

# The Increasing Complexity of Defamation Law in #MeToo Era Lawsuits

Jamie R. Abrams

“Dizzying” is probably the single best word to describe how defamation law is transforming sexual assault and sexual harassment litigation in the wake of the #MeToo Movement. The #MeToo Movement ushered in cultural and legal reforms holding perpetrators of sexual assault and sexual harassment accountable for their harms. The social movement upended many social, legal and political norms, including litigation trends and patterns of interest to Kentucky attorneys.

Before the #MeToo Movement, the best that most victims of sexual assault and sexual harassment might generally hope for when suing an employer was a quietly negotiated settlement with a strict non-disclosure agreement securing financial redress. These closed door approaches, however, also often ended careers for the accusers and allowed powerful perpetrators to flourish unchecked within institutions and industries. These approaches only worked for industries and perpetrators with the resources to even negotiate a settlement.

The #MeToo Movement allowed victims to find their voices in new ways, tell their stories in different platforms, and find community with other victims. The #MeToo Movement brought accusers forward after years (decades even) of quietly navigating abusive co-workers and complicit institutions and systems protecting powerful perpetrators in all industries and sectors. The movement ushered in a new era of public accountability for systemic perpetrators as their patterns and behaviors were exposed by victims. The #MeToo Movement exposed in public what was often known previously only through hushed “whisper networks.”

#MeToo era allegations have sometimes been brought in court through criminal and civil proceedings as in the cases of accused perpetrators like Bill Cosby and Harvey Weinstein. More often though the stories have been told on social media and in the “court of public opinion.” From a legal standpoint, these social media spaces are dramatically less protective of speech for accusers than statements made in courts or government proceedings. These accusations are also capable of rapid dissemination with dramatic ease, thus increasing the potential reputational harm for the accused with fewer, if any, procedural protections. The #MeToo Movement has introduced new forums, channels and processes in which to report assault and harassment claims. These extra-legal approaches, in turn, wield varying degrees of accountability, liability and risk.

Defamation law dramatically shapes this changing legal landscape for both civil claims in court and accusations outside of court. Defamation is a false, defamatory, unprivileged statement of fact that is published concerning another causing harm. Defamatory statements are those that harm the reputation of another and lower their esteem in the community. Defamatory statements

must be false based on provable facts. Truth is a defense to a defamation suit, thus yielding a trial within a trial when allegations of sexual assault are the source of the defamation suit. Some notable privileges also protect statements made in judicial proceedings or government proceedings as well as other privileges.

For statements uttered about private figures, the defamation plaintiff need only prove *negligence* in defendant’s false and defamatory statement. Plaintiffs must prove actual malice for statements involving a celebrity or public figure because public figures have greater access to the channels to defend themselves from reputations harms. Individuals can become public figures for limited purposes, while otherwise retaining their private figure status. For example, Christine Blasey Ford likely became a public figure narrowly with respect to her allegations against Justice Kavanaugh, although she was otherwise an entirely private figure in all other matters.

Defamation law has emerged as both a proactive and a reactive litigation strategy in #MeToo era cases. The list of recent defamation cases reads as quite the “who’s who” of litigants. President Trump, Roy Moore, Jeffrey Epstein, Ghislain Maxwell, Alan Dershowitz, Harvey Weinstein, Bill Cosby, Johnny Depp, and more, are litigants on both sides of the “v.” in defamation suits. The volume and pace of these high-profile cases will lead to rapid developments in this area of law.

The #MeToo Movement led many victims of sexual assault and sexual harassment to file civil lawsuits against the accused perpetrators. These lawsuits then spawned retaliatory defamation suits against the victim-accusers. Mother Jones reported in its article *She Said, He Sued* in February 2020 that 100 defamation suits have been filed *against* accusers since 2014. Three-quarters of these lawsuits involved defamation suits against college students and faculty accused of sexual misconduct suing their school and their accusers for defamation. A lawyer for the Victim Rights Law Center reported that about 5% of her caseload used to involve defending an accuser from a defamation suit while today *almost half* of her cases involved defamation defense of an accuser.

These defensive strategies for accused perpetrators are not surprising. The standard playbook popularly known for defending someone accused of sexual abuse and harassment is known by the acronym of DARVO—Deny, Attack, Reverse Victim and Offender. Defamation suits against the accusers are examples of each of those defense strategies. These retaliatory suits reflect a denial, an attack, and they flip the victim and the offender around.

The question becomes how can victims tell their stories safely and how can legal advocates protect them in doing so? Victims often need to tell their stories many times to obtain the various protections that the law allows. For example, victims may need to tell their stories of sexual assault and sexual harassment in seeking housing, registering for college classes, seeking counseling services, in various investigations, and in obtaining medical care.

The costs of being sued in a defamation suit are dramatic for survivors of sexual assault and harassment. To *bring* a lawsuit, victims do not necessarily need a lawyer to bring the suit, or they might find a lawyer to represent them on a contingent fee basis. In contrast, for a victim to become a *defendant* in a defamation suit, they likely do need to hire a lawyer, if able, in their own defense. Defending against a defamation claim can be very costly. One #MeToo accuser-defendant in a defamation suit reported spending \$30,000 in her own defense. Just the *threat* of being a defendant in such a suit can create a strong deterrent headwind to plaintiffs coming forward.

Nor is it just accusers who might face defamation liability for allegations of sexual assault and sexual harassment. Lawyers, spouses/significant others, online posters and media outlets can also face liability for their coverage of the accusations. The *Rolling Stone* article about sexual assault allegations at the University of Virginia and the string of defamation suits it yielded is a good example of the scope of civil liability here.

But the strategic use of defamation law in sexual assault and sexual harassment cases has not been a one-way street in the wake of the #MeToo Movement. Accusers too are starting to use defamation law proactively to sue the accused for their denials, dismissals and deflections of the accused speaking of the accuser’s claims.

Three particularly thorny issues are emerging in these back-and-forth defamation cases arising out of sexual assault and sexual harassment claims. For the purposes of linguistic clarity, the terms accuser and accused below are used to describe the accuser (alleged victim) and accused (alleged perpetrator) in the underlying public accusation of sexual assault and sexual harassment. The terms plaintiff and defendant are used to describe the parties in the resulting defamation suit.

(1) **Fact v. Opinion.** One interesting legal issue arises when accusers sue the accused for defamation arising from their public statements about the underlying allegations. This particularly arises when the accused go beyond simple denials and suggest publicly that the accuser is a liar or that the accused carries ill motives in the underlying lawsuit. Are these statements actionable fact or non-actionable opinion? In fact, most of the defamation cases considering this question are #MeToo era cases. For example, Summer Zervos sued Donald Trump for his statements suggesting she was a liar in public statements regarding her accusations against him. Trump argued that his statements were not actionable because they were just “fiery rhetoric, hyperbole and opinion.” Donald Trump’s statements that Stormy Daniels’ allegations were “a total con job” were found to be just “rhetorical hyperbole” that was “exaggerated and heavily

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laden with emotional rhetoric and moral outrage” and thus not actionable.

Likewise, women accusing Bill Cosby of sexual assault also sued Cosby, Cosby’s wife and his lawyer for defamation after they suggested publicly that the victims were lying about their allegations. Reflecting the challenges of these cases, the same statements made by Cosby and others yielded different outcomes in different courts on the same question of whether the statements were fact or opinion. The Third Circuit held that Cosby’s wife’s and Cosby’s lawyers’ statements that the accusers’ claims needed to be vetted were just opinion (and thus not actionable). The District Court of Massachusetts concluded that they were actionable statements containing facts.

There are three different jurisdictional approaches to the questions of mixed fact and opinion statements. Kentucky courts have held that a statement couched as an opinion can still support a defamation claim if it can be proven “verifiably false.” The test is whether a “reasonable factfinder could conclude that an allegedly defamatory statement implied an assertion of fact.” To be actionable, the statement must imply the allegation of undisclosed defamatory facts as the basis of the opinion.

**(2) Public v. Private Figures.** Another theme in these increasingly complex and public cases is the question of whether the public or private figure standard applies to allegations of sexual assault and sexual harassment. For defamation suits against public figures, plaintiffs must prove actual malice. The #MeToo Movement has powerfully brought claims into the public spotlight, thus suggesting that otherwise private individuals might become limited purpose public figures in their public accusations. The test is whether the defendants have inserted themselves into the public debate or been drawn into it. Accusers might paradoxically prefer the “limited purpose public figure” status when they are *defending* against a defamation suit because then the plaintiffs would have to prove actual malice on the part of the victim, a heightened burden of proof.

**(3) Anti-SLAPP Statutes.** Finally, Kentucky lawyers may be interested in how Anti-SLAPP laws affect this area of litigation. Kentucky does not currently have such a law, but one was introduced in the 2021 Regular Session. SLAPP stands for Strategic Lawsuit Against Public Participation. Anti-SLAPP statutes seek to prevent the filing of lawsuits to target those who petition the government and are sued as an effort to chill the petitioner’s exercise of their First Amendment rights. Applied to the context of #MeToo lawsuits, these statutes would provide a procedural remedy to the accusers who are sued by the accused in defamation suits. There are 29 states that have such laws and 21 that do not. There has been a push to enact more of these laws after the #MeToo Movement.

Rep. Nima Kulkarni (D) of Kentucky’s 40th District and Rep. Jason Nemes (R) of Kentucky’s 33rd District co-sponsored House Bill 132 in the 2021 Regular Session. It was assigned to the Committee on Committees where it remained for the session. The bill would create a new Section of KRS Chapter 454 to create procedures to swiftly dismiss legal actions that chill a party’s exercise of their First Amendment rights (a proposed Anti-SLAPP bill).

The focus of an Anti-SLAPP statute is on the *defendant’s* activity that gave rise to the asserted liability and whether that activity is protected petitioning. In the context of a #MeToo era defamation claim filed against an accuser, the defamation defendant would be the victim alleging the harassment and misconduct of the accused-plaintiff. The accuser-defendant has to show that the accused-plaintiff’s defamation suit is not meritorious. Anti-SLAPP laws can thus offer accusers a defense to retaliatory claims of defamation intended to chill accusers from coming forward with claims.

H.B. 132 applies to communications made in a “legislative, executive, judicial, administrative, or other governmental proceeding” or on an issue under consideration or review in such proceedings. It seeks to protect the accuser’s constitutionally guaranteed “freedom of speech or of the press, the right to assemble or petition, or the right of association . . . on a matter of public concern.” At least one California case has held that “violence against women” is a matter of pressing public concern protected by its Anti-SLAPP statute.

Kentucky’s bill would allow the accuser-defendant in a retaliatory defamation suit to file a motion within 60 days of being served with a suit to show by good cause that the party is entitled to expedited relief to dismiss the proceeding. The moving party seeking dismissal would have to prove that the responding party cannot state a cause of action upon which relief can be granted. If successful, the accuser-defendant could stay all proceedings, motions, and discovery. The court can dismiss the underlying defamation cause of action with prejudice if the responding party cannot establish a prima facie case as to each essential element of the cause of action. Attorney’s fees are available under some circumstances. The bill is intended to be broadly construed so as to protect First Amendment rights.

These three issues are a sampling of the thorny legal issues emerging from the intersection of #MeToo era lawsuits and defamation law. H.B. 132 offers important protections against retaliatory lawsuits and merits a more robust consideration by the Kentucky General Assembly next session. Lawyers using defamation law as both a shield and as a sword in litigation tactics will need to stay abreast of these rapid developments in strategy and law.

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