St. John's Law Review

Volume 94
Number 4 *Volume 94, Winter 2022, Number 4*

Article 7

Protecting Women's Voices: Preventing Retaliatory Defamation Claims in the #MeToo Context

Nicole Ligon

PROTECTING WOMEN'S VOICES: PREVENTING RETALIATORY DEFAMATION CLAIMS IN THE #METOO CONTEXT

NICOLE LIGON[†]

As part of a personal commitment to positively utilize my legal skills, I joined the Legal Network for Gender Equity,[1] a group of attorneys who support individuals seeking to come forward about their experiences with sexual harassment and assault. Through this network, I regularly counsel women who want to share their stories but are concerned that by doing so, they may open themselves up to costly defamation suits from their aggressors. Their concerns are not so much rooted in any notion that their stories are or could actually be defamatory. Instead, these concerns often stem from a recognition that the legal system in many ways benefits those with greater resources—frequently the aggressors in these actions—and a sensible concern that defending oneself in a legal action could be burdensome on both financial and emotional levels even if the complaint were ultimately dismissed.[2]

[†] Clinical Professor of Law and Supervising Attorney and of the First Amendment Clinic at Duke University School of Law. Thank you to *St. John's Law Review* for the opportunity to participate in its Fall 2020 Symposium and corresponding issue.

[1] The Legal Network for Gender Equity is a project of the National Women's Law Center. *See Legal Network for Gender Equity*, NAT'L WOMEN'S L. CTR., https://nwlc.org/about/nwlc-legal-network/ [https://perma.cc/8GX2-MDLB] (last visited July 2, 2021).

[2] Retaliatory lawsuits in the #MeToo context are, unfortunately, all too common. *See* Madison Pauly, *She Said, He Sued*, MOTHER JONES (Mar./Apr. 2020), https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault/ [https://perma.cc/2BC5-8PN4]; Kara Fox & Antoine Crouin, *Men Are Suing Women Who Accused Them of Harassment. Will It Stop Others from Speaking Out?*, CNN, https://www.cnn.com/2019/06/05/europe/metoo-defamation-trials-sandra-muller-france-intl/index.html [https://perma.cc/K6G6-9PY3] (last updated June 5, 2019, 4:24 PM); Sui-Lee Wee & Li Yuan, *They Said #MeToo. Now They Are Being Sued.*, N.Y. TIMES (Dec. 26, 2019), https://www.nytimes.com/2019/12/26/business/china-sexual-harassment-metoo.html [https://perma.cc/69WS-MB8M].

My clients regularly come to me hoping that I may be able to allay their fears about how defamation cases are treated by our legal system, or at least help them engage in a risk assessment before they step forward. Some of my most difficult conversations in counseling these individuals, however, involve explaining that there is often not an easy and quick exit from a defamation lawsuit. Their inclination that the legal system is not set up with First Amendment rights in mind is correct: rules governing legal processes are designed to give plaintiffs their day in court against potential accusers. Naturally, "day" is just a euphemism here; defamation cases frequently take months, if not years, to resolve.[3]

As a First Amendment advocate and legal advisor, I see it as my duty to help my clients participate in the national dialogue surrounding the prevalence of sexual harassment and assault in the safest way possible. For instance, where appropriate, I will sometimes counsel clients to remove identifying descriptors of assailants or specific employers to the extent that naming them is not central to the story they wish to tell. My doing so has nothing to do with a concern for the aggressors or wrongdoers, but solely because I wish to spare my clients from being on the receiving end of an expensive and draining defamation suit. Indeed, industry experts have estimated that news publishers typically spend $500,000 on average to get defamation suits dismissed,[4] meaning that the sheer financial burden on a defendant can be steep.

Part of the reason why these suits are so costly is the way in which the tort of defamation is structured. As a general rule, defamation liability requires a plaintiff to show that the defendant made an unprivileged and false statement concerning the plaintiff to a third party, with a requisite level of intent, and that the statement caused the plaintiff to suffer some harm.[5] Some of these elements are frequently taken as givens: unless the plaintiff gave permission for the utterance of a statement, for

---

[3] *See* Thomas A. Waldman, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 1016 (1992).

[4] *See* Kelly McBride, *McClatchy Could Hire 10 Reporters for the Money It Will Spend to Get Devin Nunes Lawsuit Dismissed*, POYNTER (Apr. 11, 2019), https://www.poynter.org/ethics-trust/2019/mcclatchy-could-hire-10-reporters-for-the-money-it-will-spend-to-get-devin-nunes-lawsuit-dismissed [https://perma.cc/TKY3-AP88].

[5] RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

instance, it is deemed unprivileged.[6] And removing the name of or other identifying information about an assailant could, for example, spare one from a defamation suit because it may not be obvious to a reader that the "concerning [the plaintiff]" requirement is met.[7] But most of the other elements of this tort require serious factual investigation and analysis.

Take, for example, the requirement that a defamatory statement be "false."[8] As a matter of law, an opinion generally cannot be false,[9] and thus cannot support a defamation action. Consequently, parties in defamation suits frequently litigate whether commentary regarding the plaintiff constitutes opinion or fact. For example, if a survivor accused their alleged harasser of being a "sexual predator," questions might arise relating to whether this terminology is a factual accusation. On the one hand, a plaintiff may point to a dictionary definition—take Merriam-Webster's, which defines a "sexual predator" as someone who has "committed a sexually violent offense and especially one who is likely to commit more sexual offenses."[10] An accusation that someone has committed a crime will likely be read as a defamatory per se statement, and to the extent the dictionary definition supports this reading, the plaintiff may be able to make out a successful case for defamation.[11] However, a defendant may instead point to numerous court opinions finding that the terms "predator" and "predatory" have been construed as hyperbolic opinions in other cases and contexts.[12]

---

[6] *Id.* § 10.

[7] *Id.* § 558.

[8] *Id.*

[9] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974).

[10] *Sexual Predator*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

[11] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 765 n.1 (1985) (White, J., concurring) ("At the common law, slander, unlike libel, was actionable per se only when it dealt with a narrow range of statements: those imputing a criminal offense, a venereal or loathsome and communicable disease, improper conduct of a lawful business, or unchastity of a woman."). Courts continue to identify criminal accusations as defamatory per se. *See* In re Lipsky, 460 S.W.3d 579, 596 (Tex. 2015).

[12] *See* Dossett v. Ho-Chunk, Inc., No. 19-CV-01386, 2020 WL 3977609, at *9–10 (D. Or. July 14, 2020) (finding that a statement suggesting that someone engaged in "predatory behavior" in the context of a sexual harassment dispute constituted a statement of opinion entitled to First Amendment protection); Tagliaferri v. Szulik, No. 15-Civ-2685, 2016 WL 3023327, at *2 (S.D.N.Y. May 25, 2016) ("Use of colorful language such as 'predator,' 'victimized,' or 'face of evil' are not actionable in and of themselves. . . . In this case, the term[ ] 'predator' . . . do[es] not, without external context, amount to accusations that Plaintiff engaged in specific unlawful behavior.").

Similarly, the intent element of a defamation tort leaves much room for parties to dispute. The plaintiff's burden with regard to proving the intent element varies based on how well-known the plaintiff is, but the general rule is that if a plaintiff is a public figure, he must show that the defendant made her statement with "actual malice," and if he is a private figure, he must show that the defendant made her statement with "common law malice."[13] This invariably leads to a separate dispute regarding whether the plaintiff is a public figure or private figure,[14] because it is much more difficult for a plaintiff to show that a defendant acted with actual, as opposed to common law, malice. Indeed, actual malice requires the plaintiff to show that a speaker made her statement with actual knowledge that it was false or with reckless disregard as to its truth.[15] Conversely, common law malice simply requires the plaintiff to show that a speaker made her statement with an "ill will" towards the plaintiff or with a reckless and conscious indifference toward the plaintiff's rights.[16] Some courts are seemingly reluctant to delve into either the question of the plaintiff's public figure status or the speaker's state of mind—to the extent the parties disagree—at the motion to dismiss stage.[17] This means that unless the

---

[13] *Gertz*, 418 U.S. at 333–34, 344–46.

[14] *See, e.g.*, Elliott v. Donegan, 469 F. Supp. 3d 40, 48–49 (E.D.N.Y. 2020). A plaintiff is a general-purpose public figure if he "enjoy[s] significantly greater access to the channels of effective communication and hence ha[s] a more realistic opportunity to counteract false statements than private individuals normally enjoy" and he has "assumed roles of especial prominence in the affairs of society . . . invit[ing] attention and comment." *Gertz*, 418 U.S. at 344–45. A plaintiff is a limited-purpose public figure if he (1) has "access to channels of effective communication"; (2) "voluntarily assumed a role of special prominence in a public controversy"; (3) "sought to influence the resolution or outcome of the controversy"; (4) "the controversy existed prior to the publication of the defamatory statements"; and (5) he "retained public figure status at the time of the alleged defamation." Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982). The *Fitzgerald* test tracks the two *Gertz* factors, with the first *Fitzgerald* requirement being the same as the first *Gertz* factor, the second and third *Fitzgerald* requirements corresponding to the normative *Gertz* factor, and the fourth and fifth *Fitzgerald* requirements reflecting unstated but necessary technical considerations. *See* Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 (4th Cir. 1994); Reuber v. Food Chem. News, Inc., 925 F.2d 703, 708–09 (4th Cir. 1991).

[15] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[16] Hainer v. Am. Med. Int'l, Inc., 492 S.E.2d 103, 107 (S.C. 1997).

[17] *See, e.g.*, McGlothlin v. Hennelly, 370 F.Supp.3d 603, 617 (D.S.C. 2019) (holding that resolving the public figure question is "more appropriate for a summary judgment motion after discovery has been conducted"); Trivedi v. Slawecki, No. 11-CV-02390, 2012 WL 5987410, at *3 (M.D. Pa. Nov. 28, 2012); Rosanova v. Playboy Enter.'s, Inc., 580 F.2d 859, 862 (5th Cir. 1978); Isuzu Motors

plaintiff agrees that the intent element is not met, defendants may be unlikely to win a dispositive motion to dismiss the case at this stage on the basis of this element.

When factual disputes occur and a defendant cannot—in the eyes of the court—conclusively disprove all elements of the defamation tort on the basis of a complaint, cases will not be disposed of at a motion to dismiss stage. This means that survivors are often forced to endure lengthy and costly discovery. Discovery can entail a number of personal and invasive requests, including requiring the survivor to sit for a deposition during which she will be interrogated about matters relevant to the case, having the survivor answer questions relating to the case in writing via interrogatories and requests for admission, and obligating the survivor to sift through all documentation she has that is relevant to the case and to compile and share that information with her assailant's counsel. The expense in undergoing discovery can be steep for a defendant in this type of action—not only on a financial level but also an emotional one.

Even if, after going through discovery, the survivor wins dismissal on the basis of summary judgment or following a trial, she will have already suffered a great deal of irreversible costs. Indeed, attorney's fees mount exponentially during the discovery process.[18] And even where a defendant wins dismissal of a defamation suit, there is not always a guarantee that she will be able to recover the money spent to defend herself against a frivolous defamation claim in many jurisdictions.[19] In other words, some courts give well-resourced plaintiffs the ability to utilize the court system to deliver a silencing blow to women seeking to come forward by forcing them to defend themselves in

---

Ltd. v. Consumers Union of U.S., Inc., 12 F.Supp.2d 1035, 1044 n.1 (C.D.Cal. 1998); *but see* Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092 n.4 (4th Cir. 1993) (noting that the "district court's caution" in not deciding whether the plaintiff was a public figure at the motion to dismiss stage was "unnecessary" because the "plaintiffs' status as 'public figures' [was] irretractably admitted on the face of the complaint."); Freedlander v. Edens Broad., Inc., 734 F.Supp 221, 224 (E.D. Va. 1990) (holding, at the motion to dismiss stage, that plaintiffs were public figures).

[18] The Garment Workers Ctr. v. Superior Court, 117 Cal. App. 4th 1156, 1161 (2004) (recognizing that "discovery is usually the most time-consuming and expensive aspect of pretrial litigation").

[19] *See A Small Newspaper in Iowa Wins a Libel Suit, but Legal Costs May Force It to Close*, FIRST AMEND. WATCH (Oct. 10, 2019), https://firstamendmentwatch.org/a-small-newspaper-in-iowa-wins-a-libel-suit-but-legal-costs-may-force-it-to-close [https://perma.cc/SSH4-6KKJ] (noting that a newspaper who successfully defended itself against a frivolous libel action fell to the brink of closure due to $140,000 in legal costs).

costly, albeit it ultimately unsuccessful, lawsuits. This can lead to a dearth of survivors willing to come forward to openly speak on their experiences, during a time when sexual assault and harassment is already severely underreported.[20]

But the situation is brighter in jurisdictions with robust anti-SLAPP laws. Anti-SLAPP laws take aim at strategic lawsuits against public participation or, as they are commonly known, "SLAPP" suits.[21] SLAPP suits are commonly defined as "lawsuit[s] designed to shut down a person's right to participate in public discourse through a lawsuit that the plaintiff has filed not because he thinks he can win, but to intimidate or punish someone else."[22] In other words, SLAPP suits are brought not to compensate a wrongfully injured person or company, but rather to discourage the defendants and others from exercising their First Amendment rights. Retaliatory defamation suits brought

---

[20] *See The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system (last visited July 2, 2021) [https://perma.cc/T8YQ-GJSG] (noting that only about 23% of sexual assaults are reported to police).

[21] *Lawsuit Denied Concerning Bishop Tube Site*, DAILY LOC. NEWS (Sept. 7, 2018), https://www.dailylocal.com/news/local/lawsuit-denied-concerning-bishop-tube-site/article_92eda182-b2d7-11e8-8ec9-e7c2b71b1f9e.html ("*The original SLAPP action* was filed by O'Neill . . . in the Court of Common Pleas in Chester County and claimed the advocacy activities of van Rossum and the Delaware Riverkeeper Network resulted in defamation/commercial disparagement, interference with contractual or business relations and amounted to a civil conspiracy.") (emphasis added); Jon Hurdle, *Judge Throws Out Developer's 'SLAPP Suit' Against Environmental Group*, 90.5 WESA (Aug. 23, 2017), https://www.wesa.fm/post/judge-throws-out-developers-slapp-suit-against-environmental-group#stream/0 [https://perma.cc/E235-SCEE] ("The ruling supports DRN's contention that O'Neill's challenge, filed on June 27, was a so-called 'SLAPP' suit—a legal acronym standing for 'Strategic Lawsuit Against Public Participation'—an attempt to block its free-speech rights."); James Tager, *SLAPPs: The Greatest Free Expression Threat You've Never Heard Of?*, PEN AM. (Oct. 30, 2017), https://pen.org/slapps-free-expression-threat/ [https://perma.cc/3W3F-YMY6] (characterizing the O'Neil lawsuit as a SLAPP lawsuit); David E. Hess, *Chester County Judge Issues Opinion Reaffirming Decision To Dismiss SLAPP Suit Against Environmental Group*, PA ENV'T DIG. (Oct. 24, 2017), http://www.paenvironmentdigest.com/newsletter/default.asp?NewsletterArticleID=41406[https://perma.cc/9TMN-FYR2]; *see also* Darcy Reddan, *Pa. Developer Says Defamation Ruling At Odds With Prior Suit*, LAW360 (Sept. 21, 2018, 5:53 PM), https://www.law360.com/articles/1085095/pa-developer-says-defamation-ruling-at-odds-with-prior-suit (DRN's attorney Mark Freed explaining that future appeals in this action are "particularly troubling given [the] trial court's finding that [the developer] 'by all accounts, is simply using this lawsuit to chill free speech and harass those' who oppose his project."). The author's opinion on this categorization of this case is based on her research, which has been disclosed throughout this piece.

[22] Tager, *supra* note 21.

against women who wish to speak out about their experiences with sexual assault or harassment are examples of SLAPP suits.[23]

While approximately thirty states currently have anti-SLAPP laws, these statutes vary in strength and levels of protection for defendants.[24] One way to help ensure that women are able to come forward with their experiences and speak candidly without undue fear of a costly defamation suit is to encourage the widespread enactment of strong anti-SLAPP laws. California's anti-SLAPP statute is often considered to be an exemplary guide for protecting defendants from frivolous and time-consuming defamation claims.

California's anti-SLAPP statute, California Civil Procedure Code § 425.16, enables defendants to quickly move to strike a complaint after it has been filed so that the case may be disposed of before the parties endure lengthy pretrial practice.[25] Once a defendant moves to strike the complaint under California's statute, the court will automatically stay discovery until the court has ruled on the motion.[26] To successfully strike a complaint, the motion must demonstrate that the defendant is being sued for a protected activity: speaking openly and freely "in connection with a public issue."[27] California courts have consistently construed this "public issue" language broadly,[28] making the statute widely applicable to speech on many issues.[29] For example, a California state court dismissed a case against

---

[23] *Id.*

[24] *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection/ [https://perma.cc/E9NA-VDFY] (last visited Feb. 27, 2021).

[25] CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2015).

[26] *Id.* § 425.16(g).

[27] *Id.* § 425.16(b)(1) & (e).

[28] Briggs v. Eden Council for Hope & Opportunity, 969 P.2d 564, 573–74 (Cal. 1999); Jarrow Formulas, Inc. v. LaMarche, 74 P.3d 737, 742 (Cal. 2003) ("In addition to honoring the anti-SLAPP statute's plain language, the Court of Appeal's construction adheres to the express statutory command that 'this section shall be construed broadly.' "); Club Members for an Honest Election v. Sierra Club, 196 P.3d 1094, 1099 (Cal. 2008) ("The Legislature has also directed that section 425.16 'shall be construed broadly' given that the anti-SLAPP statute protects speech about important public issues.").

[29] "Although the [California] [l]egislature originally enacted [the anti-SLAPP statute] to address the 'paradigm SLAPP suit' of a defamation lawsuit filed by a large developer against environmental activists, the anti-SLAPP statute is not limited to this typical scenario." THOMAS R. BURKE, ANTI-SLAPP LITIGATION § 2:5 (listing cases that go beyond the paradigm anti-SLAPP scenarios).

the creators of the film *Borat* because the plaintiffs appeared in the movie drinking alcohol and making racist and sexist remarks; the court found that those citizens' racist and sexist views were "issues of public interest."[30] It thus follows that commentary related to inappropriate sexual conduct likely constitutes speech on "public issues" under California's statute.

Once a movant under California's anti-SLAPP law has shown that the plaintiff's cause of action arises from the defendant's speech on a public issue, the burden completely shifts to the plaintiff.[31] The court will then strike the cause of action unless the plaintiff can produce admissible evidence that establishes a probability of success on the merits.[32] And if a defendant wins an anti-SLAPP motion to strike, California will automatically award the defendant the reasonable costs and attorney's fees accumulated in the course of the action, which the plaintiff frequently covers.[33] This mandate is critical because it makes it so a well-resourced plaintiff is less likely to be able to financially "punish" a defendant for speaking out about her experience.[34]

The fact that not all jurisdictions have anti-SLAPP protections means that some survivors will face more risk in speaking out about their experiences than others. Indeed, because California's anti-SLAPP law provides defendants with numerous strong protections, even well-resourced plaintiffs are forced to think twice before bringing a meritless defamation suit

---

[30] *See* Doe v. One Am. Prod., Case No. SC091723, at *5 (Ca. Super. Ct. Feb. 15, 2007); Complaint for Plaintiff at 2, Doe v. One Am. Prod., Case No. SC091723, at *5 (Ca. Super. Ct. 2007).

[31] Simpson Strong-Tie Co., Inc. v. Gore, 230 P.3d 1117, 1123 (Cal. 2010).

[32] *Id.*

[33] *See* Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi, 141 Cal. App. 4th 15, 22 (Cal. Ct. App. 2006) ("[T]he full protection of a defendant's rights requires an award of attorney fees for litigating the adequacy of the plaintiff's undertaking."); Lin v. City of Pleasanton, 176 Cal. App. 4th 408, 413 (Cal. Ct. App. 2009), *as modified on denial of reh'g* (Aug. 11, 2009) (recognizing defendant's ability to recovery attorney's fees under CAL. CIV. PROC. CODE § 425.16 even where a demurrer was granted). *See e.g.*, Wynn v. Chanos, No. 14–cv–04329, 2015 WL 3832561, at *6 (N.D. Cal. June 19, 2015), *aff'd*, 685 F. App'x 578 (9th Cir. 2017) (awarding $390,149.63 in fees and $32,231.23 in costs); Metabolife Int'l, Inc. v. Wornick, 213 F. Supp. 2d 1220, 1228 (S.D. Cal. 2002) (awarding $318,687.99 in attorney's fees and costs); Vargas v. City of Salinas, 200 Cal. App. 4th 1331, 1338 (2011) (affirming award of $226,928 in fees and $2,495.84 in costs).

[34] Because discovery is also stayed under the statute, plaintiffs likewise are less able to inflict emotional damage onto defendants as well, since the defendant can be spared forced depositions and other discovery obligations.

there. But in the jurisdictions that do not have anti-SLAPP statutes,[35] or otherwise have weaker protections,[36] survivors wishing to speak out about their experiences remain more vulnerable and face greater risks.

To better ensure more accurate reporting and highlighting of women's experiences with sexual harassment and sexual assault, it is critical for more states to adopt strong protections for defendants in defamation cases. Until this happens, women will continue to face the difficult choice of whether to risk exposure to a defamation lawsuit aimed solely at silencing their truths in order to speak about their experiences. While attorneys, such as those who partake in the Legal Network for Gender Equity, can sometimes help to shield these individuals from viable defamation claims on a case-by-case basis, legislative reform in this area would better and more broadly ensure that these important stories can be heard while limiting potential exposure from frivolous lawsuits brought by well-resourced wrongdoers. Now is the time for states to consider enacting these protections to help protect women's voices, especially in the space of sexual assault and sexual harassment.

---

[35] At the time of publication, these states include Alabama, Alaska, Idaho, Iowa, Kentucky, Michigan, Mississippi, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, West Virginia, Wisconsin, Wyoming. *See State Anti-SLAPP Laws*, *supra* note 24.

[36] For example, anti-SLAPP laws in certain states are too narrow to effectively protect defendants whose speech is significant and on general matters of public concern. Prior to being amended in November 2020, New York's statute, for instance, only applied where speech by the defendant concerned the plaintiff's application to a "government body" for "a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act." Civil Rights Law, ch. 767, § 3, 1992 N.Y. Laws 3970, (current version at N.Y. CIV. RIGHTS LAW § 76-a (McKinney 2020)). And Virginia's statute, for instance, merely permits and does not mandate payment of reasonable attorney fees and costs to a successful anti-SLAPP movant. *See* VA. CODE ANN. § 8.01-223.2(B).