

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 2 2026

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOHNATHAN TALBOT,

Plaintiff - Appellant, Cross-Appellee

v.

MANOAH AINUU; THE NORTH FACE, a
Delaware Company,

Defendants – Appellees,
Cross-Appellants.

Nos. 24-2038

24-2135

24-2144

D.C. No.

2:23-cv-00066-BMM

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Brian M. Morris, Chief District Judge, Presiding

Submitted August 13, 2025**
Submission Vacated August 14, 2025
Resubmitted October 2, 2026
Anchorage, Alaska

Before: GRABER, OWENS, and R. NELSON, Circuit Judges;
Partial Concurrence and Partial Dissent by Judge R. NELSON;
Dissent by Judge GRABER.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Plaintiff Johnathan Talbot appeals from the district court’s decision granting Defendants Manoah Ainuu and The North Face Apparel Corporation’s motions to dismiss his complaint, which asserts claims for defamation and tortious interference. Defendants cross-appeal the district court’s decision denying their motions for relief under Washington’s Uniform Public Expression Protection Act (“UPEPA”), Wash. Rev. Code §§ 4.105.010–.903.¹ We review de novo. *See Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1009 (9th Cir. 2017) (reviewing de novo a motion to strike under an anti-SLAPP law); *Sarver v. Chartier*, 813 F.3d 891, 897 n.1 (9th Cir. 2016) (same, for a choice-of-law determination); *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (same, for dismissal under Rule 12(b)(6)). We affirm.

1. The district court did not err by dismissing Plaintiff’s defamation claims. A defamation claim premised on statements that do not “impl[y] an assertion of objective fact . . . is foreclosed by the First Amendment.” *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1157 (9th Cir. 2021) (citations omitted). Plaintiff alleges that Ainuu’s Instagram posts about their encounter made two defamatory assertions: that Plaintiff “made racist comments” and “assaulted” Ainuu. Considering three factors, we hold that no “reasonable factfinder could conclude”

¹ UPEPA is Washington’s anti-SLAPP (strategic lawsuit against public participation) law. *Thurman v. Cowles Co.*, 562 P.3d 777, 778 (Wash. 2025).

that the challenged statements “impl[y] an assertion of objective fact.” *Id.* (citation omitted); *see id.* (describing our three-factor test).

First, the “broad context” in which Ainuu’s posts appeared “negates the impression” that the challenged statements assert objective facts. *Id.* According to Plaintiff, Ainuu uses his Instagram account to “speak out against what he defines as racism.” Accordingly, those who read Ainuu’s Instagram posts would anticipate encountering his subjective views on racism. *See id.* (concluding that viewers of the defendant’s television program, which addressed “liberal politics,” would expect the defendant “to use subjective language that comports with her political opinions” (citation omitted)).

Second, the “specific context and content” of the challenged statements reflect that those statements do not assert objective facts. *Id.* at 1159 (citation omitted). Ainuu’s posts about Plaintiff contain “colorful, figurative rhetoric that reasonable minds would not take to be factual.” *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 367 (9th Cir. 1995). For example, Ainuu described his interaction with Plaintiff as follows: “The amount (hot words incoming) of gaslighting, toxic masculinity, and white guilt were drowning.” As to the alleged physical confrontation, Ainuu said that Plaintiff “flipped” and “got right in my face.” Furthermore, Ainuu described the interaction in enough detail that a reasonable viewer would be “unlikely to construe the [challenged] statement[s] as insinuating

the existence of additional, undisclosed facts.” *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995). In his first post, Ainuu stated that Plaintiff “started asking questions—very directly—about diversity,” “kept cutting me off,” and “got very defensive.” Ainuu stated that, inside the bar, Plaintiff “squared up to me” and “got right in my face like this.” Those descriptions, which Plaintiff does not challenge, make “clear that the challenged statements represent [Ainuu’s] interpretation” of the interaction and leave viewers “free to draw [their] own conclusions.” *Partington v. Bugliosi*, 56 F.3d 1147, 1156–57 (9th Cir. 1995).

Third, we consider whether the challenged statements can “be proved true or false by reference to a ‘core of objective evidence.’” *Yagman*, 55 F.3d at 1441 (citation omitted). Ainuu flatly stated that Plaintiff said “racist things.” That statement may be provably false in some instances but, in others, whether a statement is racist may be a matter of opinion. *Cf. id.* at 1440 n.17 (contemplating that an allegation of anti-Semitism “might well qualify for protection under the First Amendment as mere ‘name-calling’”). Likewise, the phrases “flipped,” “[i]nitiating a fight,” and “assaulted me,” can carry a spectrum of meanings. *See Underwager*, 69 F.3d at 367 (explaining that accusing someone of “lying” is not, without more, actionable because “lying” could imply anything from a white lie to deception). This factor is inconclusive. But the three factors, considered together, reflect that the challenged statements are not actionable.

2. The district court correctly dismissed Plaintiff's other claims.² Plaintiff's claim for tortious interference relies on his claim for defamation, and he concedes that those claims rise or fall together. Likewise, Plaintiff's claims against The North Face fail because they are premised on vicarious liability for Ainuu's actions.

3. The district court did not err by denying Defendants' UPEPA motions.

a. The district court correctly applied the choice-of-law rules of Montana, the forum state, to conclude that Washington's substantive law applies. *See N. River Ins. Co. v. James River Ins. Co.*, 116 F.4th 855, 859 (9th Cir. 2024) (explaining that we "presumptively apply the choice-of-law rules of the forum state"); *Buckles v. BH Flowtest, Inc.*, 476 P.3d 422, 424 (Mont. 2020) (describing Montana's analysis under the Restatement (Second) of Conflict of Laws). Under the Second Restatement, Washington—where Plaintiff was domiciled at the time of the alleged defamation—presumptively has the most significant relationship with the case. Restatement (Second) Conflict of L. § 150(2); *see Sarver*, 813 F.3d at 897–98 (explaining that § 150 sets forth the presumptive rule for claims of multistate defamation by "aggregate communication").³ The contacts listed in

² Plaintiff does not argue that the district court abused its discretion by dismissing his complaint with prejudice.

³ If Montana had a "statutory directive concerning choice of law applicable to the underlying cause of action," we would apply that directive and conclude the choice-of-law inquiry. *See Buckles*, 476 P.3d at 424. Plaintiff's briefing argued

§ 145(2) do not overcome that presumption. Although Plaintiff lived in Montana until shortly before the incident, his key asserted injury—losing his employment—occurred in Washington. *See* Restatement (Second) Conflict of L. § 145(2)(a) (listing, as a factor, “the place where the injury occurred”). Finally, the factors in § 6(2) support applying Washington law. UPEPA aims to protect “the exercise of the right of freedom of speech.” Wash. Rev. Code § 4.105.901. By contrast, Montana had not enacted anti-SLAPP legislation when this action was filed. *See* Uniform Public Expression Protection Act, ch. 250, § 17, 2025 Mont. Laws (H.B. 292) (providing that Montana’s anti-SLAPP law does not apply in civil cases filed before May 1, 2025); *see also Sarver*, 813 F.3d at 899–900 (concluding, in similar circumstances, that § 6(2)’s factors favor applying the law of the state that *had* enacted an anti-SLAPP law).

b. Defendants failed to meet their burden of establishing that UPEPA applies. UPEPA covers speech that is “on a matter of public concern.” Wash. Rev. Code § 4.105.010(2)(c). Washington courts determine whether speech is on a matter of public concern by considering “the content, form, and context of a given statement, as revealed by the whole record.” *Jha v. Khan*, 520 P.3d 470, 477 (Wash. Ct. App. 2022) (citation omitted).

that the Montana Constitution assigns to the jury choice-of-law questions in defamation actions, but Plaintiff abandoned that contention at oral argument by conceding that § 150 applies here.

Although racism is a matter of public concern, *see Dodge v. Evergreen Sch. Dist. No. 114*, 56 F.4th 767, 777 (9th Cir. 2022), the form and context of Ainuu’s speech suggest that he spoke on a matter of private concern. Ainuu (1) posted the statements shortly after his encounter with Talbot, (2) referenced primarily his encounter with Talbot, and (3) specifically called on Talbot’s employer to take action. While Ainuu posted on his public Instagram account, a “form of [] speech” that may be “useful for conveying either private or public concerns,” the “context of the speech” was a private, personal dispute. *Johnson v. Ryan*, 346 P.3d 789, 797 (Wash. Ct. App. 2015) (holding that speech on an internet blog was not of public concern).

“[T]he speaker’s intent or motive” further indicates that Ainuu’s speech was not a matter of public concern. *Id.*; *see also Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 925 (9th Cir. 2004) (explaining “the role that motive plays in the public concern analysis”). Some of Ainuu’s posts referenced racism in the broader “outdoor industry.” But Ainuu posted about racism primarily to hold Talbot individually accountable, rather than to contribute to a larger discussion on racism in the outdoor sports industry. *Alpha Energy Savers*, 381 F.3d at 925 (“In a close case . . . the fact that [a statement] was made because of a grudge or other private interest . . . may lead the court to conclude that the statement does not substantially

involve a matter of public concern.” (citation omitted)). Because Ainuu did not speak on a matter of public concern, UPEPA does not apply.

AFFIRMED.

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R. NELSON, J., concurring in part and dissenting in part:

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The majority disposition correctly concludes that UPEPA does not apply. *See* Maj. Disposition Section 3. And it correctly concludes that Ainuu’s statements about Plaintiff making “racist comments” are too subjective to be actionable. *See id.* 3, 4. I join the majority disposition on those issues, and join Section 3 in full.

I disagree, however, that Ainuu’s statements saying Plaintiff “assaulted” him cannot support a defamation claim. A disputed statement about assault creates triable issues, because whether an assault happened is an objective question of fact. *See Hartzell v. Marana Unified Sch. Dist.*, 130 F.4th 722, 746–47 (9th Cir. 2025). While Ainuu’s initial posts may have been subjective, Ainuu’s later statements claimed that Plaintiff was “aggressive” and “[i]nitiating a fight with [Ainuu]” without much further explanation. And Ainuu made a standalone comment on an Outdoor Research post saying, “Remember when Johnathan, your director of gloves, assaulted me last month?!?” This is a bare accusation of criminal conduct that can be factually proven or disproven. False social media posts are not exempt from defamation.

Additionally, under Washington law, “defamatory words spoken of a person which, in themselves, prejudice him in his profession, trade, vocation, or office are slanderous and actionable per se[.]” *Getchell v. Auto Bar Sys. Nw., Inc.*, 440 P.2d 843, 848 (Wash. 1968). Ainuu’s comment on Outdoor Research’s post and his

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repeated tagging of its profile in his own posts make clear that Ainuu's goal was to cause Plaintiff professional injury. The fact that Ainuu succeeded in causing Outdoor Research to fire Plaintiff makes his statements all the more actionable.

Accordingly, I would reverse summary judgment of Plaintiff's defamation and tortious interference claims only as to Ainuu's statements about assault.

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GRABER, Circuit Judge, dissenting:

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I concur in paragraphs 1, 2, and 3(a), but respectfully dissent from paragraph 3(b). I would hold that Manoah Ainuu spoke on a matter of public concern and that, accordingly, Washington’s Uniform Public Expression Protection Act (“UPEPA”) applies. Because, as the disposition correctly concludes, Johnathan Talbot’s complaint failed to state a claim, I would reverse the district court’s denial of Defendants’ motions under UPEPA.

UPEPA applies to any “cause of action asserted in a civil action against a person based on the person’s [e]xercise of the right of freedom of speech . . . on a matter of public concern.” Wash. Rev. Code § 4.105.010(2)(c). Defendants met their burden of establishing that UPEPA applies, because Ainuu’s speech was a matter of public concern. See M.G. v. Bainbridge Island Sch. Dist. #303, 566 P.3d 132, 145 (Wash. Ct. App. 2025) (describing a movant’s burden and explaining that speech that “can be fairly considered as relating to any matter of political, social, or other concern to the community” satisfies UPEPA’s “public concern” requirement); Jha v. Khan, 520 P.3d 470, 477 (Wash. Ct. App. 2022) (“Whether speech is a matter of public concern is a question of law[.]”). Washington courts “broadly construe whether speech is a matter of public concern,” M.G., 566 P.3d at 146, and consider “the content, form, and context of a given statement, as revealed by the whole record,” Jha, 520 P.3d at 477–78 (citation omitted).

The topic of racism in the outdoor-sports community, which garnered significant public attention even before Ainuu’s encounter with Talbot, is a matter of public concern. See Connick v. Myers, 461 U.S. 138, 148 n.8 (1983) (stating that “racial discrimination” is “a matter inherently of public concern”); Dodge v. Evergreen Sch. Dist. #114, 56 F.4th 767, 777 (9th Cir. 2022) (noting that topics “such as immigration, racism, and bigotry . . . are all matters of public concern.”); Adams v. County of Sacramento, 143 F.4th 1027, 1035 (9th Cir. 2025) (“Speech that addresses the topic of racism as relevant to the public can involve a matter of public concern.”), cert. denied, 145 S. Ct. 1657 (2026)).¹

In his Instagram posts about Talbot, Ainuu opined that Talbot treated him in a racist manner and also asserted, expressly and directly, that their interaction was part of a systemic problem in the outdoor-sports community. For example: “Our outdoor industry microcosm can’t have people like this,” “My work is to change the outdoor industry,” “[T]his happens way too often (only post about it 1/420 of the times),” “This is not just for me, it’s for Us.” Furthermore, according to Talbot’s own complaint, Ainuu spoke frequently about racism in that community: he used his Instagram profile “to make statements about ‘social justice’ and ‘systemic racism,’” a practice that “align[ed] with North Face’s use of its public

¹ In determining whether speech involves a matter of public concern, “Washington courts . . . focus on well-developed Washington and federal decisional law[.]” Johnson v. Ryan, 346 P.3d 789, 794 (Wash. Ct. App. 2015).

platform to speak out against what it defines as racism.” See Snyder v. Phelps, 562 U.S. 443, 455 (2011) (concluding that the defendant’s picketing was on matters of public concern and noting that the defendant “had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of” the plaintiff).

Although a conflict between Talbot and Ainuu precipitated Ainuu’s posts, that conflict concerned purported racism—the matter of public concern about which Ainuu spoke. Thus, their conflict does not suggest that Ainuu’s “speech on public matters was intended to mask an attack” on Talbot “over a private matter.” Id. Moreover, Ainuu posted his statements on Instagram, where the general public could access them, and he encouraged others to share his posts. See Hernandez v. City of Phoenix, 43 F.4th 966, 978 (9th Cir. 2022) (“Publicly posting on social media suggests an intent to communicate to the public or to advance a political or social point of view” (citation modified)).

Washington courts have interpreted UPEPA very broadly, to encompass even one-off incidents as matters of public concern. See, e.g., Law Office of John Randolph, PLLC v. EWU Media LLC, 589 P.3d 799, 811 (Wash. Ct. App. 2026) (holding that a police investigation of a stranger talking with a child is a matter of public concern); Carter v. Jones, 581 P.3d 1050, 1098 (Wash. Ct. App. 2025) (holding that the topic of a single sexual encounter between a pastor and a

parishioner is a matter of public concern). Here, Ainuu had spoken extensively on the relevant matter of public concern long before his dispute with Talbot, and he tied his comments about their dispute expressly to the larger topic of systemic racism in the outdoor-sports industry. Ainuu thus spoke on a matter of “public concern,” and UPEPA applies.

The disposition reaches the opposite conclusion primarily by looking to what it divines was Ainuu’s motive. The disposition errs legally and factually. Under Washington law, motive plays, at most, a secondary role in assessing whether speech related to a matter of public concern. See Johnson, 346 P.3d at 797 (holding that courts “must” assess “the content, form, and context of the speech,” but courts “may also examine the speaker’s intent or motive” (emphases added)); see also Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917, 925 (9th Cir. 2004) (relied on by the disposition) (noting the secondary importance of motive, declining to consider motive, and concluding that speech was on a matter of public concern regardless of the speaker’s motive). The content, form, and context of Ainuu’s posts all dictate the conclusion that they related to a matter of public concern. Factually, Ainuu’s motives here were plainly twofold and intertwined: (1) to seek justice with respect to his dispute with Talbot (2) as an integral part of his longstanding campaign to combat, and to draw attention to, alleged racism in

the outdoor-sports industry. Considering his motive only supports the conclusion that his speech was of public concern.

Because UPEPA applies and because Plaintiff's complaint failed to state a claim, Defendants' motions under UPEPA should have been granted. See Jha, 520 P.3d at 477 (explaining that, if no statutory exception applies and the movant establishes that the other party "failed to state a cause of action," dismissal under UPEPA is mandatory). Accordingly, in my view, Defendants are entitled to attorney fees and reasonable litigation costs under UPEPA's mandatory fee-shifting provision. See id. at 477, 486. That policy choice may be neither wise nor equitable, but the Washington legislature, not this court, is entitled to make the choice. I respectfully dissent from the disposition's conclusion that UPEPA does not apply.