COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

SUPERIOR COURT
DOCKET NO.: 2177CV00572

WILLIAM FAHEY,
Plaintiff,

v.

ANDREW P. FLANAGAN, and
TOWN OF ANDOVER,
Defendants.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS, ANDREW FLANAGAN'S AND TOWN OF ANDOVER'S, MOTION FOR SUMMARY JUDGMENT

Plaintiff, William Fahey, ("Fahey" or "Plaintiff") submits this memorandum of law in opposition to Defendants, Andrew Flanagan's ("Flanagan") and Town of Andover's (the "Town") (collectively the "Defendants") Motion for Summary Judgment. Contrary to the arguments raised by the Defendants, the following Memorandum of Law demonstrates very clearly that (1) there are material facts in dispute and (2) the facts asserted by the Plaintiff are more than sufficient to meet his burden of proof for the finders of fact to rule in favor of the Plaintiff and against the Defendants.

I. SUMMARY OF ARGUMENT

In late 2020, the Town received an allegation that William Fahey, a 27-year employee of the Town of Andover, had engaged in sexually inappropriate behavior with a young female while Fahey was her supervisor at Andover Youth Services ("AYS"). Mr. Fahey was placed on leave and the Town hired an outside agency, Regina Ryan of Discrimination and Harassment Solutions, to investigate the allegations of sexually inappropriate behavior. On April 5, 2021, Ms. Ryan issued a report (the "Ryan Report") which included findings that the allegations of sexually

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inappropriate behavior were not credible. Despite the fact that the allegations that formed the basis for the investigation in the first place were deemed not credible, the Town dismissed Mr. Fahey for "just cause" on May 10, 2021. Mr. Fahey challenges the Town's determination of a "just cause" dismissal. The Town's reliance on the Ryan Report is flawed, as the scope and the focus of that investigation was the allegation of sexually inappropriate behavior that was found to be not credible. Plaintiff has alleged that he has been targeted by Town Manager Flanagan since shortly after Flanagan was hired in 2015.

During and subsequent to the Town's investigation, Town Manager Andrew Flanagan actively misled Town citizens and Select Board Members with the intent to falsely portray Mr. Fahey as a perpetrator of criminal conduct. Mr. Flanagan insisted that the allegations against Mr. Fahey were brought to the Town's attention by the Essex County District Attorney's Office when in reality the opposite was true. Mr. Flanagan also stated on several occasions in written correspondence to Select Board Members that the allegations against Mr. Fahey were deemed "credible" by the District Attorney's Office and by Massachusetts State Police. Further, Mr. Flanagan made no effort to share with the public the findings of the Ryan Report that the allegations of sexually inappropriate behavior were not credible. In fact, over a month after the Ryan Report was released, Mr. Flanagan brazenly implied to members of the Select Board that the only reason why the District Attorney's Office and MA State Police were not bringing charges against Mr. Fahey was because of "statute of limitations" issues. Mr. Flanagan has since admitted that he never had any conversations with the District Attorney's Office or MA State Police about this matter. Mr. Fahey has brought claims for defamation of character, intentional interference with a contract and intentional infliction of emotional distress based on Mr. Flanagan's conduct including but not limited to his false and inflammatory commentary on this matter.

II. FACTUAL BACKGROUND

Fahey was hired in January 1994 by the Town to create Andover Youth Services ("AYS"). Ex. 1; Ex. 15, Fahey Dep. 22: 7-8. AYS was formed in the wake of three Andover teen suicides and was designed as a program to support and benefit Andover adolescents. Ex. 1; Ex. 15, Fahey Dep. 22: 21-24. Since his hiring in 1994, Fahey has devoted his life to the development and administration of AYS. Ex. 1; Ex. 13, Fahey Aff. ¶2.

From the time he was hired in 1994 until 2019, Fahey was a member of the Andover Independent Employees Association (the "Association"). Exhibit 1 ¶ 7. In 2019 Fahey was taken out of the Union subsequent to an MOA with The Town. Ex. 1 ¶8; Ex. 4. The Agreement states that, "[t]he Town Manager may remove any incumbent only for cause…". Ex. 4. "Cause" is defined in the Agreement.

The AYS youth and staff developed the slogan "with love and kindness." Ex. 18, Stackhouse-Lightner Aff. ¶14. To support this slogan, on the gymnasium floor of the AYS it states, "Love and Support for Young People Everywhere." Ex. 18, Stackhouse-Lightner Aff. ¶15. The AYS staff followed this motto in their work and encouraged the youth participants to use love and kindness in their words and actions. Ex. 18, Stackhouse-Lightner Aff. ¶16. In working with youth, it is necessary to show that adults care about them, as they may not get those affections and affirmations from home which are a part of youth development. Ex. 17, Wesson Aff. In showing affection to youth it is appropriate to hug a youth participant if they reached out for a hug and is appropriate to use words of affirmation such as expressions of love and admiration. Ex. 16, Stackhouse-Lightner Dep. 37:16-22; Ex.18, Stackhouse-Lightner Aff ¶13.; Ex. 17, Wesson. Aff. The focus of AYS was to ensure that the youth in the program felt welcomed, loved, appreciated, and an integral part of the community. Ex. 16, Stackhouse-Lightner Dep. 16:16-24, 17:1-2; Ex.18;

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Stackhouse-Lightner Aff. ¶¶ 4, 13, 14. These goals all stemmed from the desire to avoid another opioid crisis or suicide epidemic as was faced in the Town in 1994 and the purpose of forming AYS. Ex. 13, Fahey Aff. ¶2.

In His Role as AYS Director, Fahey Helped a Family in Need.

In 2011, in his capacity as Director of AYS, Mr. Fahey was asked to assist an Andover family that had three teenaged girls whose parents had been sent to prison. Ex. 15 Fahey Dep. 31:3-6, 23-24; 32:1; Ex. 19, Gillette Dep. 12:11-15. At the time of the parents' immediate incarceration, the oldest was a freshman in college, the middle was a seventeen-year-old junior in high school ("MJ"), and the youngest was a freshman in high school. Ex.19, Gillette Dep. 17:14-24, 18:1-2. A few days after the abrupt incarceration, there was a meeting organized in the girls' home with the girls' grandparents in which TIP (Trauma Intervention Program), the school social worker, neighbors and Mr. Fahey were all in attendance to collaborate in a community effort to support the family. Ex. 15, Fahey Dep. 38:1-5. In that meeting, Mr. Fahey agreed to help support the grandparents and the two girls still at home. Ex. 15, Fahey Dep. 39: 2-10. Mr. Fahey even helped MJ get a staff job at youth services. Ex. 15, Fahey Dep. 32:2-11, 53:6-18. Mr. Fahey continued to assist the family during and after the parents' jail sentence. Ex. 15, Fahey Dep. 40:9-14, 54:11-19.

In 2016, a friend of MJ's reached out to Mr. Fahey and expressed his concerns about MJ's well-being. Ex. 15, Fahey Dep. 90:4-12. During the visit, the friend went to Mr. Fahey's computer and pulled up a podcast that showed MJ discussing her porn involvement in an interview. Ex. 15, Fahey Dep. 91:11-16, 22-24; 92:1. Accordingly, Mr. Fahey went to MJ's mother at her home to discuss these concerns. Ex. 15, Fahey Dep. 93:18-24. She asked for the

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identifying podcast information and with this information Ms. Johnson searched for her daughter on her computer. Ex. 15, Fahey Dep. 102:18-24.

On April 12, 2019, MJ and Fahey exchanged the following texts:

> **MJ: "Can I see you soon?? I need to talk to you?"**
> Fahey : "Hey MJ- im in Georgia; everything alright!"
> **MJ: Not really**
> Fahey: What's going on?
> **MJ: I just am so sick of my life I want to use**
> **MJ: Everything is wrong**
> Fahey: What's wrong? And using is just going to make everything so much more painful
> **MJ: everything is just so fucked up I can't fix it**
> **….**
> **MJ: My dads using right infront of me**
> **MJ: I hate my life**

Ex. 20, Text Messages.

On April 18, 2019, MJ was in Andover visiting from California and reached out to Mr. Fahey for emotional support and asked to meet him in the early evening so she could talk to someone. Ex. 20, Text Messages. Mr. Fahey, having received her concerning text just days before, agreed to meet with her and talk to her. Ex. 20, Text Messages. MJ texted Mr. Fahey saying she would be late, but Mr. Fahey waited for her. Ex. 20, Text Messages.

The Investigation and Fahey Termination

In late 2020, MJ reported to Andover Town Community Support Coordinator Sobhan Namvar ("Namvar") allegations that Mr. Fahey had engaged in sexually inappropriate behavior while Mr. Fahey was her supervisor and for a period thereafter. Ex. 5. The Town referred the matter to the Essex County District Attorney's office. Ex. 1 ¶32. The District Attorney's office declined to take any action and determined that no criminal conduct had occurred. SOF 10. On January 14, 2021, the Town engaged Regina Ryan of Discrimination and Harassment Solutions to investigate the allegations. Ex. 12, Ryan Engagement Letter. On February 5, 2021, the Town

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placed Fahey on paid administrative leave and stated in a letter that the Town "received credible information that you may have engaged in improper conduct with a minor." Ex. 7. It is unclear how the Town determined the information was "credible." Ex. 21, Flanagan Dep., p. 111; Ex. 7. The letter went on to say that "you are being placed on administrative leave immediately and until further notice, pending an investigation into this information that we are commencing you will be notified when we intend to interview you." Ex. 7. Fahey's cell phone and computer were confiscated, and he was embarrassingly escorted from his office at the Cormier Center. Ex. 13.

The scope of the investigation provided by the Town to Regina Ryan of Discrimination and Harassment Solutions was to address whether Mr. Fahey "engaged in sexually inappropriate behavior" with MJ while he was her supervisor at Andover Youth Services. Exhibit 5. The investigation found that MJ's allegations of sexually inappropriate behavior were not credible, was "undermined by significant gaps in her credibility" and that MJ was an "unreliable historian and made numerous inconsistent statements." Ex. 5, pg. 19. The Ryan Report noted that MJ also stated in the interview that she "loved Bill and he never hurt me." Ex. 5, pg. 19. The investigator further stated that MJ's "lack of support for these serious allegations reveals a cavalier disregard for the truth and appears motivated more by emotion than fact" and stated that toward the end of the interview MJ told the interviewer "Fuck him" while referring to Fahey. Ex. 5, pg. 20. The interviewer further opined that given MJ's "mental health problems and drug addiction, her confusion is understandable and even sympathetic… [n]evertheless, her recollections are not sufficiently reliable to support many of her assertions." Ex. 5, pg. 20.

Prior to releasing written findings of the investigation, Ms. Ryan informed Mr. Flanagan that MJ's allegations of sexually inappropriate behavior were not credible. Ex. 22, Ryan Dep., 94:23 – 96:8. On April 5, 2021, the investigator released the Ryan Report containing the findings

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of the investigation which concluded, as the Defendants were already aware, that the allegations made by MJ were not credible and were unsubstantiated. Ex. 5, pgs. 19-20. Nevertheless, the investigator made findings of alleged policy violations against Mr. Fahey that were not within the scope and focus of the investigation. Ex. 5. These conclusions were reached without any expansion of the investigation to include interviews with AYS personnel, AYF members or individuals such as Mary Wesson who at the time probably had more experience with youth development and services than anyone else in the community. Ex. 16, Stackhouse-Lighter Dep. 51:12-22; Ex. 18, Stackhouse-Lighter Aff.; Ex. 17, Wesson Dep.; see Ex. 5 pg. 2. For example, the Ryan Report stated that Fahey refused to refer children and families to a licensed social worker. Ex. 5, pg. 24. However, Ryan admitted in her deposition that not only did she fail to interview the AYS social worker, Jaclyn Stackhouse-Lightner, to make that determination, she didn't even know that AYS had a social worker on staff. Ex. 22, Ryan Dep., 110:13-19. Jaclyn Stackhouse-Lightner confirmed that Fahey did regularly make referrals to her. Ex. 18, Stackhouse-Lightner Aff. ¶8. In fact, the only people interviewed by Ryan in connection with the investigation were MJ, MJ's parents, two of MJ's friends, Namvar, and Fahey. Ex. 5, pg. 2.

On April 7, 2021, Flanagan sent Fahey a letter on behalf of the Town noticing his "intent" to dismiss Fahey as the AYS director "based upon the investigatory report issued by Ms. Ryan on April 5, 2021." Ex. 8. Flanagan stated in his April 7 letter that, among Ms. Ryan's findings were that Fahey engaged in inappropriate behavior by "physically hugging" and his "improper expression of love" to participants. Ex. 8. Fahey expressly denies any allegations of inappropriate behavior. Ex. 12, Fahey Aff. ¶¶ 3, 14. Flanagan's April 7 letter also made the accusation that Fahey "downloaded pornographic video content on a Town-owned device." Ex.

8. This accusation is disputed by Fahey. Ex. 13, Fahey Aff. ¶8. Notably, there was no mention of any finding against Fahey of sexual misconduct. Ex. 8.

On April 22, 2021, Fahey, through Counsel, contested the "facts" relied upon by the Town in the Report. Ex. 9. Fahey's April 22 response letter also refuted any allegation that could rise to the level of supporting "termination for cause" and denied any allegation that Fahey engaged in services that he was not qualified to provide, or any other conduct considered "unbecoming". Ex. 9. The Fahey response letter pointed out the numerous flaws in the Report and asserted that the flawed investigation and Report were simply tools designed to further Flanagan's goal to terminate Fahey. Ex. 9.

On May 10, 2021, Flanagan responded to Fahey's April 22 letter by terminating Fahey and concluding that "given the existence of just cause the best interests of the Town and its residents warrant dismissal, which takes effect immediately." Ex. 10. In his letter, Flanagan accused Fahey of "cultivating a personal, dependent relationship with vulnerable participants and families" as evidenced by the fact that Fahey was "referring to yourself as 'Billy'" and that he texted messages using "emojis" expressing "luv" for and physically hugging AYS participants. Ex. 10. Again, these "findings" were never discussed with Fahey as being improper prior to his suspension nor was he ever given the opportunity to respond. Ex. 9. Further, Flanagan never addressed the issues raised with respect to the flaws in the investigation and the Ryan Report. Ex.10.

On May 13, 2021, the Eagle Tribune published an article concerning the investigation and Fahey's termination. In the newspaper article, Flanagan was quoted as stating that because of the conduct disclosed earlier in the year from an "outside agency" and "other complaints" against Fahey throughout the years, Flanagan decided to terminate Fahey. Ex. 23, *Andover Youth Services*

Director Fired, Eagle Tribune, May 13, 2021. Fahey has no knowledge of any other such "complaints." Ex. 13, Fahey Aff. ¶13. Fahey's personnel file contained no mention of the other "complaints" referenced by Flanagan in the Eagle Tribune article nor did it contain any performance evaluations or performance improvement plans. Ex. 24, Porter Dep. 55:10-20, 56:8-15. In other words, despite the fact that Fahey worked under the supervision of the Town Manager, Flanagan never warned Fahey of other "complaints", nor did he ever give Fahey the opportunity to address those phantom "complaints." Ex. 13, Fahey Aff. ¶13.

It was well known among the Town administration and residents that Flanagan disfavored Fahey from the time he was hired. Ex. 25, Margas Dep. 12:1-24, 13:1-8; Ex. 26, *Supporters Call for Transparency in Firing of Fahey*, Eagle Tribune, May 22, 2021. Flanagan's personal secretary testified to hearing statements from Flanagan showing his disdain toward Fahey. Ex. 25, Margas Dep. 12:1-24, 13:1-8.

Flanagan's Comments to the Selectboard and the Public.

At all relevant times, Town Manager Andrew Flanagan propagated a false narrative intentionally inferring that Mr. Fahey had engaged in criminal activity. Ex. 27, Emails to Select Board. Specifically, Flanagan communicated to the Select Board that Massachusetts State Police and the Essex County District Attorney's Office had determined that MJ's allegations of sexual misconduct were credible. Ex. 27, Emails to Select Board. He even stated that the only reason why these agencies were not bringing charges against Mr. Fahey was because of "statute of limitations" issues. Ex. 27, Emails to Select Board. Mr. Flanagan later admitted at his deposition that he does not recall who made the determination that the allegations were credible. Ex. 21, Flanagan Dep., p. 111. Mr. Flanagan also admitted that neither he nor anyone in his office ever had any

conversations with the Essex County District Attorney's Office or the Massachusetts State Police regarding the allegations. Ex. 21, Flanagan Dep., p. 140.

Mr. Flanagan's repeated statements to the Select Board regarding "credible allegations" as determined by MSP and the DA's office continued well after he had been briefed by Regina Ryan and informed that the allegations were in-fact not credible:

Q: Again you're telling the board that there was a credible complaint that was believed to be credible by both the DA's Office and State Police; correct?
A: Correct.

Q: Yet this was a full month after the report from Regina Ryan came out; correct?
A: Correct.

Q: And in that report she concluded that as to the serious allegations of sexual misconduct, (MJ) could not be believed, correct?
A: Correct.

Q: But you didn't share any of that with the Select Board?
A: Correct.

Ex. 21, Flanagan Dep., p. 144:2-16.

In response to several emails from the public, Flangan responded with a "cut and paste" email in which he stated that past youth participants' experiences with Fahey were "harmful" without further explanation. Ex. 28, Emails to Community Members. As a result of the Town's dismissal of Fahey, and Flanagan's inflammatory commentary concerning the matter, Fahey's reputation has been tarnished within the Town of Andover and in surrounding communities. Ex. 13, Fahey Aff. ¶16. Since his dismissal Fahey has been unable to find employment in a comparable capacity to his role as AYS Director. Ex. 13, Fahey Aff. ¶16.

III. MATERIAL FACTS IN DISPUTE

The following facts by numbered paragraphs in the statement of facts are in dispute: 9, 14, 17, 18, 19, 26, 28, 29, 33, 34, 35, 36, 37, 40, 41, 42, 43, 44, 45, 46, 47, 51. The following numbered

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paragraphs on the statement of facts are partially disputed: 8, 10, 15, 20, 22, 23, 24, 25, 32, 38, 39. Virtually all material facts are in dispute.

IV. STANDARD OF REVIEW

The burden of demonstrating the absence of a triable issue falls to the moving party. Lev v. Beverly Enters.-Mass., Inc., 457 Mass. 234, 237 (2010). The court must view the evidence in the light most favorable to the nonmoving party. Lynch v. Crawford, 483 Mass. 631, 641 (2019). "Any doubts as to the existence of a genuine issue of material fact are to be resolved against the party moving for summary judgment." Lev, 457 Mass. at 237.

Here, summary judgment should not be granted as there are genuine issues of material facts demonstrating that the Defendant is not entitled to summary judgment as a matter of law.

V. ARGUMENT

A. The Defendants Breached Fahey's Employment Contract When They Terminated Him Without Just Cause.

The question of whether or not an employer has "just cause" to fire an employee is a question of fact for the jury. Boothby v Texon Inc., 414 Mass. 468, 481 (1993). Just cause is an affirmative defense, "commonly a question of fact, it can rarely be ruled as a matter of law that it has been sustained." Goldhor v. Hampshire College, 25 Mass. App. Ct. 716, 722 (1988); *quoting* Chaplain v. Dugas, 323 Mass. 91, 93 (1948). A jury is not required to believe the employer's testimony that the plaintiff was discharged for legitimate reasons. Maddaloni v. Western Mass. Bus Lines, Inc., 386 Mass. 877, 882 (1982). "When evidence on a contested matter is conflicting, the issues is for the trier of fact." Id.

"Just Cause" is a defined term in Mr. Fahey's Agreement with the Town, therefore the definitions of just cause that were cited by the Defendants in their brief are inapplicable. The Town has failed to cite to any of the provisions of just cause as laid out in the Agreement other than

"conduct unbecoming" which is vigorously disputed by Fahey, Wesson, Stackhouse and other witnesses expected to testify at trial. Clearly, a genuine dispute of material fact exists as to whether Mr. Fahey's termination was supported by "just cause" as defined in his Agreement.

Here, the Town relied upon the flawed Ryan Report to find just cause to terminate Fahey's employment. The Ryan Report stated that the scope of the investigation was to determine whether MJ's allegations of Fahey's sexually inappropriate behavior were credible. The investigator determined that these allegations were <u>not</u> credible. Importantly, despite making that finding, the investigator made findings beyond the scope of the investigation yet only interviewed witnesses that were pertinent to MJ's allegations. The investigator lacked insight on matters outside of the scope and focus of the investigation that she provided commentary on. The Plaintiff has submitted evidentiary support for his contention that the investigator's adverse findings against the Plaintiff were flawed. A jury can conclude that the investigator's ancillary findings that led to Mr. Fahey's dismissal were insufficient to show just cause.

In 1994 Mr. Fahey was hired to assist troubled youth in the wake of an increase in suicides among young people and an opioid crisis. Mr. Fahey developed a strong youth services program serving thousands over 27 years. The youth center's motto was "Love and Kindness" and AYS employees ensured that all youth felt loved and needed, Despite the motto and purpose of AYS, Flanagan relied upon the Ryan Report finding that he was hugging participants, stating he loved them in texts and using emojis in texts. When engaging with youth, especially troubled youth, it is appropriate to tell them they are loved. Although The Town stated that Fahey violated the Town's policy by uninvited hugging of program participants, they offered no evidence, testimony or otherwise that showed Fahey ever gave an unsolicited hug to a youth participant. None of the other AYS staff were interviewed to determine when and if hugging was a common

and acceptable practice when dealing with youth. Importantly, as Stackhouse and Wesson have attested, it is not inappropriate to offer a hug to a youth participant and to grant that hug when welcomed. Often troubled youth do not receive the love and affection necessary for developmental growth and need to have that validation elsewhere.

Flanagan also based Fahey's termination on the Ryan Report finding that Fahey failed to refer participants and their families to professionals, namely social workers. Importantly and quite telling as to the legitimacy of the investigation, the investigator never interviewed Jaclyn Stackhouse-Lightner, the AYS social worker, to determine if Fahey had referred participants to her. In fact, the investigator did not even know that AYS had a social worker on staff. Indeed, Fahey regularly referred youth participants to Ms. Stackhouse-Lightner for referrals to appropriate health care professionals. It is impossible to reconcile the allegation that Fahey did not refer participants when the investigator and the Town failed to even interview the person to whom the referrals would have been made.

Finally, Flanagan stated that Fahey downloaded pornography on a town-owned device. This finding is not credible. Fahey did not have a Town owned laptop at the time and denies downloading pornographic materials to show to MJ's mother.

B. Defendants have Breached the Covenant of Good Faith and Fair Dealing.

Every contract contains an implied covenant of good faith and fair dealing which requires that neither party do anything to destroy or injure the other's right to the fruits of the contract. <u>T.W. Nickerson, Inc. v. Fleet Nat'l Bank</u>, 456 Mass. 562, 571 (2010). A lack of good faith can be shown through the totality of the circumstances. <u>T.W. Nickerson, Inc. v. Fleet Nat'l Bank</u>, 456 Mass. at 570. Summary judgment should be denied when, in a light most favorable to the Plaintiff, there are genuine issue of material fact as to whether the Defendant acted in good faith. <u>York v. Zurich</u>

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Scudder Invs., Inc., 66 Mass. App. Ct. 610 (2006); Maddaloni v. W Mass. Bus Lines, Inc., 386 Mass. 877 (1982). Even if evidence of improper motive is weak, only a "toehold" is necessary to survive summary judgment. DiPietro v. Sipex Corp., 69 Mass. App. Ct. 29, 36-37 (2007).

Here, there is ample evidence to support the Plaintiff's argument that Defendants did not act in good faith when he terminated Fahey. Viewing the totality of the circumstances and as shown in the prior section, there was no "just cause" for terminating Fahey. Defendants breached the covenant of good faith and fair dealing by relying setting up and relying upon a flawed Ryan Report to support "just cause" and by intentionally misleading the public about the credibility of allegations against Fahey.

C. Fahey Can Succeed on His Defamation Claim Against the Defendants.

Defamation is defined as "written words which would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community." Stone v. Essex Cnty. Newspapers, Inc., 367 Mass. 849, 853, (1975).

To withstand a summary judgment motion in a defamation case, a Plaintiff needs to show evidence establishing disputed issues of material fact that: (1) the defendant made a false statement or statements of and concerning the plaintiff to a third party; (2) the statement or statements could damage the plaintiff's reputation within the community; (3) the defendant was negligent in making the statement or statements; and (4) the statement caused economic harm or is actionable without proof of economic harm. Reilly v. AP, 59 Mass. App. Ct. 764, (2003). "The element of publication is satisfied where the defamatory communication is transmitted to even one person other than the plaintiff." Phelan v. May Dep't Stores Co., 443 Mass. 52, 56 (2004); Restatement (Second) of Torts, supra at § 577. "Where the communication is susceptible of both a defamatory and nondefamatory meaning, a question of fact exists for the jury." Jones v. Taibbi, 400 Mass. 786,

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792 (1987). See Restatement (Second) of Torts, supra (jury decides "whether a communication, capable of a defamatory meaning, was so understood by its recipient"). "[T]he imputation of a crime is defamatory per se, requiring no proof of special damages." Phelan v. May Dep't Stores Co., 443 Mass. 52, 56, 819 N.E.2d 550, 554 (2004); see Lynch v. Lyons, 303 Mass. 116, 118-119 (1939). "Statements that prejudice someone in her profession or business or may probably have tended to do so are also defamatory per se." Sellig v. Visiting Nurse & Cmty. Health, 10 Mass. L. Rep. 231 (1999); see Lynch v. Lyons, 303 Mass. 116, 118-119 (1939).

On February 5, 2021, Flanagan told the Select Board that Fahey was being investigated for serious and credible allegations of misconduct with a minor. Then, on May 10, 2021, not only did Flanagan completely disregard the truth that the allegations were not credible, but he even expanded on the falsity by completely fabricating a story that the reason the DA did not pursue the matter was because the statute of limitations had passed. Flanagan, continued to perpetuate the false information, which is shown in his May 26, 2021, email to the Select Board where he, again, falsely confirms that "[t]he determination that the allegations were credible was made solely by the District Attorney's Office." Flanagan knew that those statements were untrue.

Flanagan perpetuated a false scenario to justify his terminating Fahey's employment knowing that it was damaging to Fahey's reputation in the Andover community and the youth services community at large.

1. **Flanagan's Defamatory Statements were made with Actual Malice.**

The Defendants have argued that in order for Fahey to proceed he must show malice on the part of Flanagan because Fahey is a "public figure." Fahey disputes that, as former Director of AYS, he is a "public figure." In N.Y. Times Co. the U.S. Supreme Court stated that, '[w]e have no occasion here to determine how far down into the lower ranks of

government employees the "public official" designation would extend...". N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 n.23(1964) (internal cite omitted).

Nevertheless, even if Fahey is found to be a public official, the facts established in this matter clearly show that Flanagan knowingly put false and misleading information concerning the investigation into the public domain. Flanagan stated that the allegations against Fahey were initiated at the Essex County District Attorney's Office who deemed the allegations of criminal misconduct against Fahey to be "credible." Flanagan even went as far as to state that a "statute of limitations" issue was the only reason why State Police and the DA were not prosecuting Fahey themselves. Flanagan made these statements despite the fact that nobody at his office ever spoke with State Police or the DA's office about an investigation of Fahey. He also made these statements after he had already received information from his own investigator that the allegations against Mr. Fahey of sexual misconduct were in fact not credible. Thus, even if Fahey is determined to be a "public official" he can show actual malice on Flanagan's part. See Van Liew v. Eliopoulos, 92 Mass. App. Ct. 114, 124 (2017) (evidence supported a finding of defamation and actual malice where defendant knew that multiple investigators had found no wrongdoing by the plaintiff.); Murphy v. Boston Herald, Inc., 449 Mass. 42, 60 (where substantial doubts have been raised as to the veracity of a reporter's information, the purposeful failure to investigate known witnesses may be proof of actual malice.).

2. Flanagan's Statements are Not Protected by Conditional Privilege.

The same argument applies in response to the Defendant's argument that Flanagan's defamatory statements are protected from liability by "conditional privilege". A public official's qualified privilege is lost if (1) the publication was made with knowledge of falsity or with reckless disregard for the truth; (2) the publication was unnecessary, unreasonable, or excessive; or (3) the

defendant acted with actual malice. Barrows v. Wareham Fire Dist., 82 Mass. App. Ct. 623, 631 (2012) (internal quotes omitted). [T]he conditional privilege is lost only "if the publication is not made chiefly for the purpose of furthering the interest which is entitled to protection" (emphasis supplied). Dragonas v. Sch. Comm., 64 Mass. App. Ct. 429, 439, 833 N.E.2d 679, 688 (2005); citing Ezekiel v. Jones Motor Co., 374 Mass. at 390 n.4.

In Dragonas the court looked at the statement the Defendant made as an educator to parents, in a “privileged” and “unprivileged” view. Dragonas v. Sch. Comm., 64 Mass. App. Ct. 429, 440 (2005). In a privileged view the statements could be explained as an honest attempt to convey concerning information. Id. However, from an ‘unprivileged” standpoint the tone and substance, along with his ongoing antagonistic relationship with the plaintiff could have shown his interest was not in furtherance of a legitimate interest. Id.; See also Ezekiel v. Jones Motor Co., 374 Mass. at 391-392 (extrinsic evidence of the history of the employment relationship is relevant in determining whether the defendant possessed an improper motive). The court in Dragonas held that summary judgment was not proper because there were genuine issues of material fact as to (1) whether the alleged defamatory statements were false and (2) whether the conditional privilege was abused due to malice. Dragonas at 440.

Here, Flanagan knew that the statements he made about the MA State Police and DA’s inquiry and their reasons for not taking action were false. He was aware that The Town’s own investigator had found MJ not credible but continued to tell others that the DA and MA State Police found her allegations to be credible. He even took it further to suggest that Fahey had committed a crime, but that the statute of limitations had passed. Flanagan’s admission that neither he nor anyone in his office had ever communicated with MA State Police or the District Attorney’s Office shows a reckless disregard for the truth when it came to these serious allegations, privacy

concerns, personnel issues, and insinuations of criminal guilt. Further, Flanagan's defamatory statements served no purpose other than to tarnish Fahey's reputation within the community. There was simply no legitimate reason for Flanagan to continue to perpetuate information that he knew was false and damaging to Fahey. If Flanagan had any qualified privilege, it has unequivocally been lost through his reckless publications.

D. Fahey Can Succeed on His Claim of Intentional Infliction of Emotional Distress.

To make out a claim of intentional infliction of emotional distress, the plaintiff must show that (1) that Defendant intended, knew, or should have known that his conduct would cause emotional distress; (2) that the conduct was extreme and outrageous; (3) that the conduct caused emotional distress; and (4) that the emotional distress was severe. Polay v. McMahon, 468 Mass. 379, 385, (2014).

Here, Flanagan knew the serious nature of the allegation and how wrongful statements, or criminal accusations can be damaging to a person's reputation in the community, yet Flanagan had a cavalier disregard to the consequences of his actions. He knew that by telling the Select Board that the State Police and DA had credible information implying that Fahey committed a crime sexual in nature with a minor, but that the statute of limitations had passed would case Fahey emotional distress. At the time Flanagan made the statement, he knew that the Town's own investigator found no credibility to the allegations. His statements and blatant lies were nothing short of extreme and outrageous. The emotional distress to Fahey that resulted from Flanagan's actions was severe. As a result, Fahey has been unable to obtain a job in the field he has spent his entire career in, he has had to seek professional help from his doctors due to the stress and anxiety, and it has taken a toll on his relationship with his family and his community.

E. Flanagan Intentionally Interfered with the Plaintiff's Contract with the Town.

To make out a case of intentional interference with a contract, a plaintiff must prove that (1) he had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions. Williams v. B & K Med. Sys., 49 Mass. App. Ct. 563 (2000). Improper means include the use of threats, misrepresentation of the facts, and defamation. Id. See United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 817 (1990). It was well known that Flanagan did not like Fahey. It was Flanagan's decision to have the Town initiate an investigation into the allegations against Fahey. It was Flanagan that made the decision to put Fahey on leave. Flanagan knew the scope of the investigation found the allegations not credible, but reached far outside the scope without credible evidence so he could terminate Fahey. Throughout this time, Flanagan continued to wrongfully fuel misinformation to the Select Board and Andover community so that he could justify Fahey's termination. Flangan used improper means by misrepresenting the facts on the credibility of the allegations made by MJ and telling the Selectboard that the DA was not prosecuting because of a statute of limitations issue. Flangan knowingly induced the Town to terminate Fahey's contract through his improper means. As a result, Fahey has been harmed.

F. Flanagan is Not Protected by Common Law Immunity.

"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 v. Salem State Coll., 446 Mass. 525, 537 (2006). The Defendant is not shielded from liability if the Plaintiff offers evidence "from which a jury could infer that the defendants acted in bad faith or with malice." Id. at 538 (2006); cf. Cachopa

v. Town of Stoughton, 72 Mass. App. Ct. 657, 665 (2008) (no summary judgment on common-law immunity where the plaintiff produced evidence from which a jury could infer that official's conduct motivated by revenge, raising inference of malice). "Actual malice" is defined as "a spiteful, malignant purpose, unrelated to the legitimate corporate interest of the employer." Blackstone v. Cashman, 448 Mass. 255, 263 (2007).

In Coachopa v. Town of Stoughton, the court found that the facts were sufficient to show that the Defendant's termination of the Plaintiff was likely in retaliation for past acts and the relationship between the Plaintiff and the Defendant. Cachopa v. Town of Stoughton, 72 Mass. App. Ct. 657, 662 (2008).

Similarly, Flangan had a known history of malice toward Fahey that was evident in the Town office, as Tonia Margas testified in her deposition. It was not uncommon to hear Flanagan talking badly about Fahey to other Town officials in an open manner in the office. Further, it was even understood by town residents that Flangan and Fahey "butted heads" as was noted by statements made by residents to the newspaper. Flanagan's disdain for Fahey was not a secret nor was it a secret that he was looking for a way to terminate Fahey. The facts are sufficient for a jury to determine that Flanagan acted with malice and is not entitled to common law immunity.

VI. CONCLUSION

For the reasons set forth above, the Defendants' Motion for Summary Judgment must be DENIED.

DATED: June 27, 2024

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Daniel J. Murphy, hereby certify that on June 27, 2024, a true and accurate copy of the foregoing document was served via electronic to the following:

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