

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 933 (Aguiar-Curry)
Version: May 25, 2023
Hearing Date: June 13, 2023
Fiscal: No
Urgency: No
AWM

SUBJECT

Privileged communications: incident of sexual assault, harassment, or discrimination

DIGEST

This bill makes privileged, and therefore excluded from the category of communications that can constitute defamation, a communication made by an individual, without malice, regarding an incident of sexual assault, harassment, or discrimination, and authorizes a prevailing defendant in a defamation action arising from such a privileged communication to recover reasonable attorney fees, costs, and other specified relief.

EXECUTIVE SUMMARY

Defamation can cause real harm to the targets of false statements. The tort of defamation, however, is frequently abused by persons who use the legal system as a means of chilling legitimate speech and political activity; such suits are known as strategic lawsuits against public participation, or “SLAPP” suits. Plaintiffs in SLAPP suits bring defamation, and similar claims, not because they expect to win, but because they know that the cost and burden of defending a lawsuit can wear down and silence critics, particularly when the critic is an individual without the resources to defend against a lawsuit. SLAPP suits also serve as a warning to other potential critics: stay silent, or you could be next. In recognition of the harm SLAPP suits inflict on free speech and public debate, California has a strong anti-SLAPP statute that allows the targets of SLAPP suits to have the case dismissed early on in the proceeding and recover attorney fees and costs.

Unfortunately, current defamation law does not expressly privilege conversations relating to allegations of sexual assault, abuse, or discrimination, leaving victims of these offenses open to retaliatory defamation claims that cannot easily be dispensed with through an anti-SLAPP motion. In one high-profile instance involving the Legislature, former Assemblymember Matt Dababneh was accused of extreme sexual

harassment by a lobbyist; an explicit description of the allegations is set forth in the second paragraph of Part 3 of this analysis. After resigning from the Legislature and shortly before the allegations were substantiated by an independent investigator, Dababneh filed a defamation suit against his accuser. His accuser ultimately prevailed on her anti-SLAPP motion to strike, but only after appealing the case to the Court of Appeal, which held that her statements to the media in connection with her complaint to the Legislature were privileged as statements in connection with a Legislature proceeding. Most victims, however, will not make their complaints to the Legislature and thus may be left open to SLAPP defamation claims when they speak to members of the public or the media about their allegations.

This bill seeks to disincentivize and make it more difficult for abusers and discriminators to file retaliatory defamation claims against their accusers. First, the bill creates a conditional privilege for communications made by an individual regarding an incident of sexual assault, harassment, or discrimination, as defined, provided that the statement was made without malice and the person had a reasonable basis to file a complaint of sexual assault, harassment, or discrimination (whether or not a complaint was actually filed). Second, the bill permits a prevailing defendant in a defamation action brought against the defendant for making such privileged communications to recover reasonable attorney fees and costs, in addition to other damages that are already available at law. Together, these measures are intended to provide protection for victims of sexual assault, harassment, and discrimination.

This bill is sponsored by the California Employment Lawyers Association and Equal Rights Advocates, and is supported by 9to5, the American Association of University Women - California, the American Association of University Women San Jose, the California Anti-SLAPP Project, the California Partnership to End Domestic Violence, the California Work & Family Coalition, Caring Across Generations, the Child Care Law Center, Consumer Attorneys of California, GRACE - End Child Poverty in California, Legal Aid at Work, the Lutheran Office of Public Policy - California, Media Alliance, Mujeres Unidas y Activas, the National Council of Jewish Women California, Parent Voices California, the Santa Clara County Wage Theft Coalition, ValorUS, Women's Foundation California, Work Equity, and Worksafe. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that "defamation" is effected by either libel or slander, and defines those terms as follows:
 - a) "Libel" is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes them to be shunned or avoided, or which has a tendency to injure him in his occupation.

- b) "Slander" is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which causes actual damage to a person, including through specifically enumerated damaging allegations such as charging a person with crime or their qualifications with respect to their profession. (Civ. Code, §§ 44-46.)
- 2) Provides that specified publications are "privileged," including:
 - a) A publication or broadcast made in the proper discharge of an official duty.
 - b) A publication or broadcast made in any legislative or judicial proceeding.
 - c) A communication made without malice to an interested person by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or who is requested by the person interested to give the information; this includes a complaint of sexual harassment by an employee, without malice, to an employer based upon credible evidence and communications between the employer and interested persons, without malice, regarding a complaint of sexual harassment.
 - d) A fair and true report in, or a communication to, a public journal regarding a judicial, legislative, or other public or official proceeding, as specified. (Civ. Code, § 47.)
 - 3) Defines "malice," where the absence of malice is necessary to render a publication privileged, to mean that the speaker "(1) was motivated by hatred or ill will toward the plaintiff, or (2) lacked reasonable grounds for [their] belief in the truth of the publication and therefore acted in reckless disregard of the" subject's rights. (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1337 (internal quotation marks omitted).)
 - 4) Establishes the anti-SLAPP statute, which provides that a cause of action against a person arising from any act of that person in furtherance of that person's right of petition or free speech under the United States or California Constitutions in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
 - a) A defendant who prevails on an anti-SLAPP motion to strike is entitled to recover attorney fees and costs, with specified exemptions; if the court finds that an anti-SLAPP motion was frivolous or solely intended to cause delay, the court shall award costs and reasonable attorney fees to the prevailing plaintiff.
 - b) An "act in furtherance of a person's right of petition or free speech" under the state and federal Constitutions includes (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by

a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. (Code Civ. Proc., § 425.16.)

This bill:

- 1) Defines “communication” as factual information related to an incident of sexual assault, harassment, or discrimination experienced by the individual making the communication, including, but not limited to, any of the following:
 - a) An act of sexual assault.
 - b) An act of sexual harassment, as defined in Civil Code section 51.9.
 - c) An act of workplace harassment or discrimination; failure to prevent an act of workplace harassment or discrimination; aiding, abetting, inciting, compelling, or coercing an act of workplace harassment or discrimination; or an act of retaliation against a person for reporting or opposing workplace harassment or discrimination, as set forth in subdivision (a), (h), (i), (j), or (k) of Government Code section 12940.
 - d) An act of harassment or discrimination, or an act of retaliation against a person for reporting harassment or discrimination, by the owner of a housing accommodation, as described in Government Code section 12955.
 - e) An act of harassment or discrimination, or an act of retaliation against a person for reporting an act of harassment or discrimination, based on any of the protected classes enumerated in Education Code sections 220, 221.51, or 66270.
 - f) An act of sexual harassment or cyber sexual bullying, as defined in Education Code sections 212.5, 48900, or 66262.5.
- 2) Provides that a communication made by an individual, without malice, regarding an incident of sexual assault, harassment, or discrimination is privileged.
- 3) Authorizes a prevailing defendant in any defamation action brought against that defendant for making a communication that is privileged under 2) shall be entitled to their reasonable attorney fees and costs for successfully defending themselves in the action, plus treble damages for any harm caused to them by the defamation action against them, in addition to punitive damages as permitted under Civil Code section 3294 and any other relief otherwise permitted by law.
- 4) Provides that 1)-3) apply only to an individual that has, or at any time had, a reasonable basis to file a complaint of sexual assault, harassment, or discrimination, whether the complaint is, or was, filed or not.

COMMENTS

1. Author's comment

According to the author:

Strategic Lawsuits Against Public Participation (SLAPP) are increasingly being used as a weapon to threaten, silence, intimidate, and dissuade survivors of sexual assault, harassment, and discrimination from speaking out against their abusers and exposing predators. AB 933 expands protections for speech made by a survivor, without malice, about their own experience of sexual assault, harassment, or discrimination. This bill would make it harder for perpetrators to retaliate against survivors with legal threats and intimidation, but does not apply to unfounded claims. The protections in this bill will help encourage survivors to speak their truth and expose the behavior of those who harmed them. In addition, AB 933 helps take the burden off of survivors by providing reasonable attorneys' fees and damages if they successfully defend themselves against meritless lawsuits.

2. Defamation, SLAPP suits, and the anti-SLAPP process

The tort of defamation is, broadly speaking, making a false statement orally (slander) or in writing (libel) about another person that causes harm to that person.¹ "The *sine qua non* of discovery for defamation is the existence of a falsehood," which, when coupled with harm, results in statements that fall outside of First Amendment protection.² "The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage."³ With respect to prong (4), statute defines which communications are "privileged," leading to the negative implication that communications not included are unprivileged.⁴ Over the years, the Legislature has added to the list of privileged communications to further public policy goals; privileged statements include a "fair and true report" to the media about ongoing judicial and legislative proceedings,⁵ and an employee's report or complaint of sexual harassment based on credible evidence and made without malice.⁶

¹ Civ. Code, §§ 45-47.

² *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259-260 (internal quotation marks and alterations omitted).

³ *Laker v. Board of Trustees of California State University* (2019) 32 Cal.App.5th 745, 763 (internal quotation marks omitted).

⁴ Civ. Code, § 47.

⁵ *Id.*, § 47(d).

⁶ *Id.*, § 47(c); see AB 2270 (Irwin, Ch. 82, Stats. 2018). The statute establishes that some statements are absolutely privileged – such as statements made in any judicial or legislative proceeding – while others are conditionally privileged, based on whether the speaker acted with malice. (Civ. Code, § 47; see *Schep v.*

Defamation suits can serve the vital purpose of allowing a person harmed by the false statements of another to be compensated for that harm.⁷ Unfortunately, the tort of defamation is also a frequent tool of persons who would chill legitimate speech in the form of SLAPP suits.⁸ In a SLAPP suit, the plaintiff filed the lawsuit not because they expect to win – indeed, winning is not the point – but to use the cost and emotional toll of a lawsuit to (1) bully the defendant into silence or retaliate for speaking out against the plaintiff, and (2) intimidate others who might speak out, thereby chilling additional legitimate speech.⁹

California enacted its anti-SLAPP suit in response to “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and the petition for the redress of grievances.”¹⁰ The anti-SLAPP statute should “be construed broadly” to serve the goals of encouraging participation in matters of public significance and ensuring that participation is not chilled through abuse of the judicial process.¹¹

As explained by the California Supreme Court:

The anti-SLAPP statute's core provision authorizes defendants to file a special motion to strike a cause of action against a person arising from the petition or speech activities of that person in connection with a public issue. Such motions shall be granted unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. The analysis of an anti-SLAPP motion proceeds in two steps: First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim. At this second step of the analysis, a trial court considers the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based in evaluating the plaintiff's probability of success. The court accepts as true the evidence favorable to the plaintiff and evaluates the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of

Capital One, N.A. (2019) 12 Cal.App.5th 1331, 1337.) This bill establishes a conditional, not an absolute, privilege.

⁷ *E.g., Carroll v. Trump* (1:20-cv-07311).

⁸ *E.g., Pring & Canan, SLAPPs: Getting Sued for Speaking Out* (1996), p. 217; *Last Week Tonight with John Oliver, “SLAPP Suits”* (HBO, originally aired Nov. 10, 2019), available at <https://www.youtube.com/watch?v=UN8bJb8biZU>. All links in this analysis are current as of June 8, 2023.

⁹ Pring & Canan, *supra*, at pp. 8-9.

¹⁰ Code Civ. Proc., § 425.16(a).

¹¹ *Ibid.*; *e.g., Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321.

law. Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute is a SLAPP, subject to being stricken under the statute.¹²

When an anti-SLAPP motion is filed in a defamation suit, the second prong of the anti-SLAPP inquiry requires an examination of whether the statements at issue were privileged.¹³ If the defendant establishes that the statements were privileged, then the plaintiff cannot satisfy all of the elements of the defamation claim and therefore cannot establish a likelihood of success on the merits of the claim, and the anti-SLAPP motion should be granted.¹⁴

3. #MeToo and retaliatory SLAPP suits

Tarana Burke founded the #MeToo movement in 2006; the movement became widespread in 2017, when Alyssa Milano suggested that everyone who has been sexually harassed or assaulted write “me too” in response, and millions of people did.¹⁵ This viral moment coincided with other high-profile allegations of abuse by powerful individuals and systematic institutional failures to protect victims or punish abusers.¹⁶ Sadly, but perhaps predictably, many persons accused of sexual abuse or harassment turned around and filed defamation claims against their accusers.¹⁷ Numerous legal commenters have written about the increase in defamation suits being used to silence people making allegations of sexual abuse or harassment, and the chilling effect it has on others who might otherwise come forward.¹⁸

The Legislature is no stranger to the #MeToo movement.¹⁹ Among the lawmakers accused of sexual misconduct is former Assemblymember Matt Dababneh. Pamela Lopez, a lobbyist, filed a complaint with the Legislature alleging that Dababneh “forced her into a Las Vegas hotel suite bathroom during a party in 2016, masturbated in front of her and urged her to touch him.”²⁰ An independent investigator hired by the

¹² Barry, *supra*, 2 Cal.5th at p. 321 (internal citations, quotation marks, and alterations omitted).

¹³ E.g., Laker, *supra*, 32 Cal.App.5th at pp. 768-769.

¹⁴ *Ibid.*

¹⁵ Weisbrot, *The Impact of the #MeToo Movement on Defamation Claims Against Survivors* (2020) 23 CUNY L.Rev. 332, 332.

¹⁶ *Ibid.*

¹⁷ E.g., Pauly, *She Said, He Sued*, Mother Jones (Mar./Apr. 2020).

¹⁸ E.g., Weisbrot, *supra*; Ligon, *Protecting Women’s Voices: Preventing Retaliatory Claims in the #MeToo Context* (2021) 94 St. J. L. Rev. 961; Whynot, *Retaliatory Defamation Suits: The Legal Silencing of the #MeToo Movement* (2020) 94 Tul. L. Rev. Online 1; Leader, *A “SLAPP” in the Face of Free Speech: Protecting Survivors’ Rights to Speak Up in the “Me Too” Era* (2019) 17 First Am. Law Rev. 441.

¹⁹ E.g., Mason, *Female lawmakers, staffers and lobbyists speak out on ‘pervasive’ harassment in California’s Capitol*, L.A. Times (Oct. 17, 2017), available at <https://www.latimes.com/politics/la-pol-ca-women-harassment-capitol-20171017-story.html>.

²⁰ Mason, *Legislative investigation substantiates complaint against ex-Assemblyman Matt Dababneh*, LA Times (Aug. 27, 2018), available at <https://www.latimes.com/politics/la-pol-ca-matt-dababneh-investigation-20180827-story.html>.

Assembly Rules Committee substantiated Lopez's claim.²¹ Dababneh resigned prior to the findings and filed a defamation claim against Lopez.²² The lawsuit alleged that the statements Lopez made in her claim to the Legislature, and to the press in connection with that claim, were defamatory.²³ Lopez filed an anti-SLAPP motion to strike, which the trial court granted with respect to her statements to the Legislature, but not to the press.²⁴ Lopez appealed the ruling and the Court of Appeal, in an unpublished opinion, held that the trial court erred in finding that Lopez's statements to the press were not privileged under the "fair and true reporting privilege" contained in Civil Code section 47(d).²⁵

4. This bill clarifies that a communication made without malice about an incident of sexual assault, harassment, or discrimination is privileged

Lopez ultimately prevailed on her anti-SLAPP motion because her complaint was filed with the Legislature, so it fell under the statutory privilege for statements made in connection with legislative and judicial proceedings. Most perpetrators of sexual abuse, harassment, and discrimination, however, are not legislative or judicial officers or employees, so most victims will not have this privilege available to them. As such, most victims will remain vulnerable to the silencing effect of SLAPP suits filed in response to claims of sexual abuse, harassment, and discrimination.

This bill is intended to prevent SLAPP suits against actual victims of sexual abuse, harassment, and discrimination, both to protect the victims who come forward and to provide victims who are considering coming forward with greater assurances that they will not be the target of a baseless revenge suit.

First, the bill creates a conditional privilege for communications made regarding an incident of sexual assault, harassment, or discrimination. The bill defines these categories with cross-references to existing statutes, to ensure that the scope of the statements is clear. The privilege itself is conditioned on two factors: the communication must be made without malice, and can be made only by an individual who has, or at any time had, a reasonable basis to file a complaint of sexual assault, harassment, or discrimination, whether or not the complaint was filed. By making the privilege conditional on the presence of a good faith claim, rather than absolute, the bill ensures that false, defamatory allegations will not be privileged.

Second, the bill allows a prevailing defendant in a defamation suit arising from communications that are privileged under the bill to recover reasonable attorney fees and costs for the costs of defending the suit, as well as (1) treble damages in any claims

²¹ *Ibid.*

²² *Ibid.*

²³ *Dababneh v. Lopez* (Oct. 1, 2021, C08848) [nonpub. opn.] 2021 WL 4487407, *1.

²⁴ *Ibid.*

²⁵ *Id.* at pp. *12-14.

the defendant may have had against the plaintiff, and (2) any other damages already authorized by law, including punitive damages. These provisions provide a level of protection for defendants in baseless defamation suits that cannot be disposed of in an anti-SLAPP motion to strike. A court considering an anti-SLAPP motion to strike must take the plaintiff's version of the evidence as true, so a plaintiff could likely overcome the privilege at the anti-SLAPP stage with a declaration stating that the defendant's allegations of sexual abuse, harassment, or discrimination were false. Under current law, a defamation defendant generally has no further means to recover costs or attorney fees if it turns out that the plaintiff was lying – so even if the defendant prevails, the victory may be hollow because of the crushing legal fees they had to incur. This bill adds a layer of protection by giving the defendant a second chance, after they prevail, to recover the reasonable attorney fees and costs they were forced to expend in defending themselves against a retaliatory defamation suit. Ideally, however, this bill's fee-shifting provisions will deter SLAPP suits against the victims of sexual abuse, harassment, and discrimination before they are filed.

According to the California Employment Lawyers Association and Equal Rights Advocates, the sponsors of the bill:

The threat of having to engage in years of litigation, relive the personal trauma of abuse in court, and take on the burden of responding to an expensive, resource draining SLAPP suit further harms survivors and causes a chilling effect that discourages others from coming forward to share their experience. In fact, the financial burden of defending against a defamation suit is one of the main reasons those suits tend to evoke so much fear in survivors. As news coverage of this abusive litigation tactic increases, our organizations are regularly contacted by workers, students, and others who are too fearful to speak out about sexual harassment and violence they have experienced for fear of being hit with a retaliatory defamation suit. Even if they will ultimately prevail against such an attack, survivors are often unable to take on the cost and emotional toll of such lengthy and costly litigation...

AB 933 will ensure survivors of sexual assault, harassment, and discrimination are adequately protected from defamation lawsuits by clarifying that claims made in good faith are a form of protected speech. In doing so, the bill would make it harder for perpetrators to retaliate against survivors with legal threats and intimidation. The protections in this bill will help encourage survivors to speak their truth and expose the behavior of those who harmed them. This bill also provides relief to survivors in the form of reasonable attorneys' fees and damages for successfully defending themselves against these retaliatory lawsuits.

SUPPORT

California Employment Lawyers Association (co-sponsor)

Equal Rights Advocates (co-sponsor)

9to5

American Association of University Women – California

American Association of University Women San Jose

California Anti-SLAPP Project

California Partnership to End Domestic Violence

California Work & Family Coalition

Caring Across Generations

Child Care Law Center

Consumer Attorneys of California

GRACE – End Child Poverty in California

Legal Aid at Work

Lutheran Office of Public Policy – California

Media Alliance

Mujeres Unidas y Activas

National Council of Jewish Women California

Parent Voices, California

Santa Clara County Wage Theft Coalition

ValorUS

Women’s Foundation California

Work Equity

Worksafe

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 1775 (Jones-Sawyer, Ch. 327, Stats. 2020) provided that a communication between a person and a law enforcement agency in which the person makes a false report that another person has committed, or is in the act of committing, a criminal act or is engaged in an activity requiring law enforcement intervention, knowing that the report is false, or with reckless disregard for the truth or falsity of the report, is not privileged for purposes of a libel or slander action.

AB 2770 (Irwin, Ch. 82, Stats. 2018) clarified that (1) employees who report sexual harassment to their employer are not liable for any resulting injury to the alleged harasser's reputation, so long as the communication is made based on credible evidence and without malice; (2) communications between employers and anyone with an interest in a sexual harassment complaint, such as victims and witnesses, are not liable for any resulting damage to the alleged harassers reputation, as long as the communication is made without malice; and (3) former employers are not liable for any resulting injury to a former employee's reputation if, in response to inquiries from prospective employers, the former employers indicate that they would not rehire the former employee based on a determination that the former employee engaged in sexual harassment, so long as the statement is made without malice.

PRIOR VOTES:

Assembly Floor (Ayes 60, Noes 2)

Assembly Judiciary Committee (Ayes 8, Noes 0)
