

## Outside Counsel

## Expert Analysis

# Victim Defamation Claims In the Era of #MeToo

The *Me Too* era has featured a surge in sexual misconduct claims against elected officials, celebrities and prominent businesspersons. Some of these public figures have admitted wrongdoing tacitly or even with explicit public apologies. Others have sought to discredit their accusers – often with sharp counter-accusations of dishonesty, consensual relations or a mixture of the two. Counter-accusations against the typically female complainant – if false – may create further injury – and can give rise to seemingly viable defamation claims. Nonetheless, if the accuser is or becomes a public figure herself, she will need to plead and prove “actual malice,” to prevail on her defamation claim.

The actual malice standard poses an evidentiary hurdle that alleged victims may be unable to clear.

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Recent cases show that not only famous figures, but historically “private” individuals as well who elect to speak out publicly regarding their sexual claims, will need to show actual malice to prevail on a related defamation claim. The former group because they are “public figures” in the traditional sense, and the latter because they find themselves classed as “limited-purpose” public figures under defamation law.

Two recent cases involving defamation claims filed by alleged victims of sexual assault highlight this development. One of the cases, *Hughes v. Twenty-First Century Fox, Inc.*, No. 17CV7093, 2018 WL 1940175 (S.D.N.Y. Apr. 24, 2018) involved Fox news personality Scottie Nell Hughes, a known public figure. The second, *McKee v. Cosby*, 874 F.3d

54 (1st Cir. 2017) involved a private individual, Katherine McKee, who became a “limited-purpose” public figure by virtue of her public comments concerning her alleged assailant, entertainer Bill Cosby.

### ‘Hughes v. Twenty-First Century Fox, Inc.’

Plaintiff Hughes alleged that she was assaulted and raped in her hotel room in 2013 by Fox anchor and host Charles Payne. *Hughes*, 2018 WL 1940175, at \*1.

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Hughes further alleged that, “[w]hile humiliating and traumatizing, like many sexual assault victims, [she] chose not to report the incident.” *Id.* According to Hughes, she received increased opportunities to appear on various Fox programs – so long as she maintained an alleged *quid pro quo* sexual relationship with Payne. *Id.*

Hughes claims that she ended the relationship in 2015, and thereafter suffered swift retribution; Hughes alleged that her television appearances declined and opportunities diminished, as Fox blacklisted her across the industry. *Id.*

Hughes alleged, *inter alia*, defamation – based on Fox’s alleged false statements to the National Enquirer “mischaracteriz[ing] the nature of the sexual relationship as consensual.” *Id.* at \*5. Hughes asserted that Fox and Payne deliberately provided the magazine with false statements in fear that “Hughes would publically disclose her story about rape, discrimination and blacklisting *first*, causing another wave of negative publicity against Fox.” *Id.* at \*14 (emphasis in original).

Since Hughes admitted that she is a public figure, the court dismissed her defamation claims for failure to allege that the defendants made the statements with actual malice, i.e., with knowledge of falsity or reckless disregard of the truth. *See Id.* at \*15. The court examined three separate defendants’ statements to the magazine, applying the actual malice standard to each. As to the two Fox managers who contacted the newspaper, the court concluded that the complaint was bereft of particularized facts evidencing in a clear and convincing manner that they “knew or w[ere] highly aware, that the statement Fox fed to the National Enquirer was untrue.” *Id.*

Even as to the alleged assailant Payne, the district court dismissed

on the basis of the actual malice standard:

“[A]ctual malice in a defamation claim focuses primarily on what a defendant knew or believed at the time a purportedly false statement was made. While an inquiry into the defendant’s state of mind at the pleadings stage is sometimes better left for discovery, the complaint’s allegations regarding Payne suggest nothing more than the whimsical ups and downs of a scorned lover who, for nearly two years, expressed “romantic interest” in Hughes, and reciprocated her “willingness to engage in sexual conduct with” him. In view of these allegations, Hughes fails to plead that Payne’s statements maintaining the consensual nature of the affair were made with actual malice. *Id.* (citations omitted). The district court’s dismissal in *Hughes* showcases the pleading and proof burdens facing alleged assault victims who – as public figures – challenge as defamatory an alleged assailant’s public and predictably humiliating denials.

#### ‘McKee v. Cosby’

In *McKee v. Cosby*, the First Circuit examined whether an alleged defamation victim may relinquish her status as a private claimant by raising her assault claims publicly outside the courtroom. 874 F.3d 54, 62 (1st Cir. 2017). In *McKee*, Katherine McKee alleged in a *New York Daily News* interview that Cosby had raped her in a hotel room in 1974. *Id.* at 58.

Shortly after the publication, Cosby’s then-attorney Martin Singer wrote a letter to the *Daily News* rebutting McKee’s allegations, by referencing news articles quoting McKee, and criticizing the paper for failure to properly investigate. *Id.* at 62. The First Circuit observed that McKee came forward after several other women levelled highly publicized sexual assault accusations against Cosby, who then “allegedly hired a team of lawyers and investigators ‘to discredit them, to intimidate them, and to intimidate any future would-be accusers.’” *Id.*

The First Circuit concluded that under these circumstances, McKee rendered herself a limited-purpose public figure, having raised her voice to the press and invited public scrutiny. *Id.* (“McKee ‘thrust’ herself to the ‘forefront’ of this controversy, seeking to ‘influence its outcome.’”). Under the heightened standard applicable to McKee as a limited-purpose public figure, the court affirmed the district court’s decision that the complaint failed to “allege facts plausibly suggesting [Cosby] knew the statement attributed to [McKee] by the [referenced news article] was not actually uttered by [McKee] or recklessly disregarded that possibility.” *McKee v. Cosby*, 236 F. Supp. 3d 427, 453 n. 25. (D. Mass. 2017), *aff’d*, 874 F.3d 54 (1st Cir. 2017).

On April 19, 2018, McKee petitioned the United States Supreme

Court to review the First Circuit's holding.

### Private vs Public Figure

The threshold determination of whether an individual is a private or public figure is of utmost importance in a defamation case, with the outcome frequently preordained if not determined on this question alone. Private figures receive the broadest protection against defamatory comment and are required to meet only the "less stringent standard" of negligence to prevail on a defamation claim. *Machleder v. Diaz*, 801 F.2d 46, 54 (2d Cir. 1986). Only when the statement relates to a matter of "legitimate public concern" will a private figure need to prove more. Private individuals claiming defamation in those instances must prove that the defendant acted "in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1975). A statement is one of "legitimate public concern" if it can be "fairly considered as relating to any matter of political, social or other concern of the community." *Huggins v. Moore*, 94 N.Y.2d 296, 304 (1999).

### Public Figure

In *New York Times Co. v. Sullivan*, the United States Supreme Court unanimously heightened the standard as it applies to public officials, by preventing them

from recovering damages for defamation without first proving "actual malice." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). This heightened standard subsequently was extended first to public figures (see *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967)), and then to "limited-purpose" public figures – meaning "an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a lim-

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ited range of issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1972).

Public figures are those who achieve fame, gain notoriety for their achievements and are in positions of persuasive power and influence. See *Gertz*, 418 U.S. at 351. Elected officials, celebrities, prominent businesspersons, musicians, athletes and political commentators naturally fall under this characterization.

"Limited-purpose" public figures are those who (1) invite public attention prior to the subject incident; (2) voluntarily inject into a public controversy related to the subject incident; (3) assume a position of prominence in the public controversy; and (4) maintain

continuing access to the media. *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-37 (2d Cir. 1974), cert. denied, 471 U.S. 1054 (1985).

There are two justifications for imposing the heightened standard on public and limited-purpose public figures. First, these individuals invite attention and comment by placing themselves in the public eye. *Gertz*, 418 U.S. at 345. Second, they have greater access to media than the average citizen, and can utilize their relative media influence to rebut defamatory statements through interviews, talk show appearances and the like. See, e.g., *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 176 (2d Cir. 2000) (holding that plaintiff media owner had access to the "channels of communication" to rebut accusations).

History indicates that charges and accusations of sexual misconduct by elected officials, entertainers and industry leaders will continue to play out publicly. Defamation claims by assailants and victims alike inevitably will remain a part of the landscape in these high profile disputes. The heightened pleading and proof standards in those defamation cases will protect alleged assailants who choose to denounce publicly their putative victims' charges. This aspect of defamation law likely will become better and more widely understood as civil litigations in this context continue to unfold.