IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

MEGAN HUNT, Plaintiff, vs. NEBRASKA FREEDOM COALITION, MALIA SHIRLEY, PATRICK PETERSON, and ROBERT ANTHONY, Defendants.	)	Case No. CI 23-5067 **ORDER ON DEFENDANTS' MOTION TO DISMISS**

This matter comes before the Court on Defendants' Motion to Dismiss, filed July 5, 2023. A hearing was held on August 11, 2023. Plaintiff appeared with counsel, Adam Morfeld and Alicia Christensen. Defendant appeared by counsel, Robert Sullivan. Arguments were heard and the matter was taken under advisement. Being fully advised in the premises, the Court finds and orders as follows:

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Megan Hunt is a Nebraska State Senator. (Compl. ¶ 11). The Nebraska Freedom Coalition (the Coalition) is a Political Action Committee. (Compl. ¶ 6). Hunt filed the Complaint in this matter on June 27, 2023, asserting a claim of defamation against Defendants: the Coalition, Malia Shirley, Patrick Peterson, and Robert Anthony. Hunt asserts that the Coalition published defamatory tweets[1] on March 22, 2023; March 24, 2023; March 31, 2023, and April 5, 2023. In the March 22 tweet, the Coalition re-tweeted a 2017 tweet of Senator Hunt depicting two children

[1] "Tweet" and "re-tweet" refer to messages posted on a social media platform that, at the time of the publications at issue, was known as Twitter. For simplicity, the Court will refer to "tweets" and "Twitter" when discussing this social media platform in this order.

in Girl Scout uniforms. The Coalition's re-tweet included the caption "@NebraskaMegan Senator Hunt did. All morning long she referred to this child as her son…#groomer." On March 24, 2023, the Coalition issued the following tweet:

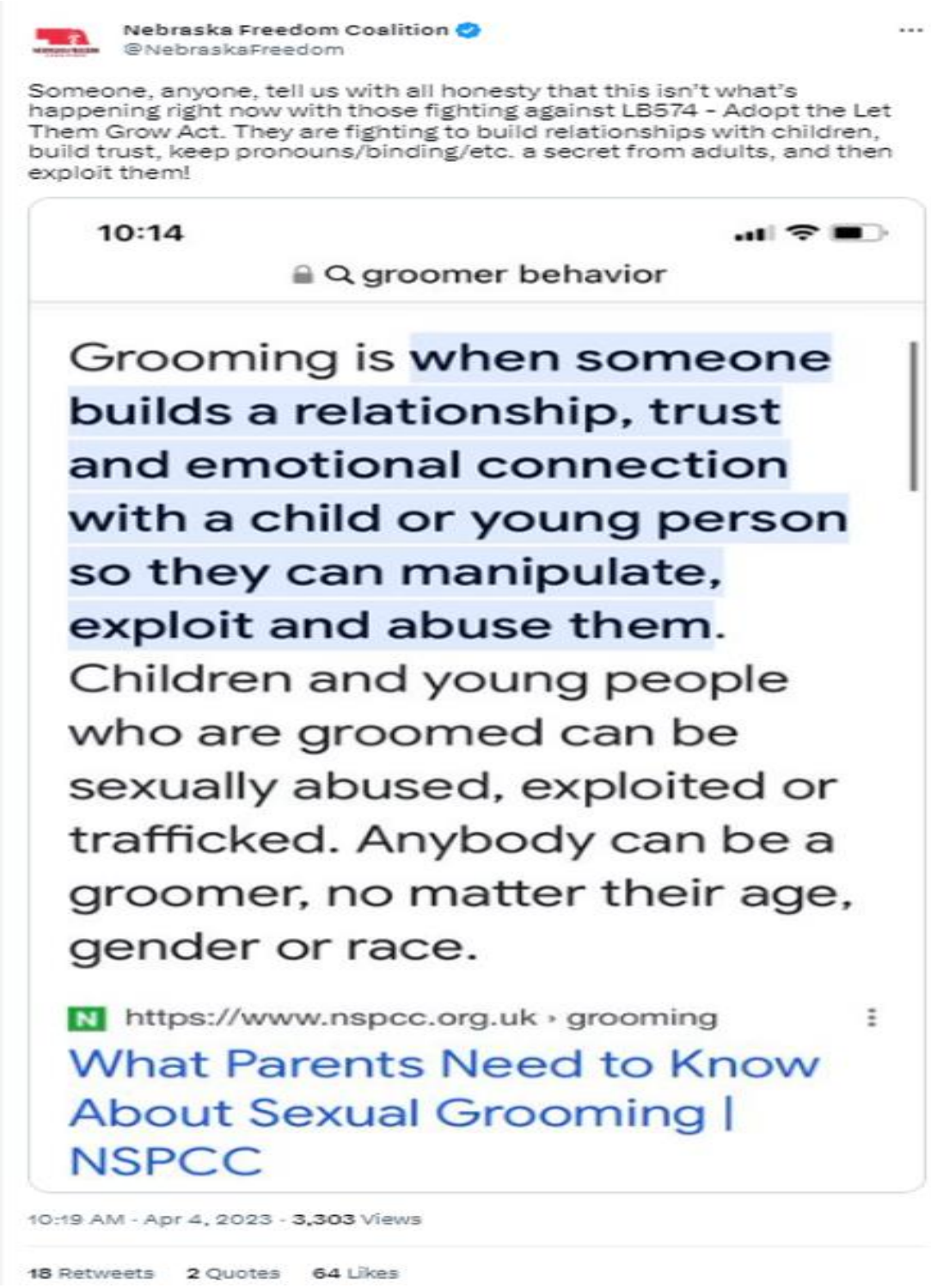
(Compl. ¶ 18). In particular, Plaintiff points to the portion of this tweet next to Hunt's picture with the words "Skills: grooming children, including her own." (Compl. ¶ 19). On March 31, 2023, the Coalition issued the following tweet:

Again, Hunt cites to the line of this Tweet that "lists Hunt's skills as 'grooming children, including her own.'" (Compl. ¶ 35). Additionally, the caption of this tweet states "Coming from the other side of the bracket is professional groomer @NebraskaMegan Hunt going against Manchild of the

Lincoln Urinal Star 'Lil Dunkeroo. . .." Finally, on April 5, 2023, the Coalition made the following tweet mentioning Hunt:

The April 5, 2023, tweet contains the same language listing Hunt's skills as "grooming children, including her own." (Compl. ¶ 36). Plaintiff additionally directs the Court's attention to an April 4, 2023, tweet by the Coalition regarding debate on LB574. The text of the tweet states "Someone, anyone, tell us with all honesty that this isn't what's happening right now with those fighting against LB574- Adopt the Let Them Grow Act. They are fighting to build relationships with children, build trust, keep pronouns/binding/etc. a secret from adults, and then exploit them!"

(Compl. ¶ 26). The image attached to this text is of a Google search bar with the term "groomer behavior" typed in. (Compl. ¶ 26). An image of the tweet at issue, as depicted in the Complaint, is shown below:



(Compl. ¶ 25). Plaintiff states that she issued retraction demands to the Coalition on March 31, 2023, and April 5, 2023. Plaintiff contends that the above tweets are an assertion by the Coalition that "Hunt is therefore an unfit parent who sexually abuses her own child." (Compl. ¶ 31).

On July 5, 2023, Defendants filed a Motion to Dismiss. That motion is now before this Court.

LEGAL STANDARD

An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Moats v. Republican Party of Nebraska*, 281 Neb. 411, 416–17, 796 N.W.2d 584, 590–91 (2011). To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. *Id.* In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Id.*

ANALYSIS

Plaintiff, a State Senator, asserts that the Coalition issued defamatory statements that Hunt sexually groomed and abused her own thirteen-year-old child. (Compl. ¶ 1). Defendant the Nebraska Freedom Coalition, a Political Action Committee, responds that while it is "unpleasant and unfortunate" when political discussion devolves into "little more than childish tantrums," such political debate is protected by the First Amendment, and this matter should be dismissed. (Def. Mot. Dismiss, p. 5).

In the ordinary case, a claim of defamation requires (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either action ability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Moats v. Republican Party of Nebraska*, 281 Neb. 411, 421–22, 796 N.W.2d 584, 593–94 (2011). However, with respect to fault, when the plaintiff in a libel action is a public figure and the speech is a matter of public concern, the plaintiff must demonstrate "actual malice," which means knowledge of falsity or reckless disregard for the truth, by clear and convincing evidence. *Id.* The plaintiff in a "public-libel" action must establish that the alleged statement is false by clear and convincing evidence and establish special damages. *Id.* In this matter, Megan Hunt is a State Senator and the tweets at issue were written by a Political Action Committee. One tweet reproduced by Plaintiff specifically cites legislative debate on LB 574. (Compl. ¶ 25). Accordingly, for purposes of this suit, Hunt is a public figure and must demonstrate "actual malice" and special damages to recover.

In the context of political debate, the Nebraska Supreme Court has noted that there is "tension between the need to protect one's reputation through a defamation action and the importance of First Amendment guarantees as they relate to political speech." *Moats v. Republican Party of Nebraska*, 281 Neb. 411, 423–24, 796 N.W.2d 584, 595 (2011). As the U.S. Supreme Court has noted, the First Amendment has "its fullest and most urgent application" to speech uttered during political campaigns. *Id.* citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S.Ct. 151 (1995) (cleaned up) (internal citations omitted). As the U.S. Supreme Court noted in the landmark case *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964), the "profound national commitment to the principle that debate on public issues should be

uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on ... public officials."

In analyzing whether the Coalition's statements are protected by the First Amendment in this case, the Court begins by addressing the issue of whether the tweets recounted in the Complaint are statements of fact or statements of opinion. In the context of a defamation claim, "the First Amendment protects the publication of statements which cannot be interpreted as stating actual facts, but, rather, is the opinion of the author." *Moats v. Republican Party of Nebraska*, *supra*. Courts considering the distinction between fact and opinion have generally determined that making the distinction is a question of law to be decided by the trial judge. *Id.* The Nebraska Supreme Court has approvingly cited the Restatement (Second) of Torts, which provides that a "defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Id.* Therefore, this Court must determine, first, whether the tweets at issue are fact or opinion, and second, if opinion, whether they imply knowledge of undisclosed defamatory facts.

Fact versus Opinion

In assessing whether a statement implies a false assertion of fact or a protected opinion, a court looks at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed. *Moats v. Republican Party of Nebraska*, *supra* (internal citations omitted). Courts applying the totality of the circumstances test in a defamation claim look to factors such as "(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates the impression, and (3) whether the statement

in question is susceptible of being proved true or false." *Id.* The California Supreme Court has summarized this analysis in the political arena as follows:

> where potentially defamatory statements are published in a public debate ... or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric, or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.

Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 601, 552 P.2d 425, 428 (1976).

Illustrations

The Court pauses to discuss persuasive case law from other jurisdictions that involves similar fact patterns to the case here. For example, a federal district court in California recently dismissed a defamation case based on tweets made in a political context. *Clifford v. Trump,* 339 F. Supp. 3d 915, 926–27 (C.D. Cal. 2018), aff'd, 818 F. App'x 746 (9th Cir. 2020). In background to the case, Stephanie Clifford, known as Stormy Daniels, asserted that she had been threatened by persons related to President Donald Trump, and she provided a sketch of the man who had allegedly threatened her. *Id.* Trump later tweeted denying Clifford's statements:

> A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!

In analyzing the circumstances of the tweet, the court recognized that the tweet contained statements that could be proved true or false: (1) that Clifford had lied, and (2) that the man did not exist. However, the court determined that Clifford's argument "crumbles" when one considers the context of the tweet. *Id.* The court held, "Mr. Trump's tweet constitutes 'rhetorical hyperbole,' which is 'extravagant exaggeration [that is] employed for rhetorical effect.'" *Clifford v. Trump*, 339 F. Supp. 3d 915, 926–27 (C.D. Cal. 2018), *aff'd,* 818 F. App'x 746 (9th Cir. 2020) (internal

citations omitted). The *Clifford* case demonstrates that the context and tone of a tweet may cause a statement to be understood as hyperbolic and non-actionable.

Given Plaintiff's arguments related to criminal accusations, the Court also finds useful the example of *Gisel v. Clear Channel Commc'ns, Inc.*, 94 A.D.3d 1525, 1526, 942 N.Y.S.2d 751, 752 (2012). In that case, a radio host made on-air comments about a local man who had recently been acquitted of criminally negligent homicide for fatally shooting a man in a hunting accident. The radio host referred to Gisel as "a cold-blooded murderer" and asked whether he "put a notch in the stock of his gun as he kills people?" The host also stated while on-air "that the hunting incident could not have been an accident." In examining the over-all context of the statements, the trial court concluded that "a reasonable listener would not have believed that the challenged statements were conveying facts about the ... plaintiff,' " rather than opinions." *Id.* (internal citations omitted). Further, the statements did not imply that the radio host was privy to undisclosed facts. Rather, the host's belief that publicly known facts amounted to the crime of murder was a protected opinion, and summary judgment for the defendant was proper. *Id.*

In contrast, where a speaker asserts personal knowledge of undisclosed facts, an opinion that a person committed criminal activity may be actionable as defamation. For example, in *Bentley v. Bunton*, 94 S.W.3d 561, 571 (Tex. 2002), the host of a local television talk show accused a judge in the county of corruption and an illegal scheme to pressure a mayoral candidate. The host supported his assertions by claiming to have made "lengthy investigations," at one point holding up documents on camera and stating that they were court records that supported his assertions. *Id.* The implication of undisclosed facts made the host's opinion as to the judge's criminal activity into actionable defamation. *Id.*

Fact or Opinion - Application

The Court now turns to the case before it and considers, "the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed" *Moats v. Republican Party of Nebraska*, 281 Neb. 411, 425, 796 N.W.2d 584, 596 (2011) (internal citations omitted). Bearing these considerations in mind, the Court holds that the statements are opinion as a matter of law.

To the extent that the Coalition's statements can be read to factually assert that Hunt actually engaged in sexual grooming or child abuse, the general tenor of the tweets and hyperbolic language therein negates that impression. The audience, reading tweets made by a Political Action Committee about a State Senator would likely "anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric, or hyperbole." *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601, 552 P.2d 425, 428 (1976). The contents of the tweets themselves further support this conclusion. The first tweet contains only the hashtag #groomer, which is not a full statement that can be verified as true or false. The latter three tweets involve a "March Madness" style "contest" to determine who is the "maddest of them all." The posts include graphical indications of hyperbole, including emojis of clowns, a tent, and a smiley face with sunglasses. They include exaggerated language such as referring to the "Lincoln Urinal Star" when tagging "@JournalStarNews." One tweet describes the "finalists" as the "Fanatical Four." All of the entries in the "Height," "Occupation," "Skills," and "Hobbies" descriptions in the profiles of the "contestants" employ mocking, exaggerated tone. For example, in addition to the language which forms the basis of this suit, each of the later 3 tweets about Hunt list her height as "hobbit." This type of language demonstrates that the tweets are not meant to be read literally. Viewing the tweets as a whole, they are of the same type of statements that are "rhetorical hyperbole" which

the United States Supreme Court has found to be protected opinion. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695 (1990).

Disclosed or Undisclosed Facts

Under the common-law rule that the Nebraska Supreme Court has approvingly cited, statements of opinion may be actionable only if they imply knowledge of undisclosed facts as the basis. See *Moats v. Republican Party of Nebraska, supra,* citing Restatement (Second) of Torts § 566 at 170. As illustrated above, an opinion that publicly known facts constitute a criminal offense is not actionable, see *Gisel v. Clear Channel Commc'ns, Inc.*, 94 A.D.3d 1525, 1526, 942 N.Y.S.2d 751, 752 (2012)(radio host calling person involved in hunting accident "cold-blooded murderer" not actionable), while an accusation of criminal conduct which a speaker implies is supported by the speaker's knowledge of undisclosed facts is actionable. See *Bentley v. Bunton*, 94 S.W.3d 561, 571 (Tex. 2002) (holding up papers as proof and mentioning personal investigation is a suggestion of undisclosed facts that make opinion actionable at common law).

Plaintiff asserts that the Coalition, through the tweets outlined above, publicly accuse Hunt of sexually grooming and abusing her own thirteen-year-old child. (Compl. ¶ 1). In this case, none of the tweets at issue suggest private undisclosed knowledge about Hunt's interactions with her child or any other child. The Coalition provides no proof for their allegations. To the extent that the tweets at issue accuse Hunt of criminal conduct, there is no indication that this opinion is based on undisclosed facts. Therefore, the tweets are not actionable defamation. See *Moats v. Republican Party of Nebraska, supra* (citing Restatement (Second) of Torts); see, also, *Gisel v. Clear Channel Commc'ns, Inc.*, 94 A.D.3d 1525, 1526, 942 N.Y.S.2d 751, 752 (2012).

One of the tweets reproduced by Hunt in the Complaint further demonstrates that the basis for the Coalition's "groomer" language is related to opposition to LB 574. In the April 4, 2023,

tweet, the Coalition states that it believes all opponents of LB574 are engaging in "grooming behavior," tweeting a picture of a google search for "grooming behavior" with the caption:

> Someone, anyone, tell us with all honesty that this isn't what's happening right now with those fighting against LB574- Adopt the Let Them Grow Act. They are fighting to build relationships with children, build trust, keep pronouns/binding/etc. a secret from adults, and then exploit them!" (Compl. ¶ 26).

The implication of these tweets, taken as a whole, is that the Coalition believed that any person who was fighting against LB574, which bars certain "gender-altering procedures" for minor children, was engaging in "grooming behavior." See 2023 Nebraska Laws L.B. 574; (see also Compl. ¶¶ 25-26). The language and imagery used by Defendants may be described as "vehement," and "caustic." See *New York Times v. Sullivan, supra*. However, the First Amendment protects the right of the Coalition to tweet its opinion that opposition to LB 574 is equivalent to grooming behavior. From the face of the Complaint, the Coalition's tweets are opinion on public debate and are not actionable as defamation. (See Compl. ¶¶ 25-26). For this reason, the Court must dismiss the Complaint.

Actual Malice and Special Damages

Based upon the Court's determination that the statements in the tweets in this case are protected opinion and not actionable as defamation, the Court does not reach the issue of whether the Complaint sufficiently alleges actual malice or special damages.

Dismissal with Prejudice

The Court finally turns to the issue of whether the dismissal of the Complaint should be with prejudice or without prejudice. A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated. *Eadie v. Leise Properties, LLC*, 300 Neb. 141, 149, 912 N.W.2d 715, 721–22

(2018). In *Clifford v. Trump, supra*, the district court determined that amendments would be futile because "there is no way for Plaintiff to amend the Complaint to transform the tweet from 'rhetorical hyperbole' into an actionable statement." The same is true here. There is no dispute about the contents of the statements in question. No amendment will transform the tweets from a Political Action Committee's rhetorical hyperbole into actionable statements. Therefore, dismissal is granted with prejudice.

CONCLUSION

In this case, a State Senator sues a Political Action Committee for defamation based on a series of tweets. The Court determines as a matter of law that these tweets are assertions of opinion rather than fact. The U.S. Supreme Court noted in the landmark case *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964), the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on ... public officials." Because of this country's profound commitment to freedom of speech, the statements at issue are not actionable as a matter of law. Therefore, the Court must dismiss the Complaint.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendants' Motion to Dismiss is granted, with prejudice.

DATED this 27th day of September, 2023.

BY THE COURT:

TODD O. ENGLEMAN
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I, the undersigned, certify that on September 27, 2023, I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Robert M Sullivan
bobsullivan402@gmail.com

Patrick Peterson
4100 Washington Street
Lincoln, NE 68506

Robert Anthony
1304 Joy Street
Papillion, NE 68046

Adam S Morfeld
adam.morfeld@nebraskaaction.com

Date: September 27, 2023 BY THE COURT: Crystal Rhoades

FOURTH DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

CLERK