

April 16, 2021

Sent via email to: snickols@cityoffrederickmd.gov

Saundra Nickols
City Attorney
City of Frederick, Maryland
101 N. Court Street
Frederick, Maryland 21701-5415

Re: Report of Investigation

On January 27, 2021 the City of Frederick, through its City Attorney, Saundra Nickols engaged this firm to conduct an investigation related to certain social media postings made by one City Alderman alleging misconduct on the part of a fellow Alderman.

A board of five Alderman constitutes the legislative body for the City of Frederick. A mayor serves as the titular chair of the Board but does not vote except in the case of a tie. While Aldermen are City officials, they are not considered to be City employees and are not subject to the general City personnel policies. They are subject to the City's Ethics Code and may be investigated by the City's Ethics Commission. However, the Ethics Code provisions are limited to conflicts of interest, financial self-dealing and lobbying, none of which are relevant to the conduct alleged in this case.

Scope of Work: The City has requested this investigator to examine allegations of misbehavior by Alderman Roger Wilson that may have occurred during his tenure as a City official. Mr. Wilson was first elected as Alderman in November 2017 and has served continuously since that date. He recently filed to run for Mayor in the next election. The City wishes to evaluate whether Mr. Wilson has engaged in behavior that could bring legal liability to the City.

The request also asked me to examine whether Alderman Ben MacShane's postings concerning Mr. Wilson constituted defamation under Maryland law.

Statement of Facts: On December 26, 2020 Alderman Ben MacShane posted on his personal Face Book page a statement alleging that Alderman Roger Wilson had committed numerous wrongful acts that may have constituted sexual harassment. *Exhibit 1.* On December 27, 2020 *The Frederick News Post* printed an article about the Face Book post. [Alderman accuses colleague of sexual misconduct on social media | Local communities | fredericknewspost.com](#) Mr. MacShane posted a follow-up message on or about December 28, 2020. *Exhibit 2.*

On January 5, 2021, *The Frederick News Post* published a statement made by Mr. Wilson in response to the MacShane postings. A reprint is attached as *Exhibit 3*. Mr. Wilson strongly denied any wrongdoing.

I interviewed Mr. MacShane by telephone on February 11, 2021. He acknowledged posting the messages about Alderman Wilson on his Face Book page on December 26 and 28, 2010. He explained that allegations had come to his attention and in posting the information his “only priority is the well-being of women in our community, and they have been treated horribly.” He declined to name any of the women who had reported their allegations to him because he was seeking to create harmony and not put the women through any more distress.

I inquired further. Mr. MacShane explained that he was approached by a female member of the community at a public function on December 21, 2020 asking if he would hear her out about the misconduct of a City official.

Mr. MacShane subsequently came into contact with other women who made strikingly similar allegations, demonstrating, in MacShane’s mind, a pattern of conduct. He noted that some of the women’s allegations are corroborated by text messages and emails, some of which he has seen.

He made efforts to seek a proper reporting avenue by speaking with his fellow Aldermen and the Mayor, to no avail as there is no established system for dealing with this type of misconduct committed by an elected official. Thus, he resorted to the Face Book posting as a means of making the community aware of the matter.

I told Mr. MacShane that my investigation would be deficient unless I could obtain some first-hand accounts from women who had been aggrieved. He seemed to think that the women would not be inclined to speak with me because they were aware that the City lacked a mechanism to hold an Alderman accountable for this type of conduct.

I asked Mr. MacShane to pass my contact information on to any of the women who may be willing to come forward.

I interviewed Mr. MacShane again on March 11, 2021. He relayed that before he posted the messages on Face Book, he was personally aware of four women who alleged that they had disturbing interactions with Mr. Wilson, and knew, second-hand, of multiple additional women who alleged they had been subjected to his advances. These events spanned a time period from about 2016 to 2020.

Mr. MacShane stated that his purpose in making the social media posts was to “expose and confront sexual harassment behavior, to question Mr. Wilson’s fitness for office, to deter the abuse of power and to achieve a social goal of gender equality.”

I interviewed eight women in connection with these allegations, six of whom alleged that they had been subjected to unwelcomed sexual advances by Alderman Wilson. Of these six, the complaints of two arose from events that occurred when Mr. Wilson was an Alderman for the City of Frederick. These two witnesses alleged that Alderman Wilson used his position as a means of meeting them and offering a mentoring relationship to aid them professionally, but then – unexpectedly -- suggested a sexual encounter.

Each witness requested to remain anonymous to protect their personal and business reputations. Given the nature of the allegations and the atmosphere of the community I find that this is a reasonable concern and thus do not find that it reflects negatively on the credibility of their statements. Moreover, to maintain equity amongst the witness, and to balance my own judgment, once several had requested anonymity and declined to be recorded, I decided to treat all of them the same.

On March 15, 2021 the City Attorney directed my attention to a *Frederick News-Post* article printed on January 21, 2021 that stated: “Wilson has been accused by several women of inappropriate interactions, The News-Post has independently confirmed.”

I contacted the reporter, Ryan Marshall via email to inquire about the basis of his “confirmation.” He replied as follows: *Perhaps the article wasn't clear. We've spoken to several women who have made allegations against Mr. Wilson. We have not been able to confirm whether those allegations are true.*

I invited Mr. Wilson to make a statement concerning this investigation. I heard back from his attorney who asked numerous questions that I answered in a letter dated March 5, 2021. On April 2, 2021 I made another offer to Mr. Wilson to which he has yet to respond, although I did receive two emails from his attorney asking questions, which I answered. There has not been any more communication.

Analysis

1) Mr. Wilson’s Conduct

I find there is sufficient evidence to conclude that Alderman Wilson relied on his position as an Alderman to gain the acquaintance and trust of women in the community. He then used a pretense of helping these women as an opportunity to request that they engage in sexual relationships with him. The two witnesses mentioned above reported that he so approached them during his term as an Alderman.

Although Mr. Wilson may have used his public official persona to meet these women, his propositions to them are fairly characterized as private conduct. There was no employment relationship involved and no indication that he was demanding sexual favors in exchange for some benefit that he had control over. He did not and could not have created a hostile work environment based on sexual harassment, as there was no employment relationship and no reports of repeated and pervasive conduct as to each individual. The complainants did not suffer legally compensable damages. Accordingly, Mr. Wilson’s conduct does not constitute legally actionable sexual harassment under State or federal law.

2) Mr. MacShane’s Conduct

Ben MacShane is a public official who has a First Amendment right to speak on matters of public concern. This principle is known as the public employee speech doctrine and “recognizes the unique role government employees— individuals who “are often in the best position to know what ails the agencies for which they work—play in keeping the electorate informed about the operations of public employers.” *Liverman v. City of Petersburg*, 844 F.3d 400, 408 (4th Cir. 2016) (internal quotation marks omitted). The principle applies to public officials as well to public employees.

When a public official speaks out on a matter of public concern, his speech is protected by the First Amendment. “Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community.” *Kirby v. City of Elizabeth City*, 388 F. 3d 440, 446 (4th Cir. 2004). Mr.

MacShane's comments concerned Mr. Wilson's fitness for office and were certainly of public concern, not an individualized private concern.

Even if the speaker is not correct in the views expressed, the speech is still protected, unless it is wholly unsupported by the facts and was spoken (or written) with reckless disregard of the truth. See *Miner v. Novotny*, 60 Md. App. 124 (1984). See also *Seley-Radtke v. Hosmane*, 450 Md. 468, 473 (2016) (Supreme Court has stated that statements pertaining to public officials and to public figures on matters of public concern merit special protection in our society; thus, such statements are subject to a conditional privilege—the First Amendment conditional privilege—that is overcome only by actual malice, i.e., "knowledge that [the statement] was false or with reckless disregard of whether it was false or not.")

In addition, recent court decisions have recognized that social media outlets serve as public fora for the dissemination of protected speech. *Grutzmaker v. Howard Co.*, 851 F.3d 333 (4th Cir. 2017) (examining social media posts made by County fire chief).

Finally, to sustain a claim of defamation or libel, the First Amendment requires that the plaintiff show that the defendant knew that a statement was false or was reckless in deciding to publish the information without investigating whether it was accurate. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Mr. MacShane, upon receiving the first allegation of misconduct, endeavored to obtain and did obtain additional information that tended to corroborate the first complaint. The witness who subsequently contacted him and whom I interviewed further verified the alleged pattern of conduct that can fairly be described as unwanted sexual advances. Accordingly, I conclude that Mr. MacShane had a good faith basis for believing the allegations and was speaking out on a matter of public concern when he issued his Face Book messages in December 2020.

There are no facts that would lead a reasonable person to conclude that he acted in reckless disregard of the truth. No action for defamation can lie against Mr. MacShane. Mr. Wilson's protestations notwithstanding, Mr. MacShane's speech is protected by the First Amendment. See *Miner v. Novotny*, 60 Md. App. 124 at 132 (1983) (constitutional right to free speech "cannot be made subservient to hurt feelings, bruised egos or tarnished reputations"). See also *Gohari v. Darvish*, 363 Md. 42, 55 (2001) ("common law conditional privilege arises from the principle that a defendant may not be held liable for an otherwise provable defamatory statement if publication of the statement advances social interests that outweigh a plaintiff's reputational interest.")

The City of Frederick would bear no liability for Mr. McShane's conduct.

Respectfully submitted,

/s/

Karen J. Kruger