The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

ERIC SPOFFORD

v.

NEW HAMPSHIRE PUBLIC RADIO, INC. ET AL.

Docket No. 218-2022-CV-00803

ORDER ON MOTIONS TO DISMISS

Plaintiff Eric Spofford brought this defamation action against Defendants New Hampshire Public Radio, Inc. ("NHPR"), Lauren Chooljian, Jason Moon, Dan Barrick (collectively, the "NHPR Defendants"), Nancy Bourque, Justin Downey, and Brian Stoesz stemming from an NHPR report on multiple accusations of sexual misconduct against him. Doc. 26 (Am. Compl.). Defendants now move to dismiss. Docs. 17–19, 43 (NHPR Defs.' Mot. Dismiss and related pleadings); Docs. 55–56, 64 (Downey's Mot. Dismiss and related pleadings); Docs. 62, 74 (Bourque's Mot. Dismiss and related pleading); Docs. 79–80 (Stoesz's Mot. Dismiss and related pleading). Spofford objects. Docs. 34, 58 (Obj. and Surreply NHPR's Mot. Dismiss); Docs. 61, 67 (Obj. and Surreply Downey's Mot. Dismiss); Docs. 68, 76 (Obj. and Surreply Bourque's Mot. Dismiss).[1] The Court held a hearing on these motions on January 31, 2023. After review, the Court finds and rules as follows.

[1] While he presumably objects to Stoesz's motion to dismiss as well, Spofford filed an assented-to motion to extend the deadline to object until the Court issues this Order on the other Defendants' pending motions. See Doc. 81 (Mot. Extend). The Court granted Spofford's motion to extend in a margin Order on March 14, 2023. See id. Accordingly, the Court will not address Stoesz's motion here.

Standard of Review

When ruling on a motion to dismiss, the Court assumes the facts from "the plaintiff's pleadings to be true and construe[s] all reasonable inferences in the light most favorable to [them]." Clark v. N.H. Dep't of Emp't Sec., 171 N.H. 639, 645 (2019). In addition, the Court "may also consider documents attached to the plaintiffs' pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint." Automated Transactions, LLC v. Am. Bankers Ass'n, 172 N.H. 528, 532 (2019). Ultimately, the Court must engage in a threshold inquiry to determine whether the allegations in the plaintiffs' pleadings are "reasonably susceptible of a construction that would permit recovery." McNamara v. Hersh, 157 N.H. 72, 73 (2008). If the allegations in the complaint fail to provide a basis for legal relief, the Court should grant the motion to dismiss. Mentis Scis., Inc. v. Pittsburgh Networks, LLC, 173 N.H. 585, 588 (2020).

Background

The following facts are derived from Spofford's Amended Complaint, see Doc. 26, and are assumed true for the purposes of this Order. See Lamb v. Shaker Reg. Sch. Dist., 168 N.H. 47, 49 (2015).

On March 22, 2022, NHPR published a written article (the "Article") entitled: *He built New Hampshire's largest addiction treatment network. Now, he faces accusations of sexual misconduct*, along with an accompanying online podcast. Doc. 26 ¶ 2.[2] The Article reported that Spofford, founder and former owner of Granite Recovery Centers

[2] As their contents are similar, the Court refers primarily to the Article throughout this Order in reference to both the Article and the accompanying podcast. Further, the parties' pleadings also reference a two-day radio broadcast, though the Amended Complaint references only the Article and podcast versions of the story. See, e.g., Doc. 77 (Spofford's Post-Hearing Brief on legal significance of two-part radio broadcast).

("GRC"), had sexually harassed a former GRC client and sexually assaulted two former GRC employees. Id. ¶ 110. Although the accusers remained anonymous, their allegations were (according to NHPR) substantiated by interviews with nearly 50 former clients, current and past employees, and others in the New Hampshire recovery community. Id. ¶ 111.

Chooljian, NHPR Senior Reporter and Producer, acted as lead reporter for the Article, while Moon, another NHPR Senior Reporter and Producer, contributed to it. Id. ¶¶ 16–17, 108. Barrick, NHPR's News Director, was involved in the editing and approval of the story. Id. ¶¶ 18, 108. Bourque and Stoesz were former GRC employees who were interviewed for the Article, while Downey was another source who provided corroboration for one of Spofford's accusers. Id. ¶¶ 6, 19–21.

On September 20, 2022, after requesting that NHPR take down the Article to no avail, Spofford brought this action seeking damages for defamation, defamation by implication, and false light invasion of privacy. See Doc. 1 (Compl.); see also Doc. 26.

Additional allegations pertaining to Spofford's status as a public or private figure and his claims against each Defendant are detailed in the corresponding sections of the Court's analysis below.

Analysis

Defendants now move to dismiss. In so moving, Defendants argue that Spofford is a limited-purpose public figure, and that based on this status he must allege actual malice to sufficiently state a claim for defamation. See Doc. 18 at 5–8.[3] Moreover,

[3] The NHPR Defendants filed their motion to dismiss collectively, whereas the remaining Defendants each moved individually. To the extent that the motions take similar or identical positions, the Court cites only to the NHPR Defendants' motion and memorandum as representative of the other Defendants' arguments.

Defendants maintain that Spofford fails to allege facts giving rise to a claim for defamation under the actual malice standard. See id. at 9–28. In response, Spofford contends that he is a private figure, and as such needs only prove negligence to succeed in his claim. See Doc. 34 at 18–20. Even so, Spofford argues his Amended Complaint sufficiently states a claim for defamation under either standard. Id. at 20–29.

The Court also acknowledges the position of *Amici Curiae* (American Civil Liberties Union of New Hampshire and other advocacy groups) that regardless of the deferential standard of review for a motion to dismiss, allowing a defamation action of this nature to proceed beyond the early stages of litigation would in itself have a chilling effect on free speech. Doc. 45 Ex. 1 at 11–13.

The Court first considers whether Spofford is a private or public figure for the purposes of this action. The Court then considers whether Spofford has sufficiently stated a claim for defamation under the appropriate standard.

I. Spofford's Status as Private or Public Figure

First, the Court must evaluate Spofford's status as either a private or public figure. Defendants argue that Spofford qualifies as a limited-purpose public figure, and he must therefore prove actual malice to succeed in his defamation action. See Doc. 18 at 5–8. Defendants characterize the particular public controversy at issue as "how to deal with the opioid addiction crisis," and argue that "Spofford has positioned himself as an important and widely known public voice on that question," making him a limited-purpose public figure. See id. at 6–7.

In response, Spofford contends that the particular public controversy at issue should be limited to "his conduct in the workplace," rather than the opioid crisis

generally, and for purposes of that narrower controversy he is "a private citizen" who need only prove negligence. See Doc. 34 at 19–20. Further, Spofford argues that the determination of whether he is a public or private figure should be left to the jury, referencing Justice Souter's opinion in Nash v. Keene Publishing Corp., 127 N.H. 214 (1985), for support. See Doc. 34 at 17–18.

As a preliminary matter, the Court disagrees with Spofford's assertion that the determination of his status should be left to the jury. Subsequent to the decision in Nash, the New Hampshire Supreme Court found definitively that "[d]etermining whether an individual is a public or private figure presents a threshold question of law which is grist for the court's—not the jury's—mill." Thomas v. Telegraph Publ'g Co., 155 N.H. 314, 340 (2007) (cleaned up) (citing Nash, 127 N.H. at 222). Accordingly, the Court—not the jury—will decide Spofford's status.

"Under the taxonomy developed by the [United States] Supreme Court, private plaintiffs can succeed in defamation actions on a state-set standard of proof (typically, negligence), whereas the Constitution imposes a higher hurdle for public figures and requires them to prove actual malice." Pendleton v. City of Haverhill, 156 F.3d 57, 66 (1st Cir. 1998). Individuals may fall under two categories of public figure: (1) an individual "may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts;" or (2) "[m]ore commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). "Courts make the limited-purpose public figure determination 'by looking to the nature and extent of an individual's participation in the particular

controversy giving rise to the defamation.'" Thomas, 155 N.H. at 341 (quoting Gertz, 418 U.S. at 352).

"As the first step in the limited-purpose public figure inquiry, the court must isolate the public controversy in question." Lassonde v. Stanton, 157 N.H. 582, 590 (2008) (cleaned up). "'A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way.'" Id. (quoting Waldbaum v. Fairchild Publ'n, Inc., 627 F.2d 1287, 1296 (D.C. Cir. 1980)). "'If the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy.'" Id. (quoting Waldbaum, 627 F.2d at 1297).

As instructed by Lassonde, the Court's initial step is to isolate the public controversy in question. See id. Upon review of the Lassonde decision and the cases it cites, the Court finds that NHPR's broader construction of the controversy in question as "how to deal with the opioid addiction crisis" is more consistent with the case law than Spofford's narrower focus on "his conduct in the workplace." See id. (citing Hatfill v. New York Times Co., 532 F.3d 312, 322–23 (4th Cir. 2008) (broadly construing controversy in question as "threat from bioterrorism and the nation's lack of preparation for it" instead of plaintiff's narrow framework of who committed particular anthrax attack); Tavoulareas v. Piro, 817 F.2d 762, 773 (D.C. Cir. 1987) (finding that while being an executive of a prominent company does not in itself make one a limited purpose public figure, that occupation can be relevant to whether individual has "invited attention and comment with respect to public issues affecting his business dealings," especially

"when that industry—and the company itself—is at the center of a vigorous public debate touching on a vital national interest." (quotation omitted))).

Spofford attempts to distinguish these cases, arguing that they "involved narrow controversies subsumed into broader *related* controversies in which the plaintiffs injected themselves." See Doc. 34 at 19. However, the Court finds that the Article was indeed connected to the broader controversy surrounding the opioid crisis, as the allegations of misconduct came from individuals being treated at GRC or working there in the recovery field. While the Article did not pertain to the merits or substance of the controversy itself, it did call into question Spofford's fitness as a leader in the opioid recovery field due to his alleged abuse of his position. See Pendleton, 156 F.3d at 71 (holding plaintiff—black substitute teacher outspokenly campaigning for permanent teaching position—voluntarily stepped into midst of ongoing controversy surrounding school faculty's racial diversity and was thus a limited-purpose public figure in defamation suit arising from news article containing accusations of cocaine use). Indeed, as clients or employees of GRC, Spofford's accusers are directly linked to the opioid crisis, highlighting the relationship between the alleged conduct and the broad controversy surrounding opioid addiction. See id.; see also Doc. 26 Ex. 1 at 5 (characterizing Spofford as "preying on vulnerabilities" of population he worked with at GRC). Accordingly, the Court concludes that the public controversy at issue is the opioid crisis, not Spofford's workplace conduct.

Next, the Court finds that Spofford was a limited-purpose public figure in the ongoing public controversy identified above. Throughout his Amended Complaint, Spofford presents himself as a nationally prominent figure in the addiction recovery

field. See, e.g., Doc. 26 ¶ 11 (detailing Spofford's former "status as a leader in the substance use disorder industry); ¶ 33 (listing achievements such as testifying before U.S. Senate and co-authoring acclaimed book on recovery); ¶ 45 (characterizing Spofford as "national authority on how to combat the opioid epidemic); ¶ 50 (stating Spofford's "work at GRC garnered regional and then national attention"); ¶¶ 54–55 (describing connections to Vice President Mike Pence and Governor Chris Sununu arising from Spofford's recovery expertise). In addition, Spofford highlights the significance of his own story of personal growth and how that story, and the strength of his character, lent him credibility. See, e.g., id. ¶ 50 (stating that Spofford's "personal struggle and success inspired thousands of people to trust GRC with their recovery journeys, and drew attention from state and federal government officials who sought out [Spofford]'s advice and counsel on the topic of addiction treatment"). In the Court's view, Spofford cannot simultaneously claim that he had a nationally prominent reputation based on his inspirational story of recovery while also arguing he is not a public figure in the controversy surrounding opioid addiction.

Moreover, the Court is unpersuaded by Spofford's suggestion that he could not be considered a public figure at the time NHPR published the Article because by then he "already had stepped away from his role at GRC and moved to Florida," and therefore "[t]he reasonable inference from these facts is that [Spofford] had removed himself from any controversy involving his workplace conduct." See Doc. 34 at 20. The District of Columbia Circuit's decision in Waldbaum, quoted by the New Hampshire Supreme Court repeatedly in Lassonde, addressed this scenario directly in the rare case of a general-purpose public figure or "celebrity:"

> In rare instances, a celebrity may decide to abandon his prominent position in society to return to anonymity, but persistent press attention, most likely fueled by continuing public interest, may thwart his quest for privacy. In such a case, he still may be a public figure. Although he no longer is accepting the risk of defamation voluntarily, he remains able to reply to attacks through the press, which is continuing to cover him. Because he irretrievably has lost his anonymity, potential damage to reputation poses a small incremental danger. . . . Moreover, his power and influence, due to his prominence, may continue despite his efforts to renounce publicity. . . . Media scrutiny remains appropriate and necessary to balance his undesired but nonetheless real impact on the affairs of society.

Waldbaum, 627 F.2d at 1295 n.18. The Court finds this reasoning persuasive and applicable to limited-purpose public figures as well. Applied here, Spofford's decision to step down from his official role at GRC is not determinative of whether he should be considered a public figure, especially given that Spofford departed from the recovery industry only a few months prior to the Article's publication. See id.

In summation, by outwardly presenting himself as a national figure in the fight against opioid addiction and emphasizing the inspirational nature of his own story of recovery, Spofford voluntarily stepped into the midst of an ongoing controversy and assumed the risk of public discourse surrounding his conduct and his fitness as a leader in the field. Accordingly, the Court finds that Spofford is a limited-purpose public figure in the public controversy surrounding the ongoing fight against opioid addiction, and he must prove actual malice.

II. Actual Malice

Having determined that Spofford is a limited-purpose public figure, the Court must now decide whether he has sufficiently alleged that Defendants acted with actual malice. "If the plaintiff in a defamation case is a public official or public figure, he or she must prove that the statement was made with 'actual malice,' meaning 'with knowledge that the statement was false or with reckless disregard of whether it was false or not.'"

MacDonald v. Jacobs, 171 N.H. 668, 674–75 (2019) (brackets omitted) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)). The actual malice requirement has been characterized as a "heavy, and often insurmountable" burden for a plaintiff to meet. See Lluberes v. Uncommon Prods., LLC, 663 F.3d 6, 14 (1st Cir. 2011). "[R]eckless disregard of truth" will be found only where there is a "subjective awareness of probably falsity: 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" Gertz, 418 U.S. at 334 n.6 (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

The Court first considers the sufficiency of Spofford's allegations of actual malice as to Downey and Bourque, followed by the NHPR Defendants collectively.

A. Downey

First, the Court evaluates Spofford's allegations against Downey. As alleged, the NHPR Defendants relied on Downey to corroborate the account of one of Spofford's accusers, "Elizabeth," based on information she had shared with him at the time the alleged misconduct occurred. Doc. 26 ¶ 6, 221–22. Specifically, Downey was quoted in the podcast version of the story as stating:

> [Elizabeth] told me that this happened to her, and I was like, what makes this guy think that this type of behavior is ok with a girl this vulnerable, right? If you're a (beep) rehab owner, why are you in contact with a – with the clientele after they leave there? You're supposed to have boundaries.

Id. ¶ 223; see also id. Ex. 2 (Podcast Transcript) at 7:5–7:10. NHPR used excerpts from this quote in the Article as well. Id. Ex. 1 at 6. The above-quoted statement appears to be Downey's sole contribution to the story in any of its forms. Spofford claims that Elizabeth never told Downey anything, alleging that "Downey . . . did nothing with the information Elizabeth allegedly gave him until it became advantageous for him

and his reputation to do so. That is because Elizabeth never actually gave him that information." Id. ¶ 228.

In moving to dismiss, Downey argues that his statement is not actionable because it served only to confirm that Elizabeth "told [him] that this happened to her," followed by expressions of his opinion on Spofford's alleged conduct. See Doc. 56 at 4. Downey maintains that Spofford fails to allege facts indicative of actual malice and that the statement in question falls well short of defamation under that standard. See id. at 6–8. Further, Downey argues that the majority of his statement is merely an expression of his opinion, which is unactionable. See id. at 8–10.

In response, Spofford attacks Downey's character and credibility, alleging that Downey is a heroin addict and convicted felon with a motive to lie due to his position at a rival addiction recovery organization. See Doc. 61 at 1–6. In addition, Spofford contends that the Amended Complaint sufficiently alleges that Downey made his statements with knowledge of their falsity, because Elizabeth never actually told him about Spofford's conduct. See id. at 12–13 (citing Doc. 26 ¶ 228). Alternatively, even if Elizabeth did tell Downey about the misconduct at the time, Spofford argues that Downey displayed reckless disregard for the truth by relying on Elizabeth's account because she did not show him any evidence to support her claims, and she too was actively struggling with addiction at that time. See id. at 14–15.

Upon review, the Court finds that Spofford fails to state a claim for defamation against Downey under the actual malice requirement. First, the Amended Complaint offers no support for Spofford's contention that Downey fabricated his conversation with Elizabeth, merely denying that the conversation occurred in conclusory fashion. See

Doc. 26 ¶ 228. In the Court's view, Spofford's reasoning is circular. In essence, Spofford offers only a general denial that he committed the misconduct in question, and suggests that consequently Downey must have fabricated the alleged discussion with Elizabeth because there was no misconduct to discuss. Under Spofford's reasoning, because the conversation could not have possibly occurred, Downey's statement to NHPR that Elizabeth told him about the misconduct must have been knowingly false. The Amended Complaint offers no factual allegations targeting the existence of the conversation, beyond this general contention that the absence of misconduct made such a conversation impossible.

While the Court takes no position at this time on the merits or veracity of Spofford's allegations, such a conclusory assertion based on circular reasoning is insufficient to overcome a motion to dismiss. See Air Sunshine, Inc. v. Carl, 663 F.3d 27, 33 (1st Cir. 2011) (despite requirement that court accept complaint's allegations as true, "this tenet does not apply to statements in the complaint that merely offer legal conclusions couched as facts or are threadbare or conclusory." (quotation omitted)); see also Kirch v. Liberty Media Corp., 449 F.3d 388, 398 (2d Cir. 2006) ("conclusory allegations . . . will not suffice to defeat a motion to dismiss" (cleaned up)). In light of this conclusion, the Court finds that the first portion of Downey's statement, in which he confirms that Elizabeth shared information with him, falls far short of actual malice. See MacDonald, 171 N.H. at 674–75.[4]

[4] Moreover, the Court is unpersuaded by Spofford's attempts to paint Downey and Elizabeth as inherently untrustworthy due to their struggles with addiction. Similarly, the Court does not conclude that Downey's reliance on Elizabeth's account was inherently reckless based on any qualities of Elizabeth's character.

Accordingly, the Court finds that Spofford fails to state a claim against Downey arising from the first portion of the statement, "[Elizabeth] told me this happened to her." If Spofford is aware of additional facts supporting his assertion that this conversation never occurred—beyond his circular denial identified above—he is free to amend his complaint to cure this deficiency. See ERG, Inc. v. Barnes, 137 N.H. 186, 189 (1993).

Turning now to the remainder of the above-quoted statement, the Court finds that the rest of Downey's contribution to the Article is unactionable opinion. See Automated Transactions, LLC v. Am. Bankers Ass'n, 172 N.H. 528, 533 (2019) (holding that "a statement of opinion is not actionable unless it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion." (cleaned up)). In the Court's view, Downey's expression of opinion does not imply the existence of defamatory facts, as Downey's negative reaction to what Elizabeth told him says nothing about the truth of Elizabeth's claims. To the extent Spofford challenges Downey's statement because Elizabeth's underlying accusations were untrue, "even a provably false statement is not actionable when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts." See id. at 534 (cleaned up). Downey prefaced his statement by specifying that he knew only what Elizabeth told him at the time, then shared his reactions based on those limited available facts. Therefore, the Court concludes that the remainder of Downey's statement is not actionable.

Accordingly, Downey's motion to dismiss is **GRANTED** as to Spofford's defamation claims. See Doc. 55.

B. Bourque

The Court next turns to Spofford's allegations against Bourque. As alleged, Bourque contributed to the Article by detailing the narrative of "Employee B," one of Spofford's accusers who declined to be interviewed by NHPR. See Doc. 26 ¶ 302. Because Employee B was not interviewed directly, NHPR relied on Bourque, Kaniuka, and Stoesz for this section of the story. Id. ¶¶ 302–308. Bourque, GRC's former HR Director, described a meeting during which Employee B revealed she was involved in a sexual relationship with Spofford that was not always consensual. Id. ¶ 311. In addition, Bourque provided NHPR with handwritten notes that she took during this meeting in which she wrote the words "boundaries" and "predator," though her notes did not include explicit reference to Spofford sexually harassing or assaulting Employee B. Id. ¶ 308. NHPR also quoted Bourque as stating: "There's patterns to behaviors like this . . . Sexual harassment is not about sex, it's about power . . . Having that [power] over somebody, it can destroy their life." Id. ¶ 403(a).

In moving to dismiss, Bourque argues that her contribution to the Article should be protected under the free speech rights enshrined in the state and federal constitutions. See Doc. 62 at 9–13. Further, Bourque contends that Spofford fails to allege she acted with actual malice, relying instead on conclusory allegations that the Court need not credit. See id. at 15–17. In response, Spofford argues that he has met the actual malice standard because the Amended Complaint alleges Bourque made knowingly false statements indicating that he sexually harassed and assaulted Employee B. See Doc. 68 at 16–17. Further, Spofford contends that Bourque's statements, particularly the statement regarding "patterns to behavior like this," are

actionable. See id. at 17–20. Consistent with longstanding policy not to "decide questions of a constitutional nature unless absolutely necessary to a decision of the case," the Court first evaluates Bourque's arguments related to actual malice. See State v. Berrocales, 141 N.H. 262, 264 (1996).

Upon review, the Court finds that Spofford has not sufficiently alleged actual malice as to Bourque. Like Downey, Bourque primarily contributed to the Article by repeating details of a conversation she had with one of Spofford's accusers. Spofford offers no facts supporting his assertion that Bourque had knowledge that Employee B's accusations were false or that she acted with reckless disregard for the truth when relaying them to NHPR.[5] His suggestion that Bourque "put words in [Employee B's] mouth" by asking an arguably leading question about whether "certain boundaries had been crossed" is insufficient to suggest that Bourque had a subjective awareness that Employee B's response to that question was probably false. See Gertz, 418 U.S. at 334 n.6. Further, Spofford's assertion that Bourque would have included more in her handwritten notes had there truly been misconduct to report is similarly unpersuasive and irrelevant to actual malice. Therefore, the Court finds that Spofford has failed to allege that Bourque acted with actual malice.

[5] Spofford relies on this Court's (Wageling, J.) decision in Brown v. Brown, No. 218-2020-CV-00673, 2021 N.H. Super. LEXIS 13 (Jan. 14, 2021), for support. In Brown, the Court determined that the Counterclaim Defendant met the actual malice standard based on the allegation that Counterclaim Plaintiff "knew her statements to be false. Or, at very least, given that she had the ability to confirm independently through the parties' joint financial advisor all expenditures from all of the declared accounts in advance of the allocation of assets, and/or in advance of asserting the allegations of criminal conduct, her conduct was undertaken with reckless disregard for the truth." Applied here, the Court finds the Brown decision distinguishable. In Brown, Counterclaim Plaintiff inevitably had personal knowledge of whether her own statements were false, whereas here Bourque is accused of repeating statements made to her by a third party, Employee B. To the extent Spofford alleges that the conversation itself could never have occurred because there was no misconduct to discuss, that circular argument fails for the reasons outlined above in the Court's analysis of the allegations against Downey.

Moreover, the Court finds that Bourque's statement about "patterns of behavior like this" constitutes an unactionable statement of opinion. Spofford primarily takes issue with Bourque's phrasing of "behavior like this," which he argues falsely insinuates that Employee B's accusations were true. See Doc. 68 at 19. However, in the Court's view, Bourque's statement at most implies that she believes Employee B, paired with her perspective on the damaging effect of sexual harassment. Such a statement of opinion is not actionable. See Automated Transactions, LLC, 172 N.H. at 533.

Having decided that Spofford fails to allege that Bourque acted with actual malice, the Court declines to consider the remaining constitutional arguments. See Canty v. Hopkins, 146 N.H. 151, 156 (2001) (where a particular argument is dispositive, court need not consider remaining or alternative arguments).

Accordingly, Bourque's motion to dismiss is **GRANTED** as to Spofford's defamation claims. See Doc. 62.

C. NHPR Defendants – NHPR, Chooljian, Moon, and Barrick

Finally, the Court evaluates the sufficiency of Spofford's allegations against the NHPR Defendants. As alleged, Chooljian exclusively reported on Spofford for nearly two years, primarily in relation to GRC's handling of the COVID-19 pandemic. Doc. 26 ¶¶ 83–107. The NHPR Defendants targeted Spofford due to his prominence, hoping the story would garner national attention and greater visibility from donors. Id. ¶ 122. Chooljian in particular was driven by personal ambition, hoping that the Article would become a career-defining piece. Id. ¶ 115.

Shortly after the Article's publication, Former GRC Director of Human Resources Lynsie Metivier sent a text message to Chooljian to set up a time to discuss the story.

Id. ¶ 272. In a subsequent phone call, Metivier informed Chooljian that while in her former position at GRC, she never received a complaint or allegation involving accusations that Spofford had engaged in sexual misconduct. Id. ¶ 277. Metivier also expressed doubts about the credibility of one of the accusers (Employee A), based on her romantically pursuing certain GRC colleagues. Id. ¶¶ 280–85.

On May 17, 2022, one of the Article's key on-the-record sources, Piers Kaniuka, sent a letter to NHPR. In that letter, Kaniuka stated, in pertinent part:

> I am writing to clarify and correct statements by me that were included in [the Article] . . . Specifically, I am concerned with your use of my statement comparing Mr. Spofford to Harvey Weinstein and my statement that Mr. Spofford should be prosecuted . . . I regret making those statements. I did not have any direct personal knowledge concerning any sexual abuse, misconduct, or other inappropriate behavior by Mr. Spofford with employees, clients, or former clients.

Id. ¶¶ 165–202; see also id. Ex. 16. Despite Spofford's insistence that this letter constituted a retraction of Kaniuka's support that fatally undermined the validity of the Article, the NHPR Defendants have refused to amend the Article or withdraw it from the NHPR website. Doc 26 ¶ 167; see also id. Ex. 17 (May 19, 2022 Letter from NHPR's counsel rejecting Spofford's demand to take down Article).

In moving to dismiss, the NHPR Defendants highlight several areas of Spofford's Amended Complaint as exemplifying his failure to allege facts supporting an inference of actual malice. First, the NHPR Defendants argue that the Article's headline, metatags, and "innuendo" do not misleadingly imply criminality, despite Spofford's suggestions to the contrary. See Doc. 18 at 10–12. Second, the NHPR Defendants discuss each of the Article's identified sources—Kaniuka, Elizabeth, Downey, Employee A, Bourque, and Stoesz—and argue that none of them provided NHPR with a subjective awareness of probable falsity. See id. at 12–24. Third, the NHPR Defendants argue

that Spofford's allegations about another NHPR story concerning vandalization of reporters' homes fail to support a conclusion that NHPR acted with actual malice. See id. at 25–27. Fourth, the NHPR Defendants argue that Chooljian's prior reporting on GRC's handling of the COVID-19 pandemic does not demonstrate a relentless public assault on Spofford's reputation evincing actual malice. See id. at 27–29.

In objecting, Spofford takes the opposite position on each of NHPR's points, and ultimately argues that the Amended Complaint sufficiently alleges that the NHPR Defendants acted with actual malice. See Doc. 34 at 6–16, 20–29. In addition, Spofford contends that the NHPR Defendants violated journalistic norms through their publication of the Article, and were motivated by hopes of garnering sponsorships or donations from their #MeToo-related coverage of him. See id. at 16.

As a preliminary matter, the Court is unpersuaded by Spofford's arguments related to the implications of the Article's headline, metatags, and innuendo. Those implications—even assuming that NHPR's use of the word "accusations" in the title or the selection of a photograph with a GRC building obscured by trees created the negative inferences Spofford suggests—are irrelevant to whether NHPR had a subjective awareness of probable falsity in their reporting. See Gertz, 418 U.S. at 334 n.6. Similarly, several of the remaining issues identified by the parties—the unrelated vandalism story, Chooljian's long-running focus on GRC, and NHPR's alleged violations of journalistic norms—may be relevant to some degree under a lesser standard, but do not tip the scales in the Court's assessment of actual malice. See, e.g., Michel v. NYP Holdings, Inc., 816 F.3d 686, 703 (11th Cir. 2016) ("Actual malice requires more than a departure from reasonable journalistic standards.").

In the Court's view, the primary issue relevant to actual malice in this case is the reliability of NHPR's sources. Spofford alleges that all of the identified sources were unreliable or biased against him, and that they shared motives to lie and cause harm to his reputation. See, e.g., Doc. 26 ¶¶ 171–202 (attacking Kaniuka's credibility due to his being exiled from recovery community after abusing drugs, and suggesting bias against Spofford due to breakdown of once-close relationship); ¶ 319 (characterizing Kaniuka, Bourque, and Stoesz as "deeply unreliable and motivated to defame [Spofford]). Spofford makes similar assertions regarding the reliability of his accusers. See, e.g., id. ¶¶ 212–219 (alleging Elizabeth's accusations unbelievable because she contacted Spofford after alleged misconduct); ¶¶ 238–247 (alleging Employee A's accusations unbelievable because she never provided Chooljian copies of inappropriate messages or photographs); ¶¶ 302–306 (alleging Employee B's accusations unbelievable because she declined to be interviewed).

Upon review, the Court does not find these so-called biases and motives to lie fatal to the credibility of NHPR's sources. If anything, the fact that Bourque, Stoesz, and Kaniuka all appear to have quit or were fired from GRC in connection with these sexual misconduct allegations lends credence to their accounts. Moreover, a defendant's ill will toward a plaintiff is relevant to establishing actual malice "only when combined with other, more substantial evidence of a defendant's bad faith." See Tavoulareas, 817 F.2d at 795 ("It is settled that ill will toward the plaintiff or bad motives are not elements of actual malice and that such evidence is insufficient by itself to support a finding of actual malice."). Further, the Court finds that the NHPR Defendants' use of anonymous sources was not so reckless as to rise to the level of actual malice. See Michel, 816

F.3d at 704 ("That many of the sources were not identified by name does not render them or their reliance on them invalid."). Absent clearer indicia that the NHPR Defendants acted in bad faith in relying on these sources, or were subjectively aware that the information provided by these sources was probably false, the Amended Complaint fails to allege actual malice. See id.; see also Gertz, 418 U.S. at 334 n.6.

Additionally, the Court does not find that the NHPR Defendant's refusal to modify or withdraw the story after receiving communications from Kaniuka or Metivier constituted actual malice. Regarding Metivier, Spofford argues that it was irresponsible for NHPR to publish the story without interviewing Metivier, and that Metivier's subsequent phone call with Chooljian severely undermined the credibility of the other sources. See Doc. 34 at 13. "Malice can be shown by the omission of facts if the publisher knew or strongly suspected that the omission would create a false and defamatory impression." Warren v. Fed. Nat'l Mortg. Ass'n, 932 F.3d 378, 386 (5th Cir. 2019). Even assuming Spofford's allegations to be true and drawing all reasonable inferences in his favor, the Court does not find that the omission of Metivier's account undermined the content of the Article such that it created "a false and defamatory impression." See id. As alleged, Metivier simply informed Chooljian that she was never made aware of any misconduct during her time at GRC. See Doc. 26 ¶ 277. Notably, Metivier did not reveal any unambiguous factual errors in the story, or provide any additional information casting doubt on the accusations beyond a suggestion that Employee A was untrustworthy due to her romantic pursuit of GRC employees. See id.

¶¶ 280–285. Therefore, the Court concludes that NHPR's omission of Metivier's account does not rise to the level of actual malice.[6]

The Court reaches the same conclusion regarding Kaniuka's letter. Spofford characterizes this letter as a "retraction" of Kaniuka's support for the Article that went to the heart of the truth or falsity of the accusations in the report. See Doc. 34 at 14; see also Doc. 26 ¶¶ 179–180; id. Ex. 16. However, upon review of the letter, the Court disagrees with Spofford's assertion that Kaniuka's letter constituted a "retraction." While Kaniuka does express regret for some of the language he used during a prior interview and state that he had no personal knowledge of the misconduct in question, the letter also confirms that he made the statements attributed to him in the Article, and does not dispute the accuracy of any of the Article's content. In the Article, Kaniuka offers general opinions on Spofford's character, corroborates Employee B's story (not through direct personal knowledge, but instead by stating that he spoke with her), and tells Chooljian that he resigned from GRC in connection with Employee B's accusations. Contrary to Spofford's position, the letter does nothing to undermine Kaniuka's role in the story or cast doubt on the other sources' contributions. Therefore, the Court concludes that NHPR's refusal to withdraw or amend the Article following receipt of Kaniuka's letter does not support a finding of actual malice.

In summation, the Court concludes that Spofford's Amended Complaint fails to allege that the NHPR Defendants acted with actual malice in their reporting.

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[6] Consequently, the Court disagrees with Spofford's argument raised in his post-hearing brief, see Doc. 77, that NHPR should have declined to release the second day of the two-day radio broadcast version of the story after receiving Metivier's call. As explained above, Metivier's call did not provide the NHPR Defendants with a subjective awareness of probable falsity in their reporting, and thus Spofford fails to allege the NHPR Defendants acted with actual malice by publishing the second half of the radio broadcast.

Accordingly, the NHPR Defendants' motion to dismiss is **GRANTED** as to Spofford's defamation claims. See Doc. 17.

III. False Light Invasion of Privacy

Spofford's remaining claim, for false light invasion of privacy, fares no better. The New Hampshire Supreme Court has yet to recognize a cause of action for false light invasion of privacy, see Thomas v. Telegraph Publ'g. Co., 151 N.H. 435, 440 (2004), but recently considered and applied the elements for such a claim as outlined in the Restatement (Second) of Torts. See Mansfield v. Arsenault, No 2020-0100, 2021 WL 72370, at *2 (N.H. Jan. 8, 2021). Under that framework:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

See id. (citing Restatement (Second) of Torts § 652E, at 394 (1977)).

As explained above, Spofford fails to allege that any of Defendants had knowledge of, or acted in reckless disregard as to, the falsity of the publicized matter in question. Therefore, even assuming a cause of action for false light invasion of privacy is available in New Hampshire, the Court finds that Spofford fails to sufficiently allege facts giving rise to such a claim.

Accordingly, Defendants' motions are also **GRANTED** as to dismissal of Spofford's false light invasion of privacy claim. See Docs. 17, 55, 62.

Conclusion

Consistent with the foregoing, Downey's motion to dismiss is **GRANTED**. See Doc. 55. Bourque's motion to dismiss is **GRANTED**. See Doc. 62. The NHPR Defendants motion to dismiss is **GRANTED**. See Doc. 17.[7]

Spofford is free to amend his complaint to remedy the deficiencies identified above and supplement his allegations with facts indicative of actual malice. See ERG, 137 N.H. at 189. Any such amendment should be submitted within thirty days of the Clerk's Notice of Decision accompanying this Order. Otherwise, dismissal shall be final.

SO ORDERED.

Date: April 17, 2023

Hon. Daniel I. St. Hilaire
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/17/2023

[7] The Court notes that Spofford moved to extend the deadline to file an objection to Stoesz's motion to dismiss until ten days after this Order is issued, which the Court granted on March 14, 2023. See Doc. 81. Spofford made this request to narrow the scope of the parties' briefing, given the overlap of certain legal issues common to Stoesz's motion and the motions considered in this Order. Accordingly, the parties should limit their discussion of the issues raised in Stoesz's motion in light of the analysis in this Order, so as to avoid wasteful duplication and repetition.