COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS. SUPERIOR COURT DEPARTMENT
C.A. NO.: 2177CV00572

WILLIAM FAHEY,
Plaintiff,

v.

ANDREW FLANAGAN, Individually and as Manager for the TOWN OF ANDOVER
Defendants.

DEFENDANT'S, ANDREW FLANAGAN, INDIVIDUALLY AND AS MANAGER FOR THE TOWN OF ANDOVER, MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S COMPLAINT

Defendant Andrew Flanagan Individually and as Manager for the Town of Andover, ("Flanagan") hereby submits this Memorandum of Law in support of his Motion for Summary Judgment. Flanagan maintains that, as a matter of law, the Plaintiff cannot prevail on his claims for breach of contract, breach of the covenant of good faith and fair dealing, defamation of character, Intentional Infliction of Emotional Distress, and Intentional Interference with Advantageous Contractual/Business Relations, against him because there are insufficient competent facts in the record from which a factfinder could conclude that the Plaintiff has meet the essential elements of the claims against Flanagan and no genuine issue of material facts exists. For these reasons, the Plaintiff's claims against Flanagan fail as a matter of law.

INTRODUCTION

This case arises from the termination of the Plaintiff, William Fahey, from his position as the Director of Youth Services of the Defendant, Town of Andover by the Town Manager,

Defendant Andrew Flanagan on May 10, 2021. The Plaintiff was terminated as a result of allegations of misconduct by a former employee of AYS which were investigated by Attorney Regina Ryan of Discrimination and Harassment Solutions. Attorney Ryan produced a report of her findings on April 5, 2021, and Mr. Flanagan based his decision to terminate Fahey primarily on her report. The Defendants contend that the findings of the investigator support a finding of good cause to terminate the plaintiff and no reasonable finder of fact could decide otherwise. Accordingly, Summary Judgment in favor of the defendant is appropriate.

I. FACTS ESTABLISHED BY RYAN REPORT

The Plaintiff was hired by the Town as Director of Youth Services on January 17, 1994. Andrew Flanagan was hired as Town Manager in August of 2015 (**SUF ¶2, ¶3**).

In December of 2020 MJ, a former employee of the Town of Andover ("Town") reported to a Police Department employee, Sobhan Namvar, that the Plaintiff engaged in sexually inappropriate behavior with her while he was her supervisor at AYS and that those events began when MJ was 16 years old and continued for years. (**SUF ¶8**). The Andover Police referred the matter to the Essex County District Attorney (**SUF¶9**). The DA investigated the matter, interviewed MJ, and determined that the Plaintiff's actions did not rise to the level of a crime but referred the matter to the Town for further action. **(SUF ¶10).**

On February 5, 2021, the Plaintiff was placed on leave with pay from his position (**SUF ¶11**). At that time, Plaintiff was ordered to turn over his laptop, computer and cellphone issued by the Town. **(SUF ¶12).** The Town retained Regina Ryan of Discrimination and Harassment Solutions to investigate the allegations. (**SUF ¶14**). Ms. Ryan interviewed several persons including MJ, the Plaintiff and others, and reviewed numerous documents, including text messages from the Town owned cell phone. (**SUF ¶15**). Her investigation found the following:

Plaintiff met "MJ" in December 2011, when her parents were abruptly incarcerated, and he undertook to support the family. He first met MJ at Andover High School where she was a junior. As part of that meeting, he took her for a walk.. In August 2012, Plaintiff hired "MJ" on a part-time basis .(**SUF ¶14**). MJ accused the Plaintiff of inappropriate conduct towards her and "grooming her over the span of years (SUF¶17). The investigator interviewed the Plaintiff who admitted that he would often drive MJ in his truck to run errands and give her rides home. (**SUF ¶19).** Plaintiff at times would drive MJ late at night, alone, and at least one time he spent time with her alone at his AYS office until after midnight. (**SUF ¶19).** Plaintiff admits to hugging MJ and telling her he loved her and that she was a beautiful person. (**SUF ¶19**). Fahey would touch and hug other participants at AYS as well. (**SUF¶20).**

MJ graduated from High School in 2013 (**SUF ¶21**). After her graduation the Plaintiff stayed in touch and maintained a close relationship with MJ and her family. (**SUF ¶21).** Indeed, when MJ's sister died from a drug overdose, Fahey went to the hospital and organized a memorial service for her (**SUF ¶22**). Fahey claimed that he twice helped MJ to be hospitalized for mental health problems and that he visited her in the facilities. (**SUF ¶22**). He took her for walks during those visits. (**SUF ¶22, para. 25**).

The Plaintiff reported that MJ would ask him "personal questions and flirt" with him. When he visited her at the hospital, he claimed that she told him that "I wish I could find a man like you." (**SUF ¶24**, **para. 27).**

In 2015 MJ moved to California, and her parents moved out of Andover.Fahey told the investigator that in 2016 someone named Danny told him that MJ was acting in pornographic films in California. (**SUF ¶25 para. 28**). He stated that he then drove to the Johnson home and told MJ's mother that he did not know if the allegations were true. (**SUF ¶25, para. 28**). He

claimed that the two of them then searched for the pornography on either his work laptop or on the mother's, found MJ's video, and watched it together. (**SUF ¶25, para. 28**)

The investigator also interviewed MJ's mother. Her memory of the incident ws materially different from Fahey's. She recalled that Fahey brought the pornographic video of her daughter to her house on his computer. (SUF ¶25). MJ's mother reported that Fahey told her that MJ had made a move on him. (SUF ¶26, para. 47). She also remembered that MJ told her that Fahey kissed her. (SUF ¶26, para. 50).

MJ's father reported that he originally trusted Fahey but now considers him a "creep". He reported that Fahey would often pick MJ at the house, sometimes late in the evening. (SUF ¶27, para. 55).

Ryan also interviewed Sobhan Namvar who is a licensed social worker employed by the town in the community outreach division. (SUF ¶28). He told the investigator that Fahey would often have kids in his truck and recalled MJ driving with Fahey alone. (**SUF ¶28, para. 59**). He also witnessed MJ, and other kids, mostly girls, in Fahey's office with the door closed. (**SUF ¶28, para. 60**). Ryan reviewed e-mails and text messages on Fahey's phone. (**SUF ¶29**). She reported that people seek mental health advice from him. (**SUF ¶29, para. 70).** Fahey offered mental health opinions. (**SUF ¶29).**

Ryan's Conclusions

Ms. Ryan found that the Plaintiff transgressed professional boundaries with program participants and their families in several ways. (**SUF ¶¶32-39**). She reported that she had concerns about MJ's credibility and thus determined that her allegations, when not supported by third party or documentary corroboration did not meet the preponderance of the evidence standard. (**SUF ¶30**). Similarly, Ryan found that Fahey had significant gaps in his credibility. (**SUF ¶31**). She

found his denial of meeting with MJ behind closed doors in his office to be not credible. (**SUF ¶32**). Additionally, she found that he was untruthful about how late he met with MJ at AYS, and thenhe met with her after 10 p.m. (**SUF ¶33**).She reported that Fahey told her that MJ "made a move" on him, something that he denied. Importantly, she found that Fahey's claim that he did not know whether Danny's claim that MJ was involved in pornography before he arrived at her home was accurate was far-fetched. (**SUF ¶33**). She did not believe Fahey. She concluded that Fahey violated town policy as follows:

1. He downloaded pornographic material onto his work computer and showed it to MJ's mother. (**SUF ¶39**)
2. His lack of judgment and professionalism was evidenced by his frequent meetings with MJ often behind closed doors. He met with her at night after staff had left which meeting created an appearance of impropriety. (**SUF ¶40**)
3. His driving young participants around in his truck was conduct unbecoming a Town employee. (**SUF ¶40**)
4. His expressions of affection, including hugging AYS participants and his expressions of love to them and their beauty, including sending them heart emojis reveal a lack of appreciation for acceptable boundaries. (**SUF ¶41**)
5. His visiting MJ in a mental health facility while she was in a fragile state and engaging in a conversation where she told him that she wanted to "find a man like him" demonstrated his lack of understanding of appropriate boundaries. (**SUF ¶42**).
6. After learning from her mother that MJ had a "crush on him", he continued to pursue a relationship with her with texts, office visits, and rides in his truck.

The investigator found that this behavior was peculiar and evidenced a reckless disregard for her vulnerable state and a lack of understanding of professional limitations. (**SUF ¶44**).

7. She found that Fahey frequently circumvented processes put in place by the Town to provide professional services to participants and unilaterally addressed these matter soutside his authority. (**SUF ¶45**)
8. She found that Fahey's assistance in placing MJ in a mental health facility and his visiting her there was inconsistent with his duties. (**SUF ¶46)**
9. She found that Fahey's actions towards MJ and other participants risked exposing the children to greater damage and exposed the Town to potential liability. (**SUF 47**)
10. She found that Fahey's willingness to use his position to cross all professional boundaries, to give misguided and uninformed advice was inappropriate. (**SUF ¶46**).
11. She found that his conduct misled vulnerable individuals to believe that he possessed the requisite expertise to render services and guidance amounted to conduct unbecoming a town employee. (**SUF ¶45**).

As a result, Attorney Ryan recommended discipline and corrective action up to and including termination be considered. (**SUF ¶49**).

After reviewing the Ryan report, Defendant Flanagan determined that the conduct found by the investigator produced enough evidence to rise to the level of "just cause" to dismiss the Plaintiff. (SUF ¶48). On April 7, 2021, the Plaintiff was given notice that he was being terminated from his position as director of the Andover Youth Services citing the results of the investigation and giving Plaintiff time to respond with counsel. (**SUF ¶50**). On May 10, 2021, Flanagan as Town Manager, terminated Plaintiff from his position as Director of Youth Services. (**SUF ¶52**).

II. STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue of material fact and, where viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c). "A party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if it demonstrates, by reference to material described in Mass.R.Civ.P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). "A complete failure of proof concerning an essential element of the non-moving party's case renders all other facts immaterial" and mandates summary judgment in favor of the moving party. Id. at 711.

The non-moving party cannot defeat a motion for summary judgment by resting on the pleadings and mere assertions of disputed facts. LaLonde v. Eissner, 405 Mass. 207, 209 (1989). In deciding motions for summary judgment, the court reviews the evidence in the light most favorable to the nonmoving party, but does not weigh evidence, assess credibility, or find facts. Attorney Gen. v. Bailey, 386 Mass. 367, 370-71 (1982).

Mass. R. Civ. P. 56(c) provides prompt disposition of controversies, without trial, where no salient facts are in dispute. Casseso v. Commission of Correction, 390 Mass. 419, 422 (1983); Community National Bank v. Dawes, 396 Mass. 550, 553 (1976). The Supreme Judicial Court has held that, where, as here, the movant for summary judgment does not have the burden of proof at trial, the movant may demonstrate the absence of a triable issue in either of two ways: 1) submitting the affirmative evidence that negates an essential element of the opponent's case; or 2) "by demonstrating that proof of that element is unlikely to be forthcoming at trial." Flesner v.

Technical Communications Corp., 310 Mass. 805 (1991), accord Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

The Supreme Judicial Court has firmly upheld the principle that motions for summary judgment serve a salutary purpose, and the mechanism should not be "set at naught where the opposing party merely raises vague and general allegations of expected proof." Community National Bank, 396 Mass. at 555-56 (internal quotations omitted). Thus, the Plaintiff cannot satisfy the burden to show genuine issues of material fact through mere conclusory statements or argumentative assertions. Key Capitol Corp. v. M & S Liquidating Corp., 27 Mass. App. Ct. 721, 727-728 (1989) (rev. den. 406 Mass. 1101 (1989)). Additionally, the existence of disputed facts between the parties is consequential only if those facts have material bearing on the disposition of the case. Hogan v. Riemer, 35 Mass. App. Ct. 360, 364 (1993).

III. ARGUMENT

A. The Plaintiff's Claim of Breach of Contract Fails because the Plaintiff's Misconduct in Performing his Duties as found by the Investigator was "Just Cause" to Terminate his Employment

This central issue in this case turns on the question of whether the Town had "just cause" to terminate Fahey. Terms such as "just cause" and like phrases have been construed in similar or analogous contexts as meaning: "[T]here existed (1) a reasonable basis for employer dissatisfaction with an employee, entertained in good faith, for reasons such as lack of capacity or diligence, failure to conform to usual standards of conduct,

or other culpable or inappropriate behavior, or (2) grounds for discharge reasonably related, in the employer's honest judgment, to the needs of his business. Discharge for a 'just cause' is to be contrasted with discharge on unreasonable grounds or arbitrarily, capriciously, or in bad faith." G &M Employment Serv., Inc. v. Commonwealth, 358 Mass. 430, 435, 265 N.E.2d 476 (1970).

See also Amoco Oil Co. v. Dickson, 378 Mass. 44, 47–48, 389 N.E.2d 406 (1979), and cases therein collected.

Here, the independent investigator's report clearly established that the Plaintiff failed to conform to usual standards of conduct by his inappropriate behavior towards MJ and other AYS participants. Further, his misconduct towards those adolescents exposed the Town to significant liability. The job description for the Director of Youth Services defines the position as "under general direction of the Town Manager, recommend and develop strategies and plans for the provision of recreational, education, and cultural programs for youngsters between the ages of 11-19 that are consistent with quality financial objectives; oversee the administration of all such programs and the implementation of related special projects and new ventures; oversee management and coordination of youth based recreational, educational, and cultural programs." Pursuant to the Agreement between the Town and the Independent Employees Association, the Town Manager may dismiss, demote or suspend the Director of Youth Services if there is just cause to support a finding that the employee exhibited conduct unbecoming of a Town Employee.

In the instant case, the investigative report demonstrated that the Plaintiff placed the Town at increased risk of liability when he held himself out to the community as a person who could provide professional advice to individuals dealing with mental health crises and who needed treatment (SUF ¶16). His expressions of affection to the adolescents participating in AYS activities, such as hugging them, telling them he loved them, and sending them heart emojis were not appropriate for a person in his position. Fahey's behavior towards MJ, such as taking her for walks, driving her in his truck, meeting with her in his office alone, meeting with her at the AYS building alone, was wholly inappropriate. His downloading pornographic material involving this vulnerable young woman and watching it with her mother was outrageous and way over the line of his professional duties as her youth director and could easily be construed as predatory. It is

important to note that MJ was an adult at this time and her parents did not even live in Andover. For the Director of Youth Services to conclude that it was part of his job to sit with MJ's mother and watch a video of her daughter performing in a pornographic movie was, frankly, sick.

The facts considered by Defendant Flanagan as established in the investigative report by Attorney Ryan clearly support a finding of just cause for the Plaintiff's termination. Fahey's conduct regarding the pornographic videos is outrageous. Downloading it on his work computer, watching it with MJ's mother, and then lying it to the investigator is cause for termination by itself. It is clear that the facts uncovered in the Ryan report are more than sufficient to create just cause to terminate the Plaintiff. No reasonable finder of fact could decide otherwise.

The Plaintiff's Claim for Breach of the Covenant of Good Faith and Fair Dealing Fails as a Matter of Law as he was terminated for just cause.

As outlined in Section A, Flanagan as Town Manager, had overwhelming evidence to support a just cause termination of the Plaintiff. The implied covenant of good faith and fair dealing means that neither party may do anything that will have the effect of destroying or injuring the right of the other party to receive the benefits of the contract. If the Plaintiff has failed to act in good faith and has breached his implied covenant of good faith and fair dealing, the Plaintiff cannot recover for subsequent breach of contract by the Defendant. [The scope of the implied covenant of good faith and fair dealing is only as broad as the contract that governs the relationship. There is no requirement that bad faith be shown; instead, the Plaintiff has the burden of proving a lack of good faith. The lack of good faith can be inferred from the totality of the circumstances. See Pitt Construction Corporation, Plaintiff, Defendant-in-Counterclaim, v. Veracity Construction Group, Inc., and Robert Cimon, Individually, Defendants, Plaintiffs-in-Counterclaim., 2019 WL 8060580 (Mass. Super.)

Here, the Plaintiff has not put forward any facts to support the notion that Flanagan acted without good faith at any time during the independent investigation and his eventual termination. In fact, the evidence demonstrates that Flanagan as Town Manager acted in good faith. He received serious allegation of misconduct by Fahey. He reached out to third party neutral investigator, Regina Ryan, to perform the investigation into the misconduct allegations brought forward by MJ (SUF ¶10). Ms. Ryan interviewed the Plaintiff, multiple witnesses and gathered factual evidence. She also reviewed the video recording of MJ's interview by the DA. The independent investigator concluded that the evidence she credited demonstrated Plaintiff's misconduct as AYS Director over the course of several years. Flanagan reviewed the evidence gathered by the investigator and determined that just cause existed to terminate Fahey.

The Plaintiff cannot point to any material facts that can support a finding of a lack of good faith on the part of the Town in the decision to terminate his employment. Accordingly, his claim of a breach of the covenant of good faith must fail.

B. The Plaintiff's Defamation Claim Fails as a Matter of Law

To prevail on a defamation claim, a Plaintiff "must establish that the Defendant was at fault for the publication of a false statement regarding the Plaintiff, capable of damaging the Plaintiff's reputation in the community, which either caused economic loss or is actionable without proof of economic loss." White v. Blue Cross & Blue Shield of Mass., Inc., 442 Mass. 63, 66 (2004). The fundamental elements of a defamation claim include: (1) a false statement to a third-party; (2) that is of or concerns the Plaintiff; (3) which is causative or capable of damaging the Plaintiff's reputation in the community and that caused Plaintiff economic loss or is actionable without proof of economic loss; and (4) was due to Defendant's fault. See Butcher v. Univ. of Mass., 94 Mass. App. Ct. 33, 37-38 2018); Ravnikar v. Bogojavlensky, 438 Mass. 627, 629-30 (2003). "This threshold question, whether a communication is reasonably susceptible of a

defamatory meaning, is a question of law for the court." Amrak Prods., Inc. v. Morton, 410 F.3d 69, 72 (1st Cir. 2005) (quoting Phelan v. May Dept. Stores Co., 443 Mass. 52, 56 (2004)). "The court [must] examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phras or sentence." Amrak Prods., Inc., 410 F.3d at 73 (affirming dismissal given appellants failure to satisfy the threshold question of defamatory meaning).

Further, because the Plaintiff is a "public figure" due to his status as a former Director of Andover Youth Services, he must prove not only that the challenged statement was false, but that it was also published with actual malice. "Actual malice" exists where the Defendant publishes a defamatory communication with knowledge that it was false or with reckless disregard for whether or not it was false. McAvoy v. Shufrin, 401 Mass. 593, 596-97 (1988). "There must be sufficient evidence to permit the conclusion that the Defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice. St. Arcant v. Thompson, 390 U.S. 727, 730-31 (1968). The test is entirely subjective; the Defendant must have had such doubts about the truth of the statement he published. Tosti v. Ayik, 394 Mass. 482 (1985).1

In the instant case, the Plaintiffs defamation claim primarily relies upon his allegations regarding an Eagle Tribune Article, where Mr. Flanagan characterized the investigation against Plaintif as being initiated by an "outside agency". Plaintiff claims that Flanagan's statement was defamatory because he knew that it was initiated with a Town employee". See Compl. at 34. The Plaintiff also made general allegations that Flanagan made defamatory statements to various staff

members by insinuating "criminal behavior" when referencing the Essex DA's office investigating the complaint brought by MJ.

However, the statements made by Defendant Flanagan to the Eagle Tribune indicating that the investigation was initiated by an outside agency cannot be found to be defamatory when examined in the totality of the circumstances because they are true. In fact, the first agency to investigate MJ's allegations of criminal behavior by Fahey was the Essex District Attorney. MJ reported her allegations to Mr. Namvar, who passed them on to the Andover Police. The Andover Police did not investigate, but passed the allegations to the office of the Essex District Attorney which commenced an investigation. It was the District Attorney who investigated the allegations and determined that no criminal behavior occurred. The DA then sent the information on to the Town so that it could conduct its own investigation. Accordingly, the claim that the statement that the investigation was initiated by an outside agency was defamatory must fail.

The Plaintiff's claim that Flanagan's statements to town officials and employees allegedly insinuating criminal behavior by Fahey also must fail because they are protected by the doctrine of Qualified Privilege, "A person is conditionally privileged to publish a defamatory statement if the publisher and the recipient share a common interest in the subject, and the statement is reasonably calculated to further or protect that interest." Lawless v. Estrella, 99 Mass. App. Ct. 16, 22 (2020), citing Downey v. Chutehall Construction Co., Ltd., 86 Mass. App. Ct. 660, 666 (2014). Statements made by public officials while performing their official duties are always conditionally privileged. Id. at 23, citing Barrows v. Wareham Fire Dist., 82 Mass. App. Ct. 623, 630-631. Courts have reasoned that conditional privilege for public officials is particularly important because the threat of defamation suits may deter public officials from performing their official duties. Barrows, 82 Mass. App. Ct. at 631. Furthermore, in the context of workplace

investigations, conditional privilege is necessary to ensure employees can report actual or suspected misconduct without the fear of being held liable for defamation. Lawless, 99 Mass. App. Ct. at 23. Defamatory statements are protected by conditional privilege where publication "is reasonably necessary to serve the employer's legitimate interest in the fitness of an employee to perform his or her job." Bratt v. International Business Machs. Corp., 392 Mass. 508, 509 (1984).

Flanagan's email to the town selectmen and other employees is protected by conditional privilege because it was sent in his capacity as town manager, and because he and the town employees had a common interest in ensuring a safe environment for children at Andover Youth Services by terminating Fahey's employment. The court in Lawless held that Estrella sending an email to the town manager and a selectman in her capacity as a town employee was an example of a protected conditional privilege. Lawless, 99 Mass. App. Ct. at 23, 24. This was because Estrella and the recipients of her email had a common interest, "in assessing the Plaintiff's job performance as the town's treasurer, and in the effective operation of the treasurer's office." Id. At 23. The instant case provides a very similar situation, wherein Flanagan sent an email in his capacity as the Town Manager to other town employees. Further, in their respective capacities as town manager and town selectmen, both the senders and recipients of the email had a "common interest" in assessing Fahey's job performance as a town employee at Andover Youth Services. The common interest is also much stronger in the instant case when contrasted with Lawless due to the safety of children being at stake.

Fahey alleges that Flanagan defamed him by advising the entire Board of Selectmen via email that "Fahey had been placed on 'administrative leave pending the outcome of a sensitive personnel investigation'. . ." (Verified Complaint and Jury Demand, 12). Fahey also alleges that Flanagan sent another email to an additional 11 Andover town employees repeating this

information. Id. However, the information contained in those communications was true, and the people informed were Town officials and employees with a need to know what was going on with Fahey. Thus, those communications could not be defamatory. Accordingly, Fahey's defamation claim must fail.

C. Flanagan's Actions Were Not Beyond the Bounds of All Decency to Inflict Emotional Distress

The claim of intentional infliction of emotional distress against Flanagan also fails because none of Flanagan's actions were "extreme or outrageous." To succeed on such a claim, the Plaintiff must prove: (1) that Flanagan intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of their conduct; (2) that Flanagan's conduct was "extreme and outrageous," was "beyond all possible bounds of decency" and was "utterly intolerable in a civilized community"; (3) that Flanagan's actions were the cause of the Plaintiff's distress; and (4) that his emotional distress was "severe" and of a nature "that no reasonable [wo]man could be expected to endure it." Agis v. Howard Johnson Co., 371 Mass. 140 (1976) (citations omitted). "To be considered extreme and outrageous, [Flanagan's] conduct must be beyond all bounds of decency and . . . utterly intolerable in a civilized community. Liability cannot be founded upon mere insults, threats, or annoyances." Foley v. Polaroid Corp., 400 Mass. 82, 99 (1987). It is not enough that a Defendant acted with a tortuous or criminal intent, that he or she intended to inflict emotional distress, or even that his or her conduct has been characterized by malice. Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 466 (1997).

Here, the undisputed facts establish that Flanagan did not take any actions intended to cause the Plaintiff emotional distress. Rather, the evidence is that Flanagan was simply providing accurate, and relevant information as to the circumstances surrounding the termination of the Plaintiff. Flanagan's statement that an outside investigation had been conducted into Fahey cited

in the news article does not rise to the level of extreme or outrageous conduct. Additionally, there is no evidence to support any inference that Flanagan acted in bad faith or with malice towards the Plaintiff. Similarly, because a Plaintiff who is a public official must prove that a Defendant acted with actual malice in order to recover damages for intentional infliction of emotional distress claims that arise from the defamation, see Hustler Magazine v. Falwell, 485 U.S. 46, 56, 108 S.Ct. 876, (1988) cited by Rotkiewicz v. Sadowsky, 431 Mass. 748, 755, 730 (2000).

Accordingly, the Plaintiff's intentional infliction of emotional distress claim fails against Flanagan as a matter of law and summary judgment should enter in his favor.

D. Flanagan had No Improper Motive or Means in Terminating the Plaintiff and cannot Establish Intentional Interference with the Plaintiff's Contract with the Town

Plaintiff's allegation fails because Flanagan did not intentionally interfere with the Plaintiff's contract with improper motive or means. To make a successful claim for intentional interference with advantageous relations, a Plaintiff must prove that (1) he had an advantageous relationship with a third party (e.g., a present or prospective contract or employment relationship); (2) the Defendant knowingly induced a breaking of the relationship; (3) the Defendant's interference with the relationship, in addition to being intentional, was improper in motive or means; and (4) the Plaintiff was harmed by the Defendant's actions. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 781, 752 N.E.2d 700 (2001) (Weber). The "actual malice" instruction at issue here goes to the third element, whether the interference was "improper in motive or means." Blackstone v. Cashman, 448 Mass. 255, 260, 860 N.E.2d 7, 12–13 (2007).

The Plaintiff has provided baseless, speculative allegations against Flanagan that he purposely interfered with the Plaintiff's use of the AYS services building, and his statements regarding the removal from his position were not related to a legitimate employment interest but were instead insinuated for Flanagan's own malignant purpose (Compl. ¶83). As already

discussed in great detail, there were years of instances of inappropriate behavior by the Plaintiff uncovered by the Ryan investigation that led to Flanagan terminating the Plaintiff. The facts show that Plaintiff's termination occurred because of the inappropriate behavior by Fahey, and nothing else. Additionally, there can be no finding that Flanagan acted through "improper means". Flanagan hired an independent investigator and accepted her findings. It is impossible to construe those actions as constituting "improper means".

E. Flanagan is Protected by Common Law Immunity and the Counts against him should accordingly be Dismissed.

The Complaint does not allege facts to support a finding that Flanagan acted with malice, corruption or ill will toward Fahey. Flanagan was acting in the scope of his employment with Fahey at all relevant times. Flanagan is therefore protected by the doctrine of common law immunity for each of the five counts against him (Counts I to V). See Nelson v. Salem State Coll., 446 Mass. 525, 537 (2006); Cachopa v. Town of Stoughton, 72 Mass. App. Ct. 657, 665 (2008). Massachusetts courts have long recognized "common law" immunity for public officials performing discretionary acts in good faith. At common law, a public official exercising judgment and discretion "is not liable for negligence or other error in the making of an official decision if the official acted in good faith, without malice, and without corruption." Nelson, 446 Mass. at 537 (emphasis added); Cachopa, 72 Mass. App. Ct. at 665 (2008); see Gildea v. Ellershaw, 363 Mass. 800, 820 (1973).

In determining if common law immunity applies, "[t]here is every presumption in favor of the honesty and sufficiency of the motives actuating public officers in actions ostensibly taken for the general welfare." South Boston Betterment Trust Corp. v. Boston Redevelopment Auth., 438 Mass. 57, 69 (2002) (quoting Foster from Gloucester, Inc. v. City Council of Gloucester, 10 Mass. App. Ct. 284, 294 (1980)). To overcome a claim of common law immunity, the evidence

establishes facts to support a finding that Flanagan acted with bad faith or malice. See Echavarria v. Roach, 2017 WL 3928270, at *14 (D. Mass. Sept. 7, 2017). "Bad faith has been defined to suggest a 'breach of a known duty through some motive of interest or ill will." Brothers v. Town of Millbury, 2014 WL 4102436, at *11 (D. Mass. Aug. 14, 2014) (quoting Spiegel v. Beacon Participations, 297 Mass. 398, 416 (1937)). "Malice means a wrongful act, done intentionally, without just cause or excuse." Brothers, 2014 WL 4102436, at *11 (quoting McGurk v. Cronenwett, 199 Mass. 398, 416 (1937)).

Here, common law immunity protects Flanagan because he had discretion and acted in good faith at all relevant times. The decisions made by Flanagan in initiating an investigation of serious misconduct by an outside party and providing information to the public and Andover officials and employees were discretionary ones made in good faith. Public officials like Flanagan are permitted to "speak freely on matters of public importance, because '[t]he threat of defamation suits may deter public officials from complying with their official duties when those duties include the need to make statements on important issues.'" Landry v. Mier, 921 F.Supp. 880, 888 (D. Mass. 1986), quoting Mulgrew v. Taunton, 410 Mass. 631, 635 (1991). Flanagan was acting in his capacity as Town Manager when dealing with the Plaintiff, the District Attorney's Office, and responding to public inquiries. See also, Globe Newspaper Co. v. Police Commissioner of Boston, 419 Mass. 852, 858 (1995) (quoting Reinstein v. Police Comm'r of Boston, 378 Mass 281, 293 (1979) (finding IA report with police officer's statements that, when released, revealed their identities, was not private even where it "portray[ed] some officers in a 'garish color.'").

By operation of his status as Town Manager, Flanagan was authorized "to make a decision and to perform acts in the making of that decision." Gildea, 363 Mass. at 820. Flanagan's alleged error was committed in the scope of this authority since, as acknowledged within the Complaint, Cachopa, 72 Mass. App. Ct. at 665. As such, he is entitled to and in some regards legally required

to make certain decisions and act on those decisions in furtherance of his duties as a Town Manager in overseeing the Town's employees' performance and eligibility. Accordingly, Plaintiff's claims against Flanagan must be dismissed.

WHEREFORE, the Defendant, Andrew Flanagan, Individually and as Town Manager, respectfully requests that this Court enter summary judgment pursuant to Rule 56(c) of the Massachusetts Rules of Civil Procedure in his favor on all counts of the Plaintiff's complaint.

Respectfully submitted,

Defendant,
Andrew P. Flanagan, Individually and as
Manager of the Town of Andover,

By his attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the following attorney of record for each other party via email only on June 3, 2024:

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