

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 MOTION FOR LIMITED DISCOVERY

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 Borque, Justin Downey, and Brian Stoesz¹ stemming from an NHPR report on multiple accusations of sexual misconduct against Spofford. Doc. 26 (Am. Compl.). By Order dated April 17, 2023, the Court granted Defendants' motions to dismiss after finding that Spofford had failed to allege facts indicative of actual malice. Doc. 82. In that Order, the Court afforded Spofford the opportunity to amend his Complaint to remedy various deficiencies, primarily the failure to allege facts indicative of actual malice. Doc. 82 at 23. Spofford now moves to obtain limited discovery materials from the NHPR Defendants, contending he needs to review these materials before he can meaningfully amend his Complaint to allege actual malice. Doc. 83 ¶¶ 1–11. Defendants object. Doc. 85 (NHPR Defs.' Obj.); Doc. 88 (Borque's Obj.); Doc. 90 (Downey's Obj.); see also Doc. 92 (Spofford's Reply). After review, the Court finds and rules as follows.

¹ Spofford has since filed an assented-to motion for voluntary nonsuit without prejudice as to Stoesz, which the Court granted on May 11, 2023. See Doc. 84.

In his motion, Spofford seeks to obtain:

- The complete unredacted recordings of interviews of “Elizabeth”, “Employee A”, Nancy Bourque, Justin Downey, Brian Stoesz, and Piers Kaniuka.
- Lauren Chooljian’s notes about and communications with “Elizabeth”, “Employee A”, Nancy Bourque, Justin Downey, Brian Stoesz, and Piers Kaniuka.
- Lauren Chooljian’s notes about and communications with Lysie Metivier and any recordings of their phone call on or about March 22, 2022.
- Lauren Chooljian’s notes about and communications with Amy Cloutier (formerly Anagnost) and any recordings of interviews of her.
- Lauren Chooljian’s communications with NHPR personnel concerning the credibility of “Elizabeth”, “Employee A”, Nancy Bourque, Justin Downey, Brian Stoesz, Piers Kaniuka, Lysie Metivier, Amy Cloutier, or their respective accounts about Eric Spofford.

Id. ¶ 12. Spofford also requests that the “temporal scope of this discovery should cover the time when Chooljian began reporting about [Spofford] to the present.” Id. ¶ 13.

Spofford argues the requested discovery “pertains directly to curing the deficiencies the Court has identified with the original complaint” and that “the NHPR Defendants are in exclusive possession of the information likely needed to remedy those perceived defects.” Doc. 83 at 2 (emphasis omitted). Further, Spofford contends the discovery sought would “neither prejudice the NHPR Defendants nor run afoul of First Amendment principles.” Id. ¶ 21.

In response, the NHPR Defendants argue that granting this discovery request after dismissal, before Spofford has alleged a viable cause of action, would constitute an “extraordinary inversion of the usual order of operations.” Doc. 85 at 2. The NHPR Defendants cite case law from New Hampshire and other jurisdictions supporting the proposition that pre-discovery dismissal of a defamation action for failure to allege actual malice is proper. See id. at 3 (citing, e.g., Resolute Forest Prod., Inc. v.

Greenpeace Int'l, 302 F.Supp.3d 1005, 1027–28 (N.D. Cal. 2017) (“the circuits that have considered the question have uniformly held that a claim may be dismissed for failing plausibly to allege actual malice without permitting discovery.”)). Additionally, the NHPR Defendants contend that allowing unnecessary discovery in a defamation action of this nature may threaten First Amendment values and have a chilling effect on constitutionally protected freedoms. See id. at 6–9. Borque and Downey join in the NHPR Defendants’ position. See Docs. 88, 90.

Upon review, the Court agrees with Spofford that some of the discovery materials he requests could, in theory, include evidence that the NHPR Defendants’ acted with actual malice. Actual malice requires a “reckless disregard for the truth,” or a “subjective awareness of probable falsity” shown through “sufficient evidence to permit the conclusion that the defendant[s] in fact entertained serious doubts as to the truth of [their] publication.” See Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n.6 (1974) (quotations omitted). Here, Chooljian’s notes during or after her discussions with various sources could potentially indicate she subjectively distrusted the sources’ accounts but decided to report them anyway. In addition, internal communications between Chooljian and other NHPR employees concerning the sources’ credibility could demonstrate that the NHPR Defendants displayed a reckless disregard for the truth by reporting a story they knew or suspected was false. Nevertheless, the Court also agrees with the NHPR Defendants that allowing Spofford to “go digging around in NHPR’s files, based on nothing more than generalized conclusory accusations, in search of a factual basis for his claim” would be inappropriate, and could have a chilling effect on speech. See Doc. 85 at 4, 6–9.

Both sides raise weighty considerations. The Court finds that an *in camera* review of the materials would properly address the parties' respective concerns, enabling identification of any materials relevant to actual malice without permitting a fishing expedition that could harm constitutional freedoms.

In addition, the Court finds that further deviations from Spofford's request are warranted because the scope of that request is excessive. First, Chooljian had been exclusively reporting on Spofford long before publication of the allegedly defamatory story, and she and the other NHPR Defendants undoubtedly possess numerous notes, interviews, and recordings pertaining to Spofford that are irrelevant to this action. Moreover, the Court reiterates that "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 Doc. 82 at 19 (quoting Tavoulareas v. Piro, 817 F.2d 762, 795 (D.C. Cir. 1987)). In other words, evidence of bias or ill will towards Spofford, without more, is insufficient to prove actual malice. See Gertz, 418 U.S. at 334 n.6. In the Court's view, materials pertaining to NHPR's other stories about Spofford would only be relevant to show a pattern of ill will or bias, which is insufficient to establish actual malice. See id.; see also Tavoulareas, 817 F.2d at 795. Therefore, Spofford's requested temporal scope, spanning the entirety of Chooljian's reporting about him, is overbroad.

Similarly, the substantive scope of the discovery request is also excessive. For example, release of the complete, unredacted recordings of interviews with "Elizabeth" and "Employee A" may reveal identifying information, which would be destructive to their expectation of anonymity when they agreed to participate in NHPR's reporting. To

further protect the anonymity of these sources (and to aid in the Court's review), the Court finds that the interviews and communications in question should be provided in the form of written transcripts as opposed to audio recordings. In addition, while internal NHPR communications concerning the sources' credibility may be relevant, further materials pertaining to NHPR staff's personal impressions or accounts of Spofford would not support a finding of actual malice, and should thus be excluded.

For the reasons stated above, the NHPR Defendants are ordered to provide the following materials for *in camera* review by the Court:

- Lauren Chooljian's notes about, communications with, and transcribed interviews of "Elizabeth" and "Employee A," with all identifying information (name, address, phone number, etc.) redacted or replaced with anonymized identifiers.
- Lauren Chooljian's notes about, communications with, and transcribed interviews of Nancy Borque, Justin Downey, Brian Stoesz, Piers Kaniuka, Lysie Metivier, and Amy Cloutier.
- Lauren Chooljian's communications with NHPR personnel concerning the credibility of "Elizabeth," "Employee A," Nancy Borque, Justin Downey, Brian Stoesz, Piers Kaniuka, Lysie Metivier, and Amy Cloutier. Such communications should again redact identifying information and instead use anonymized identifiers with respect to "Elizabeth" and "Employee A."

These materials should be limited to those pertaining to the story in question, not the entire span of Chooljian's reporting on Spofford. In the event the Court, after *in camera* review, preliminarily determines certain materials are relevant to proving actual malice in this case, the Court will identify those particular materials in a further Order (under seal). Thereafter, the NHPR Defendants may object to the dissemination of those particular materials, to which Spofford may reply, before the Court decides whether to provide copies to the parties.

Before concluding, the Court briefly addresses the issue of cost. As the NHPR Defendants note, Spofford's discovery request is indeed atypical, especially in light of

the case law indicating the Court is not required to grant such a request before dismissing this action. See, e.g., Resolute Forest Prod., Inc. 302 F.Supp.3d at 1027–28. Further, the Court notes that the language of the Superior Court Rules pertaining to discovery contemplates that the requesting party would copy the documents in question, unlike this case where NHPR will bear the burden of transcribing and redacting interviews, notes, and communications. See Super. Ct. R. 24(a) (“Any party may serve on any other party a request: (1) to produce and permit the party making the request . . . to inspect, copy, test, or sample any designated documents” (emphasis added)); see also Super. Ct. R. 25(c) (“If the request for [Electronically Stored Information] is considered to be out of proportion to the issues in the dispute, at the request of the responding party, the court may determine the responsibility for the reasonable costs of producing such ESI”).

Here, given the unusual nature of this discovery request and the atypical burden shouldered by the NHPR Defendants as the responding party, see Super. Ct. R. 24(a), the Court finds that Spofford should bear the costs associated with transcribing the interviews he requests. See Super Ct. R. 1(b) (“The rules shall be construed and administered to secure the just, speedy, and cost-effective determination of every action.”). As Spofford likely did not anticipate this expense when he filed his motion, Spofford shall clarify, **within ten days** of the date on the Clerk’s Notice of Decision accompanying this Order, whether he wishes to maintain his request. This is not intended to dissuade Spofford from going forward, only to provide him the opportunity to reconsider, should he so choose, with the knowledge he will bear the cost. If nothing is filed, or if Spofford clarifies that he wishes to maintain his discovery request, the NHPR

Defendants shall provide the above-listed materials for *in camera* review **within forty days** of the date of the Clerk's Notice of Decision accompanying this Order.

Consistent with the foregoing, Spofford's motion for limited discovery is **GRANTED** as to the above-listed materials, but is otherwise **DENIED**. See Doc. 83. Spofford shall clarify whether he wishes to maintain his discovery request **within ten days** of the Clerk's Notice of Decision. If he does, the NHRP Defendants shall then provide the above-listed materials for *in camera* review **within forty days** of the date of the Clerk's Notice of Decision. **Within ten days** of providing these materials, the NHRP Defendants shall file an affidavit reflecting the costs accrued in complying with this Order.

SO ORDERED.

Date: May 30, 2023

A handwritten signature in black ink, appearing to read "D. St. Hilaire". The signature is written in a cursive style with a large initial "D" and a stylized "St. Hilaire".

Hon. Daniel I. St. Hilaire
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 05/31/2023