COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

RYAN OLTHAUS, :

Plaintiff, :

v. :

JULIE NIESEN, et al., :

Defendants. :

Case No. A2002596

Judge Megan E. Shanahan

ENTRY GRANTING MOTIONS TO DISMISS

This case is before the Court on the motion to dismiss of each of the Defendants, Julie Niesen, Terhas White, Alissa Gilley and James Noe ("Defendants"), pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure. The Court, having considered the papers filed by the parties, the oral arguments before this Court, the relevant facts and the law, finds that the motions to dismiss are well taken. The Court 1) grants the motion to dismiss of Julie Niesen; 2) grants the motion to dismiss of Terhas White; 3) grants the motion to dismiss of Alissa Gilley; and 4) grants the motion to dismiss of James Noe.

I. Facts

Following the death of George Floyd, racial tensions were high throughout our country. Responding to public protests on policing in Cincinnati, Cincinnati City Council scheduled a series of public meetings in the summer of 2020 to hear from constituents. On June 24, 2020, during one such meeting, Plaintiff, a uniformed police officer, was assigned to City Hall to provide police services including crowd control and security for City Council's chambers. During that meeting, Plaintiff gave a hand signal that was interpreted by some as a "white supremacist" hand signal. According to Plaintiff, the hand signal was intended as an "okay"

signal in response to an inquiry after a fellow officer that had just left the scene. The next day, through social media and filing a complaint with the Citizen's Complaint Authority, Defendants commented upon the hand signal and upon Plaintiff. Plaintiff filed a lawsuit to restrain Defendants from publishing derogatory comments about him and to prevent them from publishing information about his family. Plaintiff maintains that he gave the universal hand signal for "okay" and that Defendants misinterpreted the signal as a "white power" sign. He argues that being called a white supremacist cop casts him as the worst kind of villain in today's society, damaging his professional and personal reputations and career, and threatening his safety and the safety of his family, colleagues, and friends.

Plaintiff filed a complaint against Defendants for false light invasion of privacy, defamation, negligence/recklessness and, as to Defendants Gilley and White, Plaintiff alleges a claim pursuant to R.C. 2307.60 for making a false allegation against a peace office in violation of R.C. 2921.15.

From the beginning of this case, this Court has recognized the significance of the competing interests in this case: reputation and the First Amendment.

II. Law

A. Rule 12(B)(6)

Rule 12(B)(6) of the Ohio Rules of Civil Procedure provides that a case may be dismissed for failure to state a claim upon which relief may be granted. "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378, 381 (1992). When reviewing the complaint, the court must regard all the material allegations as admitted and construe all reasonable inferences in favor of the nonmoving

party. *Id.* The court need not, however, accept as true any unsupported legal conclusions in the complaint. *Morrow v. Reminger & Reminger Co. L.P.A.,* 183 Ohio App.3d 40, 49, 2009-Ohio-2665, 915 N.E.2d 696 (10th Dist.). A court is to dismiss a complaint if it "appear[s] beyond doubt that plaintiff can prove no set of facts warranting a recovery." *Mitchell v. Lawson Milk Co.,* 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756 (1988).

B. Defamation/false light invasion of privacy

Police officers are public figures for defamation purposes. *New York Times v. Sullivan*, 376 U.S. 254 (1964). The elements of defamation of a public figure are: (1) a false and defamatory statement concerning the public figure; (2) publication of the statement; (3) a showing of actual malice; (4) and harm. *Williams v. Gannet Satellite Info. Network, Inc.,* 162 Ohio App. 3d 596 (1st Dist.2005). Actual malice is knowledge of the falsity of the statements or a reckless disregard for their truth. *New York Times v. Sullivan*, 376 U.S. at 280.

The seminal case on First Amendment protection afforded to speech about public officials is *New York Times v. Sullivan*, 376 U.S. 254 (1964). *New York Times v. Sullivan* held that speech about matters of public concern is entitled to the fullest constitutional protection. *Id.* at 271-273. Criticism of public officials need not be true, popular, or even well-founded to trigger the First Amendment. *Id.* at 271. Injury to a public official's reputation is not a valid basis for suppressing expressions, even where that expression contains "half-truths" and "misinformation." *Id.* at 272. Thus, statements critical of public officials engaged in their official duties are only actionable if uttered with actual malice, that is to say, with knowledge of their falsity or the reckless disregard of their truth. *Id.* at 283. Actual malice is not synonymous with bad intent or ill motive. *Burns v. Rice*, 2004-Ohio-3228 (10th Dist.) ¶ 46. The focus is upon the

defendant's attitude toward the truth or falsity of the published statements, not the existence of hatefulness or ill will. *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964).

Ohio law agrees with federal law: statements made about public officials are constitutionally protected when the statements concern "anything which might touch on an official's fitness for office." *Soke v. The Plain Dealer,* 69 Ohio St.3d 395, 397 (1994).

Expressions of opinion about public officials also are protected under the First Amendment and the Ohio Constitution. *Jorg v. CBUF*, 153 Ohio App.3d 258, 260 (1st Dist. 2003). "Once a determination is made that specific speech is 'opinion,' the inquiry is at an end. It is constitutionally protected." *Id.* at 261. Statements about racism or bigotry are inherently opinion and are protected speech. *Lennon v. Cuyahoga County Juv. Court,* 2006-Ohio-2587 (8th Dist.) ¶ 31.

Regarding false light invasion of privacy, "[o]ne 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 (i) the false light in which the other was placed would be highly offensive to a reasonable person; and (ii) 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." *Welling v. Weinfeld*, 113 Ohio St.3d 464, 467, 866 N.E.2d 1051 (2007). "It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy." *Id.* at 472.

Police officers are public officials for purposes of false light claims and "actual malice" must be demonstrated – "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." *Id.*

C. Negligence/recklessness

To establish a claim for negligence, one must show (i) the existence of a duty, (ii) a breach of that duty, and (iii) and injury proximately resulting from the same. *Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 81, 788 N.E.2d 1088 (2003). Recklessness is a perverse disregard of a known risk. *A.J.R. v. Lute*, 163 Ohio St.3d 172 (2020).

Plaintiff alleges that Defendants negligently and/or recklessly caused damage to Plaintiff's professional and personal reputations by publicly disseminating information that they knew or should have known was false despite a duty to refrain from such conduct and actual knowledge that it was likely to cause substantial harm to Plaintiff's protected interests.

III. Discussion

A. Julie Niesen

Defendant, Julie Niesen, moves for dismissal of the complaint pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure, arguing that, under the framework set forth in *New York Times v. Sullivan, supra,* there is no set of facts upon which Plaintiff can prevail. Statements critical of public officials engaged in their official duties are actionable only if uttered with actual malice, *i.e.,* knowledge of their falsity or the reckless disregard of their truth. Additionally, statements of opinion are not actionable. *Jorg v. CBUF, supra.*

Plaintiff states that in the current political atmosphere, Defendants' statements rise above mere opinion and operate as statement of fact. An opinion does not become a statement of fact because of political atmosphere.

The Complaint does not allege actual malice on the part of Defendant Niesen. It alleges Defendants' acts were malicious but it fails to plead any facts showing that Defendant Niesen

made any statement with knowledge of the assertion's falsity or reckless disregard for its truth. Indeed, the statements were either a) true, or b) opinion.

According to the allegations of the Complaint, on June 25, 2020, Defendant Niesen published a post on social media in which she portrayed Plaintiff falsely as a "white supremacist," a term not subject to being proven true or false. She wrote that Plaintiff used a hand signal that white supremacists use. That statement, and the other statements made by Defendant Niesen, were true. Defendant Niesen's post is constitutionally protected speech.

Accepting the factual allegations of the Complaint as true, it appear[s] beyond doubt that Plaintiff can prove no set of facts warranting a recovery against Defendant Niesen for false light invasion of privacy or defamation. Regarding the negligence/recklessness claim, Plaintiff alleges that Defendants disseminated information that they knew or should have known was false. As the Court has found the post to be constitutionally protected speech, the claim for negligence/recklessness fails as well.

Defendant Niesen's motion to dismiss is granted.

B. Terhas White

Defendant, Terhas White, states that the ability to criticize public officials is at the core of our democracy and that, in order to protect the rights afforded by the First Amendment, a party must show actual malice in order to overcome the protection of the First Amendment. Moreover, opinions about public officials are not actionable and comments about belief systems are not actionable. This Court agrees.

The Complaint does not allege actual malice on the part of Defendant White. It alleges Defendants' acts were malicious but it fails to plead any facts showing that Defendant White made any statement with knowledge of the assertion's falsity or reckless disregard for its truth.

The Complaint alleges that Defendant White filed a complaint with the Citizen's Complaint Authority on June 25, 2020, and falsely accused Plaintiff of using the "white power" hand signal in the course of his employment. The accusation was not false. The hand signal was made. The intent behind the hand signal is disputed. Statements critical of public officials engaged in their official duties are actionable only if uttered with knowledge of their falsity or the reckless disregard of their truth. *New York Times v. Sullivan*, 376 U.S. 254, 283 (1964). Publishing that it was the "white power" hand signal is not actionable as defamation or false light invasion of privacy.

The Complaint also states that Defendant White published on social media that Plaintiff is a "white supremacist kkkop" and a "white supremacist piece of shit." As these statements are not verifiable as true or untrue, they are opinions and are protected speech.

The Court finds that Plaintiff can prove no set of facts warranting a recovery against Defendant White for false light invasion of privacy, defamation, or a claim pursuant to R.C. 2307.60. Regarding the negligence/recklessness claim, Plaintiff alleges that Defendants disseminated information that they knew or should have known was false. As the Court has found Defendant White's speech to be constitutionally protected, the claim for negligence/recklessness fails as well.

Defendant White's motion to dismiss is granted.

C. Alissa Gilley

The Complaint does not allege actual malice on the part of Defendant, Alissa Gilley. It alleges Defendants' acts were malicious but it fails to plead any facts showing that Defendant Gilley made any statement with knowledge of the assertion's falsity or reckless disregard for its truth. The Complaint alleges that Defendant Gilley filed a complaint with the Citizen's

Complaint Authority accusing Plaintiff of "throwing up a white supremacy hand-signal towards citizens of color" and being "a threat to me, my children and so many others."

Again, accepting the allegations as true, there is no basis for finding that the words were uttered with actual malice. In considering actual malice, the focus is upon the defendant's attitude toward the truth or falsity of the published statements, not the existence of hatefulness or ill will. *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964). Defendant Gilley believed the statement that Plaintiff threw "up a white supremacy hand-signal towards citizens of color" to be true. And it cannot be denied that a hand signal was made. Only the intended meaning behind the hand signal is disputed. Defendant Gilley's speech is protected political expression.

Plaintiff can prove no set of facts warranting a recovery against Defendant Gilley for false light invasion of privacy, defamation, a claim pursuant to R.C. 2307.60, or negligence/recklessness.

The motion to dismiss of Defendant Gilley is granted.

D. James Noe

Defendant, James Noe, argues that Plaintiff failed to allege a cause of action for false light because Plaintiff has not pled or implied the essential elements, including the element of "actual malice." "Actual malice" has been defined and discussed, *supra.* It is "only when there is such a major misrepresentation of his character, history, activities, or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position that there is a cause of action for invasion of privacy." *Welling v. Weinfield,* 113 Ohio St.3d 464, 472, 866 N.E.2d 1051(2007).

Defendant Noe argues that to prevail on a claim for false light, Plaintiff must prove that any statement made by Defendant Noe is untrue. According to the allegations of the Complaint,

Defendant Noe posted on social media that Plaintiff is a "limp-dicked POS [piece of shit]" and a "white supremacist," and that Plaintiff flashed the "white power symbol to Black speakers." The first two statements are incapable of being proven true or untrue and the third statement, that a hand signal was made by Plaintiff, is true. What was intended to be conveyed by the hand signal is disputed. But "[h]onest misinterpretation does not amount to actual malice." *Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106, 116 (D.C. Cir. 2017). There is a basis in fact for Defendant Noe believing that the hand signal was a white power signal as it has come to be known as such. The language used by Defendant Noe "is value-laden and represents a point of view that is obviously subjective." *Vail v. The Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 283(1995). "It is not sufficient for [Plaintiff] to show that an interpretation of facts is false; rather, he must prove with convincing clarity that [Mr. Noe] was aware of the high probability of falsity." *Lansky v. Rizzo*, 2007-Ohio-2500, ¶25.

The Complaint further alleges that Defendant Noe "threatened to publicize Plaintiff's personal identifying information in his social media posts." As the Supreme Court noted, Defendant Noe did not express a clear intent to publicize name, address and phone number. Rather, he queried whether to do so would be legal and stated he would not do so unless told it was legal. *See State ex rel. Cin. Enquirer v. Shanahan*, 166 Ohio St.3d 382, 388, 185 N.E.3d 1089 (2022). Despite threatening to share this information, "while potentially offensive and disagreeable," *United States v. Cook*, 472 F.Supp.3d 326, 335 (N.D.Miss.2020), a claim for false light invasion of privacy will not lie. The statement neither casts Plaintiff in a light that would be highly offensive to a reasonable person, nor does the statement reflect that Defendant Noe had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which Plaintiff would be placed.

Regarding the claim for defamation, there is no actual malice alleged nor is there any.[1] There is no allegation that Defendant Noe published a false statement made with some degree of fault that reflects injuriously on Plaintiff's reputation or affects him in his profession. *Jackson v. Columbus*, 117 Ohio St.3d 328, 883 N.E.2d 1060 (2008). The right to sue for damage to one's reputation under state law is encumbered by the First Amendment. *Soke v. The Plain Dealer*, 69 Ohio St.3d 395, 397 (1994). As Defendant Noe's statements are either a) true, or b) opinion, the statements are incapable of having a defamatory meaning as a matter of law.

The Complaint alleges that Defendant Noe portrayed Plaintiff as a "white supremacist" by posting a "deceptively edited photograph" of Plaintiff on social media. Again, this Court finds that referring to a police officer as a "white supremacist" is not actionable. It is protected speech. Similarly, the threat to publish personal identifying information is not defamation as it is not a false statement made with some degree of fault that reflects injuriously on Plaintiff's reputation or affects him in his profession.

This Court finds that Plaintiff can prove no set of facts warranting a recovery against Defendant Noe for false light invasion of privacy, defamation or negligence/recklessness because his speech is constitutionally protected.

Defendant Noe's motion to dismiss is granted.

E. Plaintiff

In opposition to the motions to dismiss, Plaintiff argues Defendants' statements evidence a reckless disregard for the truth and rise to the level of defamation *per se* as the statements could

[1] As with the other Defendants, the Complaint alleges Defendants' acts were malicious but fails to plead any facts showing that Defendant Noe made any statement with knowledge of the assertion's falsity or reckless disregard for its truth.

tend to injure him in his trade or occupation, one of the three categories in the definition of defamation *per se*. Defamation *per se* is not alleged in the complaint.

Plaintiff's claim for defamation *per se* fails for the same reason his other claims fail: for a public official to prevail on a claim for defamation *per se,* actual malice must be established. "That standard is grounded in First Amendment principles that do not evaporate simply because the speech subjects the public official to particularly heinous ridicule." *Reykdal v. Espinoza,* 196 Wash.2d 458, 466 (Wash. 2020). Actual malice cannot be established in this case. The statements either were true, or the statements were a matter of opinion.

Plaintiff argues that he should be granted leave to file an amended complaint. Granting leave to amend the complaint would be futile as there simply are no additional facts to allege. *Darby v. A-Best Prods. Co.,* 102 Ohio St.3d 410, 414, 811 N.E.2d 1117, 2004-Ohio-3720. Leave to file an amended complaint is denied.

IV. Conclusion

It "appear[s] beyond doubt that plaintiff can prove no set of facts warranting a recovery." *Mitchell v. Lawson Milk Co.,* 40 Ohio St.3d 190, 193, 532 N.E.2d 753, 756 (1988). The motion to dismiss of each Defendant is granted.

3/2/23

Megan E. Shanahan, Judge

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