stated in the foregoing memorandum, it is hereby **ORDERED** that the motion for summary judgment is **GRANTED**.

JUDGMENT IS ENTERED in favor of defendant Connecticut General Life Insurance, Company and against plaintiff Larry R. Savage.

This is a final Order.

LOWELL A. REED, JR., J.