COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
FOR THE COMMONWEALTH
Case No. 2023-P-0706

DR. KRISTIN A. KNOUSE & others,[1]

Appellants,

v.

DR. DAVID M. SABATINI,

Appellee.

BRIEF OF AMICI CURIAE LEGAL MOMENTUM AND THE NATIONAL WOMEN'S LAW CENTER

On Appeal from the Commonwealth of Massachusetts Superior Court
L.T. Case No. Civil Action No. 2284CV01449

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1. Statement of interest of Amici Curiae[2]

Legal Momentum, the Women's Legal Defense and Education Fund, established in 1970, is the first and longest-serving national nonprofit civil rights organization dedicated to advancing the rights of women and girls, including victims of gender-based violence. For over 50 years, Legal Momentum has worked to achieve gender equality through impact litigation, policy advocacy, and education, and to ensure that victims of gender-based violence have access to legal protections, remedies and an unbiased justice system. Legal Momentum regularly appears before state and federal courts, including the Supreme Court, as amicus curiae on issues related to sexual harassment and sexual assault. The prominence of the #MeToo movement that encouraged many sexual harassment and sexual assault victims to publicly voice their experiences was met by a spike in defamation lawsuits filed by abusers trying to further silence their victims. In response, Legal Momentum created A Guide to Defamation for Survivors of Sexual Assault or Harassment, https://www.legalmomentum.org/library/guide-defamation-survivorssexual-assault-or-harassment.

The National Women's Law Center (NWLC) is a non-profit

[2] No party's counsel contributed content to the brief or otherwise participated in the brief's preparation. No party or party's counsel contributed money intended to fund the brief's preparation or submission. No person or entity other than the movant or the movant's counsel contributed money intended to fund the brief's preparation or submission.

organization that fights for gender justice in the courts, in public policy, and in our society, and works across issues that are central to the lives of women and girls, especially women of color, LGBTQI+ people, and low-income women. Since 1972, NWLC has worked to advance educational opportunities, workplace justice, health and reproductive rights, and income security. The NWLC Fund administers the TIME'S UP Legal Defense Fund, which improves access to justice for those facing workplace sexual harassment, including through grants to support legal representation. NWLC has also, in response to the wave of defamation lawsuits targeting sexual-harassment victims, published a toolkit to help victims understand their rights. Nat'l Women's Law Ctr., NWLC Fund Toolkit, https://nwlc.org/resource/survivors-speaking-out-toolkit-defamation-retaliation. NWLC has participated as counsel or amicus curiae in a range of cases to secure the equal treatment of women and girls under the law.

Legal Momentum, NWLC, and 31 other organizations[3] that share their commitment to protecting victims of sexual abuse and an interest in proper interpretation of the Massachusetts anti-SLAPP statute submit this brief in support of Appellant Kristin Knouse, M.D., Ph.D. ("Knouse") and the reversal of the decision reached by the district court.

[3] Additional amici are listed in the Addendum to this brief.

2. Summary of the argument

Legal Momentum, NWLC, and the other supporting organizations submit this amicus brief to provide the Court with additional information about the broad and concerning impact the district court's decision will have if not reversed. Many of these organizations have unique insight into the rampant sex discrimination, including sex-based harassment, being perpetrated in many workplaces--including university research labs—that is shared in this brief.

Affirming the district court's ruling will be harmful not only to harassment victims, but also to employees and employers more broadly. Sex-based harassment is pervasive, especially in university research labs, but vastly underreported, often due to fear of retaliation. This fear is well-founded. Reported harassers are increasingly using defamation lawsuits to retaliate against their victims when they dare to speak out, or to silence their victims from speaking out in the first place. Affirming the district court's ruling will chill reporting even further, eroding a vital check on harassment and undermining anti-discrimination laws.

This Court's ruling will have a broad impact on both employees and employers. Under current law, employers are required to investigate claims of sexual harassment, and many employees are mandated to report harassment. However, if employers can then be

sued for undertaking this legally-required investigation, there is no incentive to conduct one--they can be sued either way. In fact, because a defamation suit has no damages cap, whereas Title VII suits do, employers may very well be incentivized to risk a Title VII lawsuit rather than face a defamation suit.

For this reason, investigations and the statements made in their course are and should be protected by law. Reports of sex-based harassment to schools and employers fall within the plain language of Massachusetts' anti-SLAPP law, G. L. c. 231, § 59H, which protects, among other things, "any statement reasonably likely to encourage consideration or review of an issue by a . . . judicial body or any other government proceeding." Federal and state anti-discrimination laws often require plaintiffs to have internally reported harassment before they can bring a claim in court, meaning that these internal reports are not just likely to encourage judicial consideration, but can be necessary to obtaining judicially ordered relief. If defamation cases are allowed to chill these internal reports, it will undermine these anti-discrimination laws. This Court should not weaken these existing legal protections.

Finally, public policy concerns demand this suit fail in every way. The legal protections in place exist for a reason. For far too long, workplace harassment has been allowed to go unpunished. The district court's decision will compound that harm, providing

yet another avenue for harassers to abuse their power and punish reporting and investigation of harassment. It is reasonably anticipated that this decision will result in decreased employer investigations and a reduction in reports of illegal and abusive behavior, sending a strong message that perpetrators can harass without accountability and even further the cycle of abuse with a retaliatory defamation lawsuit.

Legal Momentum, the National Women's Law Center, and the supporting amici strongly urge this Court to rule in favor of Appellant Knouse and reverse the district court's decision.

3. Argument

a. Sex-based harassment, though pervasive, is underreported for many reasons, and allowing victims to be sued for reporting abuse creates an even greater chilling effect

Sex-based harassment--including sexual assault--is widespread,[4] immensely harmful, and vastly underreported. It

[4] Sexual assault is not just an everyday occurrence--it is an almost every minute occurrence. Every 68 seconds, someone in the U.S. is sexually assaulted. Rape, Abuse & Incest National Network (RAINN), Scope of the Problem: Statistics ("RAINN Sexual Assault Statistics")(updated 2023), https://rainn.org/statistics/scope-problem. The CDC estimates that 1 in every 4 women and 1 in 26 men in the United States are subjected to a completed or attempted rape in their lifetime, and that nearly 50% of women and about 33% of men in the U.S. are subjected to some form of sexual assault in their lifetime. Centers for Disease Control and Prevention (CDC), Fast Facts: Preventing Sexual Violence, https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html#\:~:text=Sexual%20violence%20is%20common.&text=One%20in%204%20women%20and,penetrate%20someone%20during%20his%20lifetime. These rates are even higher for transgender people, nearly half of whom

permeates workplaces across the economy, and academia is no exception. There are many reasons why victims underreport harassment, but a key one is well-founded fear of retaliation. In fact, reported harassers are increasingly weaponizing retaliatory defamation lawsuits against victims to both punish and chill their speaking out.

i. Sex-based harassment is pervasive, including in academia

In the workplace, the commonality of sex-based harassment is hard to overstate. As many as 85% of women have been subjected to sex-based harassment in the workplace. U.S. Equal Emp't Opportunity Comm'n, Select Task Force on the Study of Harassment in the Workplace ("EEOC Workplace Harassment Study") at II.B (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace (explaining factors including whether the survey asks about "sexual harassment" or about particular behaviors like "unwanted sexual attention" changes the number of respondents who identify as having experienced sexual harassment, suggesting that "many individuals do not label certain forms of unwelcome sexually based behaviors--even if they view them as problematic or offensive--as 'sexual harassment.'") (internal citations

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are sexually assaulted at some point in their lives. Nat'l Ctr. for Transgender Equal., 2015 U.S. Transgender Survey Complete Report ("Transgender Survey") 198 (2016), http://www.ustranssurvey.org/reports (2022 survey results to be published in 2024).

removed)). This average does not accurately display the disparate rates by race, including that Black women file sex-based harassment charges with the Equal Employment Opportunity Commission (EEOC) at three times the rate of white women. Nat'l Women's Law Ctr., Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women 5 (2018), https://nwlc.org/resources/out-of-the-shadows-an-analysis-of-sexual-harassment-charges-filed-by-working-women. With respect to Massachusetts specifically, more than 33% of Massachusetts' women voters said they have been subjected to workplace sexual harassment. Glatter, Boston Magazine, More Than 20 Percent of Massachusetts Voters Say They Have Experienced Workplace Sexual Harassment (Jan 11. 2018), https://www.bostonmagazine.com/news/2018/01/11/massachusetts-workplace-sexual-harassment/. These statistics come in spite of, for example, Massachusetts passing legislation to make workplace sexual harassment illegal under its anti-discrimination laws. See, e.g., G. L. c. 151B, § 3A. In a 2017 ABC News/Washington Post poll, among women who have personally been subjected to unwanted sexual advances in the workplace, nearly all--95 percent --say male harassers usually go unpunished. ABC News, Unwanted sexual advances not just a Hollywood, Weinstein story, poll finds (Oct. 17, 2017), https://abcnews.go.com/Politics/unwanted-sexual-advances-hollywood-weinstein-story-poll/story?id=50521721.

Workplace sex-based harassment in academia is just as troubling. In fact, women scientists in labs are especially likely to encounter harassment that is "because of sex." Stark, L., Exposing Hostile Environments For Female Graduate Students In Academic Science Laboratories: The McDonnell Douglas Burden-Shifting Framework As A Paradigm For Analyzing The "Women In Science" Problem, 31 Harv. J. L. & Gender 101 (2008). "[T]he standards of acceptable practices in many academic laboratories stand in stark contrast to those of many corporate workplaces in this day and age … hostile laboratory environments are endemic problems that transcend gender to affect the quality of the graduate research experience [women] are [relegated] to and perhaps even scientific discovery more broadly[.]" Id. In 2021, the Massachusetts Sexual Misconduct Task Force noted the problem and prevalence of sexual misconduct within institutions of higher education and implemented a requirement that a student sexual misconduct climate survey be conducted at least every four years. Commonwealth of Massachusetts Task Force Report on Sexual Misconduct Surveys, Report to Department of Higher Education Commissioner Carlos E. Santiago, May 3, 2022, https://www.mass.edu/strategic/documents/Task%20Force%20on%20Sexual%20Misconduct%20Surveys%20Final%20Report%20and%20Recommendations.pdf.

Sex-based harassment by faculty is a similarly widespread problem in higher education. Stubaus and Harton, Exploring Sanctions and Early Interventions for Faculty Sexual Harassment in Higher Education (2022), https://www.nationalacademies.org/documents/embed/link/LF2255DA3DD1C41C0A42D3BEF0989ACAECE3053A6A9B/file/D1CE3F246195D8EA0268626BFF30791A89C8857482C2?noSaveAs=1. While there are certainly high-profile cases (see, e.g., Hartocollis, New York Times, A Lawsuit Accuses Harvard of Ignoring Sexual Harassment by a Professor (Feb. 8, 2022), https://www.nytimes.com/2022/02/08/us/harvard-sexual-harassment-lawsuit.html), the problem extends far beyond them. Indeed, a survey conducted at 27 top research universities reported that 22.4% of female graduate students and 5.9% of female undergraduates reported sex-based harassment by a faculty member. Cantor et al., Westat, Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct (2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf. Another study surveying 525 graduate students reported that 38% of women and 23.4% of men experienced sex-based harassment from faculty or staff. Rosenthal et al., Psychology of Women Quarterly, Still Second Class: Sexual Harassment of Graduate Students (2016), https://journals.scholarsportal.info/details?uri=/03616843/v40i0003/364_ssc.xml. A systematic review of 305 cases of faculty-

student harassment found that more than half involved (1) unwelcome physical contact (i.e., sexual assault) and (2) repeat harassment by the same faculty member. Cantalupo and Kidder, A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty, 2018 Utah L. Rev. 3, 4 (2018) https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1170 &context=ulr.

The data paint a bleak picture of the scale of the problem of sex-based discrimination in academia and in the workforce more broadly. Yet, as described further below, while many people experience sexual abuse, relatively few victims ever make a formal report. Morgan and Oudekerk, U.S. Dep't Just., Bureau Just. Stat., Criminal Victimization, 2018, at 8 (2019), https://bjs.ojp.gov/ content/pub/pdf/cv18.pdf.

ii. Underreporting is common, and victims' concerns about retaliation are well-founded

The underreporting phenomenon is stark. Based on anonymous survey responses, at least one in twenty-eight U.S. workers report having been sexually harassed in the workplace annually. Dahl and Knepper, IZA Inst. of Labor Economics, Why Is Workplace Sexual Harassment Underreported? The Value of outside Options amid the Threat of Retaliation (September 2021), https://docs. iza.org/dp14740.pdf (hereinafter Why Is Workplace Sexual Harassment Underreported?). Yet only an estimated six to thirteen

percent of employees who are sexually harassed file a complaint with their employer. U.S. Equal Emp't Opportunity Comm'n, Select Task Force on the Study of Harassment in the Workplace (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace. Even in the aftermath of #MeToo going viral, though workplace harassment charges filed with the EEOC saw an initial spike in 2018-2019, by 2021, the rates were at or below where they were prior to 2017. U.S. Equal Emp't Opportunity Comm'n, EEOC Data Highlight (Apr. 2022), https://www.eeoc.gov/data/sexual-harassment-our-nations-workplaces; see also Why Is Workplace Sexual Harassment Underreported? ("[O]nly 1 in 11,000 workers file a formal sexual harassment charge with the Equal Employment Opportunity Commission . . . . Even in the aftermath of the #MeToo-induced reckoning, harassment charges are up only 10%."). Victims underreport sex-based harassment for multiple reasons, including fear of not being believed, being blamed, or experiencing retaliation. See Tucker and Mondino, Nat'l Women's L. Ctr., Coming Forward: Key Trends And Data From The Time's Up Legal Defense Fund 12, 25 (2020) ("[G]iven barriers such as fear of not being believed or fear of retaliation, many people do not report their experience: it is estimated that anywhere from 87 percent to 94 percent of people who experience workplace harassment never file a formal complaint."), https://nwlc.org/wp-content/uploads/2020/10/NWLC-Intake-Report_FINAL_2020-10-13.pdf

(citing U.S. Equal Employment Opportunity Commission, Select Task Force on the Study of Harassment in the Workplace 16 (June 2016), available at https://www.eeoc.gov/select-task-force-study-harassment-workplace.); see also Khan et al., "I Didn't Want to Be 'That Girl'": The Social Risks of Labelling, Telling, and Reporting Sexual Assault, 5 SOCIO. SCI. 432, 432 (2018). Victims' concerns about retaliation are well-founded. In the workplace, retaliation is by far the most common type of discrimination reported to the EEOC. See, e.g., EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data (Jan. 24, 2020), https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data. Workers who report sex-based harassment can face not only diminished social acceptance, demotions, firings, and shadow smear campaigns at work, but also surveillance by private investigators, attacks in the press, lawsuits, and threats of physical violence outside of work. Baker, Note, No Good Deed Goes Unpunished: Protecting Gender Discrimination Named Plaintiffs from Employer Attacks, 20 Hastings Women's LJ 83, 104-19 (2009). Indeed, according to a National Women's Law Center report analyzing 3,317 requests for legal help submitted over a 28-month period, 72% of workers requesting legal assistance said they were subjected to retaliation in some form after reporting or trying to stop the harassment, and many were subjected to multiple forms of retaliation. TIME'S UP Legal Defense Fund, Coming Forward: Key

Trends and Data from the TIME'S UP Legal Defense Fund, (2020), https://nwlc.org/wp-content/uploads/2020/10/NWLC-Intake-Report_FINAL_2020-10-13.pdf.

iii. Reported harassers are increasingly weaponizing retaliatory defamation lawsuits against victims

Reported harassers are increasingly weaponizing defamation lawsuits to silence their victims and retaliate against those who do speak out. Like others who bring "Strategic Lawsuits Against Public Participation" (SLAPP) suits,[5] named sexual harassers who file defamation suits typically do not expect to win on the merits of their claim. Leader, A., A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak Up in the "Me Too" Era, 17 First Am L Rev 441, 448 (2019). Rather, their ultimate goal is to devastate the victim financially, chill the victim's right to public participation, continue the cycle of abuse of power, and suppress the victim's ability to seek help from their schools, employers, and other institutions, including the civil and criminal legal systems.

Regardless of their strength on the merits, defamation suits can be highly effective in silencing victims or coercing them into

[5] Anti-SLAPP statutes have been enacted across the country in response to predatory litigation initiated to stifle protected activity. Roth, A., Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet, 2016 BYU L Rev 741, 741-45 (2016). Anti-SLAPP motions provide a mechanism to "weed[] out, at an early stage, meritless claims arising from protected activity." Dickinson v. Cosby, 17 Cal. App. 5th 655 (2017).

withdrawing their claims. This is because of the vast economic, social, mental, and emotional costs of defending a defamation lawsuit. Defending defamation suits can be extremely expensive. Research presented to the Senate Judiciary committee underscores the burdensome cost. See, e.g., AB 933 (Aguiar-Curry) Memorandum, https://trackbill.com/s3/bills/CA/2023/AB/933/analyses/senate-judiciary.pdf. Indeed, even winning a defamation suit can be financially ruinous without anti-SLAPP protections that allow for fee shifting. See, e.g., Inst. For Free Speech, Estimating the Cost of Fighting a SLAPP in a State with No Anti-SLAPP Law ("We estimate that it would cost between $21,000 and $55,000 to defeat a typical meritless defamation lawsuit in court, with the median at about $39,000. But the cost of a legal defense can easily soar into the six figures, and we've seen legal bills run in the millions of dollars."), https://www.ifs.org/blog/estimating-the-cost-of-fighting-a-slapp-in-a-state-with-no-anti-slapp-law/. Economically, most victims cannot afford to hire an attorney and endure years of aggressive litigation. Wexler et al., #metoo, Time's Up, and Theories of Justice, 2019 U Ill L Rev 45, 58 (2019) (noting that most of those requesting representation from the Time's Up Legal Defense Fund are low-income wage-earners).

Being subjected to court proceedings can be especially traumatic and difficult for victims. See, e.g., RAINN, Victims of Sexual Violence: Statistics, https://rainn.org/statistics/

victims-sexual-violence (collecting studies showing that "94% of women who are raped experience symptoms of [PTSD] during the two weeks following the rape[;] 30% of women report symptoms of PTSD 9 months after the rape[;] 33% of women who are raped contemplate suicide[;] 13% of women who are raped attempt suicide[;] [a]pproximately 70% of rape or sexual assault victims experience moderate to severe distress" (footnotes omitted)). On top of the physical and mental health consequences of the underlying harassment or assault (id.), victims are forced to repeatedly relive their trauma through litigation and to disclose potentially embarrassing private information through invasive discovery. See, e.g., Covert, Years after #MeToo, Defamation Cases Increasingly Target Victims Who Can't Afford to Speak Out, The Intercept (July 22, 2023), https://theintercept.com/2023/07/22/metoo-defamation-lawsuits-slapp/ (describing a victim of workplace sexual assault's experience of being sued: "It also meant she had to keep reliving what had happened to her, recounting the story over and over again to lawyers, after she had just started to get better at not thinking about it"); Cheung, Campus Sexual Assault Survivors Have Always Feared Defamation Lawsuits, Jezebel (June 2, 2022), https://jezebel.com/campus-sexual-assault-survivors-have-always-feared-defa-1849010239 (describing how a defamation plaintiff through a lawsuit could access his accuser's medical records, student records, and information about her sexual history). And

perhaps most troubling, they must endure continued unwanted interaction with their named harasser throughout the litigation process—often being forced to testify at a deposition or trial within feet of the person who harmed them. Leader, 17 First Am L Rev at 448.

For serial abusers, maintaining a defamation suit against one victim sends a clear, threatening message to all their other victims that they will face the same retaliatory response if they come forward. Mulholland and Sy, Victim Defamation Claims in the Era of #MeToo, 260 NYLJ 23, 1 (Aug. 2, 2018), (asserting that even individuals like Bill Cosby, who were later convicted of serial sexual assault, have filed defamation suits), https://rmfpc.com/wp-content/uploads/2018/08/NYLJ-Victim-Defamation-Claims-in-the-era-of-Metoo.pdf; Pauly, MOTHER JONES, She Said, He Sued (Mar.-Apr. 2020), https://www.motherjones.com/criminal-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault/ (hereinafter She Said, He Sued). Thus, a defamation suit is a way for perpetrators of sexual violence to coerce victims into withdrawing their claims and to deter others from coming forward in the first place.

Harassers also weaponize defamation lawsuits against employers who seek to remedy sex-based harassment and comply with federal and state anti-discrimination laws. And whereas Title VII includes a statutory damages cap, the potentially high, uncapped

cost of defamation litigation can lead employers to weigh the risk of defamation lawsuits by reported harassers more heavily than the risk of Title VII lawsuits by harassment victims.

Retaliatory defamation lawsuits against victims have increased at alarming rates in the past decade, especially since the #MeToo hashtag went viral in fall 2017 and inspired waves of victims to come forward for the first time and seek to hold their abusers accountable. See, e.g., United Educators, Nat'l Ctr. Domestic & Sexual Violence, Confronting Campus Sexual Assault: An Examination of Higher Education Claims (2015) (stating that of the students accused of sexual assault who sued their educational institutions, 72% of those perpetrators also sued their accusers for defamation), https://safesupportivelearning.ed.gov/resources/confronting-campus-sexual-assault-examination-higher-education-claims; see also She Said, He Sued (finding, based on a review of court documents and news reports, that "[a]t least 100 defamation lawsuits" filed from 2014 to 2020 were identified as being against sexual assault survivors by their abusers).

For lawyers who work with victims, these suits have become routine. In 2017, a lawyer for the Victim Rights Center remarked that cases where sexual assault victims faced threats of defamation lawsuits had risen from 5% of her caseload to over half of her caseload over the course of a few years. See Kingkade, As More College Students Say "Me Too," Accused Men Are Suing For

Defamation, Buzzfeed News (Dec. 5, 2017), https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing; see also Abrams, The Increasing Complexity of Defamation Law in #MeToo Era Lawsuits, Louisville Bar Briefs 22 (2021), https://www.loubar.org/UserFiles/files/bar-briefs/2021/6-June/Bar%20Briefs_June'21_Defamation%20Law%20in%20MeToo_Abrams_p22.pdf. Another attorney who, prior to 2017, used to receive inquiries twice a year from victims who feared retaliatory defamation suits, reported in 2020 that he received such inquiries every two weeks. See She Said, He Sued. This alarming trend has captured the attention of policymakers across the country, who have introduced and passed a number of state bills in the last few years to explicitly protect victims from being targeted by retaliatory defamation lawsuits. See, e.g., Cal. Civ. Code § 47.1 (2023) (creating a privilege for statements about "sexual assault, harassment, or discrimination"); N.Y. S52A (2020) (expanding protections against retaliatory lawsuits to include more people who report misconduct, including victims); Ill. H.B. 5452 (2024) (amending Illinois's anti-SLAPP law to explicitly protect victims).

In the same vein, amici Legal Momentum and National Women's Law Center have both heard from so many sex-harassment victims who were targeted with defamation suits for speaking out that they

both created toolkits for those victims to better understand defamation and anti-SLAPP laws. See, e.g., Legal Momentum, A Guide to Defamation for Survivors of Sexual Assault or Harassment, https://www.legalmomentum.org/library/guide-defamation-survivors-sexual-assault-or-harassment; see also Nat'l Women's Law Ctr., Survivors Speaking Out: A Toolkit About Defamation Lawsuits And Other Retaliation By And For People Speaking Out About Sex-Based Harassment, https://nwlc.org/resource/survivors-speaking-out-toolkit-defamation-retaliation/.

In short, allowing reported harassers to weaponize retaliatory defamation lawsuits against victims and against institutions that investigate and remedy harassment will chill victims even further and erode existing protections against harassment in schools and workplaces.

b. The law requires employers and schools to investigate claims of harassment and generally requires employees and students to report harassment before seeking relief

Title VII, Massachusetts employment discrimination law, education law, and Title IX obligate employers and educational institutions that become aware of sexual harassment to promptly investigate and implement remedial measures to stop the harassment and prevent its reoccurrence. And on the other side of the coin, the law generally requires employees and students to report harassment to their employer or school before seeking relief in court.

i. Title VII

Title VII prohibits discrimination in employment, including both quid pro quo--"this for that"--and hostile-work-environment harassment. The purpose of Title VII is to achieve equality of employment opportunities and remove barriers that favor one group of employees over another. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); see also 42 U.S.C. § 2000e-2(1).

The Title VII standard for harassment claims incentivizes employees to report harassment and employers to investigate and remedy it. The U.S. Supreme Court set the standards for employer liability in both supervisor and coworker sexual harassment cases in Faragher v. Boca Raton and Burlington Industries, Inc., 524 U.S. 775 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). In a coworker harassment case, the employer is liable if it knew or should have known of the harassment and failed to take proper and immediate remedial action. See 29 C.F.R. § 1604.11(d). In a supervisor harassment case, the employer is strictly liable if the employee suffered a tangible negative employment action, including but not limited to demotion, reassignment, or termination. But if supervisory harassment does not result in a tangible employment action, the Faragher-Ellerth defense provides employers a shield from liability if the employee unreasonably failed to take advantage of the employer's preventative and corrective opportunities even though the employer

exercised reasonable care to prevent and promptly correct the behavior. Burlington Indus., 524 U.S. at 765; Faragher, 524 U.S. at 807–08. Employers, therefore, have "strong inducement to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability." Crawford v. Metro. Gov't of Nashville & Davidson Cnty. Tenn., 555 U.S. 271, 278–79 (2009) (noting "studies demonstrating that Ellerth and Faragher have prompted many employers to adopt or strengthen procedures for investigating, preventing, and correcting discriminatory conduct"). Employees likewise have strong inducement under Title VII to report harassment in the hope that reporting will both lead the employer to remedy the harassment and require no legal action; and in recognition of the possibility that if they do not report, the Farragher-Ellerth defense may block their claim.

In other words: a failure by the employee to report harassment, and a failure by the employer to prevent, uncover, and redress harassment, is a no-win situation for both sides. If the employee fails to provide the employer with notice of the harassment, then it is unlikely the employee will prevail on her Title VII claim. Similarly, if the employer knows or should know of the harassment and fails to take action, then the employer has a greater chance of being found liable and being assessed damages, including punitive damages. Thomas v. Alabama Home Const., 271 F.

App'x 865, 869 (11th Cir. 2008)(affirming award of punitive damages where employees complained of harassment, but employer took no action and had no policies or procedures in place for employees to complain).

Title VII also obligates employers to protect employees from retaliation for participating in harassment investigations. See 42 U.S.C.A. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate" against an employee "because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation . . . under this subchapter."). This includes an obligation to protect employees from retaliatory co-worker harassment. See Noviello v. Boston, 398 F.3d 76, 89 (1st Cir. 2005) (holding "a hostile work environment, tolerated by the employer, is cognizable as a retaliatory adverse employment action for purposes of 42 U.S.C. § 2000e-3(a).").

The mere fact that statements made during or in furtherance of an investigation may be false, malicious, or even defamatory, has been deemed by courts to be insufficient to strip the speaker of protection from retaliation under Title VII. See Johnson v. Univ. of Cincinnati, 215 F.3d 561, 582 (6th Cir. 2000) (stating that under the participation clause, protection "is not lost if the employee is wrong on the merits of the charge, nor is

protection lost if the contents of the charge are malicious and defamatory as well as wrong. Thus, once activity in question is found to be within the scope of the participation clause, the employee is generally protected from retaliation." (internal citations omitted)); Proulx v. Citibank, N.A., 659 F.Supp. 972, 977-78 (S.D.N.Y. 1987) (holding that "where an employee files with an appropriate agency a Title VII discrimination claim which, albeit false and malicious, facially falls within the statute, the employer is forbidden by section 704(a) from unilaterally discharging the employee because of the filing or prosecution of the claim.").

These statements, defamatory or not, are clearly protected conduct. Thus, if Dr. Sabatini were still employed at Whitehead, Dr. Knouse would be protected under Title VII's anti-retaliation provision even if the statements she made in connection with the investigation were false and defamatory. Whitehead would also be obliged to ensure that Dr. Sabatini did not harass or otherwise retaliate against Dr. Knouse for her participation in its investigation. This protection is fundamental to the intended functioning of the anti-discrimination and harassment laws. See Noviello, 398 F.3d at 90 (holding that "provid[ing] a remedy for retaliatory harassment that expresses itself in the form of a hostile work environment . . . furthers the goal of ensuring access to the statute's remedial mechanisms.").

Because notice and action are paramount to the scheme of Title VII, it is imperative that the Court be particularly cautious about acting in a manner that could upend the purposes Congress intended. To achieve the purposes of Title VII--equality in employment--employees need to feel safe to notify employers about sexual harassment through the proper channels and employers need to feel empowered to act. Allowing retaliatory defamation cases to be weaponized against victims and other reporters will actively discourage the reporters from providing notice, thereby frustrating and diminishing the purposes and force of Title VII. Faragher, 524 U.S. at 806. If an employee reporting sex discrimination or participating in a sex discrimination investigation can be penalized with lawsuits like Dr. Sabatini's, prudent employees might reasonably choose not to report or decline to participate in investigations. Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 555 U.S. 271, 129 S. Ct. 846, 848-49, 172 L. Ed. 2d 650 (2009).

ii. Massachusetts employment discrimination law

Massachusetts General Law 151B, prohibiting sex discrimination in employment, has similar requirements to Title VII with respect to coworker-on-coworker harassment. See Noviello, 398 F.3d at 95 ("When coworkers, rather than supervisors, are responsible for the creation and perpetuation of a hostile work environment, Title VII and chapter 151B seem essentially

coterminous as they relate to employer liability."). Specifically, under chapter 151B, an employer is obligated to investigate a claim of sexual harassment once it is put on notice; and it will be liable for coworker harassment if it knew or should have known about the harassment, yet failed to halt it. See Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290, 300 (2016) ("[I]f an employee complains to the officials identified in the employer's sex-based harassment policy, the employer would be put on sufficient notice to trigger an obligation to investigate and take remedial action if the complaint proves to be well founded.") (citation omitted).[6]

Chapter 151B also forbids retaliation: it prohibits "any person" or employer from discriminating against "any person because he has opposed any practices forbidden under this chapter" or from coercing, intimidating, threatening, or interfering "with another person in the exercise or enjoyment of any right granted or protected by" Chapter 151B or "for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by" it. G. L. c. 151B, § 4-4a.

This Court should, as with Title VII, avoid upending the Massachusetts legislature's scheme encouraging employees to report

[6] Chapter 151B does differ from Title VII with respect to supervisory harassment, as it provides for strict liability without a defense like Farragher-Ellerth. College Town Division of Interco, Inc. v. MCAD, 400 Mass. 156, 167 (1987).

harassment; incentivizing employers to uncover, investigate, and remediate it; and protecting those who report it from coercion, threats, intimidation, and interference.

iii. Title IX

Finally, Title IX of the Education Amendments of 1972 similarly seeks to achieve equity in the educational environment. Specifically, Title IX mandates that "no person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681(a); see also Wills v. Brown Univ., 184 F.3d 20, 35 (1st Cir. 1999). Under Title IX, educational institutions have obligations to protect all students, faculty, and staff from sex discrimination. This includes taking prompt steps to investigate and address all reports of sexual harassment and assault; failing to do so could result in liability for damages. See Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 654 (1999) (explaining that an educational institution with actual notice of severe and pervasive student-on-student sexual harassment is liable if it responds with deliberate indifference); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (explaining the same for employee-on-student sexual harassment). The requirement was also reaffirmed by the Massachusetts General Laws. See G. L. II c. 6, § 168E(j) ("An institution shall notify its students and

employees of the institution's obligations under state and federal law to: (i) investigate or address the alleged sexual misconduct, including when the alleged act was reported anonymously . . . .").

If a student experiences harassment, it is therefore important to report it--both to give the school an opportunity to redress it, and because if the school lacks actual notice, the student will be foreclosed from seeking relief in court. It is also critical to schools that they be allowed to investigate allegations so as not to be found liable under Title IX. This Court should, as with the employment discrimination laws described above, not undermine this statutory scheme that relies on reporting and investigation.

The U.S. Supreme Court has held that Title IX also prohibits retaliation against individuals who report sex discrimination. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005). The Title IX regulations add that it is illegal for any "[educational institution] or other person" to "intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX . . . or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part." 34 C.F.R. § 106.71. This Court should be careful to avoid allowing

defamation suits to chill victims in exactly the way that Title IX attempts to prevent.

As defamation lawsuits increasingly become a tool of choice for named harassers, the threat of being sued and having to pay to mount a legal defense could increasingly deter employees and students from reporting sexual harassment and institutions from conducting genuine investigations. The result will hollow out the protections of both federal and Massachusetts anti-discrimination laws. This Court should, therefore, recognize that internal investigations conducted in accordance with federal and state anti-discrimination laws are integral to implementing these statutory schemes. In fact, as with Title VII claims subject to possible Faragher-Ellerth defenses, reporting can be a necessary precondition for--and an inextricable part of--lawsuits enforcing those protections.

c. Investigations and statements made in their course are--and need to be--protected under the Anti-SLAPP statute

Massachusetts' anti-SLAPP law, G. L. c. 231, § 59H, is--and should be--an effective antidote to lawsuits aimed at chilling reporting and investigation of illegal harassment. This law protects, among other things, "any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding" and "any statement reasonably likely to encourage consideration or review of an issue

by a . . . judicial body or any other governmental proceeding." Id. Internal reports fit into the plain language of "any statement reasonably likely to encourage consideration or review of an issue by a . . . judicial body or any other governmental proceeding." Id. Indeed, they are not just likely to encourage judicial review of illegal harassment. In many cases, as described supra, they are required. Internal reports can be necessary for a plaintiff to prevail in a lawsuit enforcing anti-discrimination law. They are, therefore, part and parcel of the petition to the government, and are protected under the anti-SLAPP statute.

Dr. Knouse's statements are petitioning activity protected by the anti-SLAPP statute, which "define[s] petitioning expansively." Bristol Asphalt, Co. v. Rochester Bituminous Prod., Inc., No. SJC-13460, 2024 WL 849711, at *7 (Mass. Feb. 29, 2024); see also N. Am. Expositions Co. Ltd. P'ship. v. Corcoran, 452 Mass. 852, 861 (2009) "Consistent with the expressed legislative intent, petitioning has been consistently defined to encompass a very broad range of activities in the context of the anti-SLAPP statute.". "Petitioning includes all statements made to influence, inform, or at the very least, reach governmental bodies--either directly or indirectly." Id. Statements can be petitions where they are not made directly to a government decisionmaker but are likely to ultimately reach the government--exactly as happened here. Berk v. Kronlund, 102 Mass. App. Ct. 710, 715, 212 N.E.3d 833, 838,

review denied, 492 Mass. 1105, 220 N.E.3d 89 (2023) ("Statements made outside any formal governmental proceedings have often been considered petitioning activity.") (citation omitted). Here, Dr. Knouse's complaint to the Whitehead Institute of sex-based harassment is appropriately considered petitioning activity because, as explained supra, an employee or student is typically foreclosed from suing based on unlawful harassment if they did not report the harassment--meaning that the internal report can be a necessary antecedent to the petitioning activity of the lawsuit. "In order to determine if statements are petitioning, we consider them in the over-all context in which they were made." Id. (citing Wynne v. Creigle, 63 Mass. App. Ct. 246, 253–254, 825 N.E.2d 559 (2005) (finding statements to press "essentially mirror images" of statements made at disciplinary hearing during investigation of plaintiff and therefore were petitioning activity)). Cutting off the internal report can cut off the petition entirely.

The mere fact that Dr. Knouse did not immediately file a charge of discrimination does not sever the connection to petitioning, because the act of notifying Whitehead laid the necessary foundation to later petition the government. Dr. Knouse acted consistently with what the law expects--and may even require--someone in her position to do. Her conduct should be considered protected activity under the anti-SLAPP law. G. L. c. 231, § 59H.

d. Public policy demands this suit fail

If Dr. Sabatini succeeds and is able to pursue his defamation claim based on Dr. Knouse's internal report and the Whitehead Institute's internal investigation, it will pave the way for other reported harassers to silence their victims and will dangerously erode both federal and state anti-discrimination laws. With the consequences of a potentially successful defamation suit looming, victims will underreport. And if bad actors face no consequences and a low probability of punishment, they may respond by pushing the boundaries of their misconduct further, creating more victims. Why is Workplace Sexual Harassment Underreported?. Employers, too, will likely less vigorously investigate and address harassment. Commentators have already noted that the threat of increasing defamation liability may cause employers to change their business practices. If potential liability causes employers to restrict the flow of information necessary for complete investigation of a harassment complaint, efforts at private compliance will be hampered. Id.

Defamation law has long recognized the need to protect the free flow of information to advance important societal interests. Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources & Other Unpublished Information, 395 Mass. 164, 172 (1985) (recognizing the need to balance "the public interest in every person's evidence and the public interest in

protecting the free flow of information"). That applies with particular force to society's interest in ending sexual harassment. The U.S. Supreme Court has recognized the importance to Title VII enforcement of encouraging the flow of information, noting that "[i]f it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others." Crawford, 555 U.S. 271, 273 (2009). Similarly, it has recognized that "Title IX's enforcement scheme also depends on individual reporting because individuals . . . may not bring suit" unless the school has "'actual notice' of the discrimination." Jackson, 544 U.S. at 181. Therefore, "[i]f recipients were able to avoid such notice by retaliating against all those who dare complain, the statute's enforcement scheme would be subverted." Id.

Defamation suits should not be allowed to defeat these critical anti-discrimination laws. In fact, the EEOC recognized as early as 1974 that the threat of defamation suits is exactly the kind of retaliation that discourages complaints and undermines Title VII. Kennedy, R., Insulating Sexual Harassment Grievance Procedures from the Chilling Effects of Defamation Litigation, 69 Wash. L. Rev. 235, 242 (1994) (citing EEOC Decision No. 74-77, 1974 WL 3847 (E.E.O.C.) (Jan. 18, 1974)). A free flow of

information is--as recognized by our highest court--essential to the functioning of civil rights laws. It is also critical to protecting victims and breaking the cycle of abuse.

4. Conclusion

For all the foregoing reasons, the undersigned respectfully request this Court reverse the district court's decision.

CERTIFICATE OF SERVICE

I certify that on March 26, 2024, I served this Amicus Brief in Knouse v. Sabatini on behalf of the Amici Curiae, via electronic mail on the following parties:

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CERTIFICATE OF COMPLIANCE WITH RULES 16(K), 17(c), 20 and 21

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19. Southwest Women's Law Center
20. The American Society for Cell Biology
21. The Women's Law Center of Maryland
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