

The Women's Legal Defense and Education Fund

December 1, 2023

Memorandum in Support of S4493A (Gounardes) / A2342 (Simon)

Legal Momentum, the Women's Legal Defense and Education Fund is the nation's first and longest serving advocacy organization dedicated to advancing women's rights and gender equality. We have done this for more than 50 years through strategic litigation, innovative public policy and education and training initiatives. Employment discrimination, issues impacting economic equality, and gender-based violence have been areas of particular focus throughout our five decades of work. It is based on this expertise that we submit this memorandum in support of S4493A (Gounardes) / A2342 (Simon), a bill providing that certain allegations made by employees involving employment discrimination shall be protected under New York's anti-SLAPP law.

Sex discrimination takes many forms. There is a persistent wage gap of which, after accounting for factors such as experience, industry, and occupation, 38% can be attributed to discrimination.¹ A 2015 study concluded that women can be three times more likely than men to be passed over for an assignment, promotion, or wage increase as a result of their gender.² Repeated each year thereafter, the 2022 results of this study reveal a continued trend of women being promoted to manager at far lower rates than men, with women of color faring worse.³ And sexual harassment in the workplace remains pervasive.⁴ Yet, rates of retaliation are high, thus, despite the prevalence of gender-based employment discrimination, approximately 70% of workers never even complain internally.⁵ To effectively address workplace discrimination, it is essential that workers can access and assert existing legal protections free from retaliatory conduct.

In recent years legislatures have taken action to enact strong protections for women workers and survivors of gender-based violence in the workplace; in particular, to ensure there are safe and reliable mechanisms to report workplace discrimination and harassment. New York has been a leader on such issues. Yet as avenues for women to report discrimination and harassment in the workplace have strengthened, we have witnessed the rapidly rising trend of survivors of sexual harassment, sexual assault and gender discrimination being sued for

¹ Francine D. Blau & Lawrence M. Khan, *The Gender Wage Gap: Extent, Trends, and Explanations* 73 (Inst. for the Study of Lab., Working Paper No. 9656, 2016), <https://docs.iza.org/dp9656.pdf>.

² Lean In & McKinsey & Co., *Women in the Workplace 2015*, at 13 (2015), <https://womenintheworkplace.com/2015>.

³ Lean In & McKinsey & Co., *Women in the Workplace 2022*, at 8–9 (2022), <https://womenintheworkplace.com>.

⁴ Thirty-eight percent of women report having been subjected to sexual harassment at work. Holly Kearn, et al., UC San Diego Ctr. on Gender Equity & Health, et al., *Measuring #MeToo: A National Study on Sexual Harassment and Assault* 10 (2019), <https://www.stopstreetharassment.org/wp-content/uploads/2012/08/2019-MeToo-National-Sexual-Harassment-and-Assault-Report.pdf>. Sixty percent of women report having been subjected to unwanted sexual attention, sexual coercion, sexually crude conduct, or sexist comments in the workplace. U.S. Equal Emp. Opportunity Comm'n, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum and Victoria A. Lipnic* 9–10 (2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace-report-co-chairs-chai-r-feldblum-victoria-lipnic> [hereinafter Feldblum & Lipnic].

⁵ Feldblum & Lipnic, *supra* note 4, at 16.

defamation.⁶ Legal Momentum has represented survivors defending against such claims and witnessed their acute retraumatization and, even with pro bono legal representation, serious financial hardship as these cases drag out over many months and years. As the cases linger, the mere existence of a defamation claim against the survivor continues to undermine their credibility as they attempt to seek accountability for the abuse itself. These retaliatory lawsuits aim to intimidate and further harass victims, weaponize our courts, and undermine the protections the legislature put in place to eliminate discrimination. Even in cases where the claimant in a defamation suit is likely to be unsuccessful on the merits, they are largely successful in imposing prohibitive costs on victims,⁷ exposing their private information to court and public scrutiny,⁸ and prolonging their trauma.⁹ Defamation suits of this nature have a chilling effect that serve to significantly undermine our anti-discrimination laws.

The New York legislature has already acknowledged this alarming trend and taken steps to curb it. For instance, during the process to amend the New York’s anti-SLAPP statute in 2020, Senate Bill sponsor Senator Brad Hoylman acknowledged that “survivors of sexual abuse [are] being dragged through the courts on retaliatory legal challenges solely intended to silence them.”¹⁰

S4493A would help to address this problem by explicitly applying New York’s anti-SLAPP law¹¹ to defamation claims based on allegations of unlawful employment discrimination under federal, state, or local law. Although New York’s anti-SLAPP likely already protects many

⁶ Legal Momentum, *A Guide to Defamation for Survivors of Sexual Assault or Harassment* (2023), <https://www.legalmomentum.org/library/guide-defamation-survivors-sexual-assault-or-harassment>; Bryce 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/>; Madison Pauly, *She Said, He Sued: How Libel Law is Being Turned Against MeToo Accusers*, *Mother Jones* (Mar./Apr. 2020), <https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault/>.

⁷ See Alyssa R. Leader, *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, 448–49 (2019) (describing studies on costs of defending civil litigation and citing one survivor’s experience of a defamation lawsuit after a university quasi-judicial process found that abuser had committed rape that cost the survivor “twice her monthly income, reaching \$20,000 even in the early stages of the lawsuit” to defend).

⁸ Know Your Title IX, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* 21 (2021), <https://knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf> (describing how even though the defamation suit against a survivor was dismissed, the “complaint is online and appears in Google searches” about her); Kylie 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 an assailant used a defamation lawsuit to obtain a survivor’s “medical records, school records, [and] even her sexual history”).

⁹ Covert, *supra* note 6 (describing how a defamation lawsuit meant a survivor “had to keep reliving what had happened to her, recounting the story over and over again to lawyers”).

¹⁰ Press Release, New York State Legislature, Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech (July 22, 2020), <https://nyassembly.gov/Press/files/20200722a.php>; see also Senator Brad Hoylman (@bradhoylman), X (July 22, 2020), <https://twitter.com/bradhoylman/status/1286002032701210626?s=20> (“This bill is going to protect survivors.”); Senator Brad Hoylman (@bradhoylman), X (July 22, 2020), <https://twitter.com/bradhoylman/status/1286032867152334851?s=20> (“Survivors in New York must be able to speak without threat of impoverishment and intimidation.”).

¹¹ N.Y. Civ. Rights Law § 70-a; N.Y. Civ. Rights Law § 76-a.

victims of employment discrimination who are sued for speaking out about their experiences,¹² S4493A would make clear that this protection extends to all allegations of unlawful employment discrimination, wherever made. In doing so, it would make it easier for survivors to dismiss retaliatory lawsuits against them. Importantly, survivors would also be able to recover costs, attorneys' fees, and in some instances compensatory and punitive damages, allowing survivors to obtain counsel on a contingency basis.¹³ Otherwise, if the plaintiff could afford a lawyer but the survivor could not, this would be a recipe for silence. S4493A would thus provide important protection by giving survivors a tool to defeat retaliatory litigation.

While we express broad support for S4493A, the bill could be strengthened by clarifying that it applies to pending litigation. As written, S4493A states that the act “shall take effect immediately and shall apply to all actions commenced on and after such effective date.” However, Legal Momentum recommends revising this provision to read “shall take effect immediately and shall apply to all actions commenced **or continued** on or after such effective date, **retroactive to the beginning of such actions.**” The New York Court of Appeals recently noted that when a statute applies to actions “commenced on or after the statute’s effective date,” it does not apply to pending litigation.¹⁴ Therefore, the bill as currently drafted risks excluding workers presently facing retaliatory defamation lawsuits from the protection of New York’s anti-SLAPP law.¹⁵

This suggestion is informed by the New York Court of Appeals recent ruling on the retroactive application of the 2020 amendments to New York’s anti-SLAPP law in *Gottwald v. Sebert*.¹⁶ There, the court relied on the language “commenced or continued” in New York anti-SLAPP law, Civil Rights Law § 70-a, in holding that the law applied to the continuation of the

¹² The law protects “any communication in a place open to the public or a public forum in connection with an *issue of public interest*,” and “any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with *an issue of public interest*,” courts must construe the term “public interest” broadly, as “any subject other than a purely private matter.” N.Y. Civ. Rights Law § 76-a(1) (emphasis added). When a survivor speaks out about employment discrimination and workplace sexual harassment, this speech concerns an issue of public interest. *See* *Coleman v. Grand*, 523 F. Supp. 3d 244, 259 (E.D.N.Y. 2021) (finding the amended anti-SLAPP law applied to a libel claim based on allegations of “sexual impropriety and power dynamics in the music industry” during the #MeToo movement); *Dossett v. Ho-Chunk*, 472 F. Supp. 3d 900, 908 (D. Ore. 2020) (holding that reporting about #MeToo allegations against the general counsel of “the oldest and largest organization of American Indian and Alaskan Native tribal governments” was a “matter of public interest” given the employer and “nature of the allegations published during a national conversation about sexual harassment in the workplace”); *Brenner v. Hill*, 2017 Cal. App. Unpub. LEXIS 7980, at *14 (Cal. Ct. App. Nov. 21, 2017) (holding that publications about sexual harassment in the workplace in the modeling industry concerned “a matter of public interest”). Additionally, statements by the bill sponsor, Senator Hoylman, indicate a legislative intent to protect survivors of sexual assault or harassment—including many victims of employment discrimination—under the 2020 anti-SLAPP amendments. *See* sources cited *supra* note 10 and accompanying text.

¹³ *See* N.Y. Civ. Rights Law § 70-a(1).

¹⁴ *Gottwald v. Sebert*, 2023 N.Y. Lexis 913, at *20 (June 13, 2023).

¹⁵ Because anti-SLAPP protections likely already apply to some workers who have made allegations of employment discrimination, *see supra* note 12 and accompanying text, and because the portion of the anti-SLAPP law providing a remedy to defendants—New York Civil Rights Law § 70-a—applies to litigation “commenced or continued,” this language—at best—risks creating ambiguity as to whether the law applies to pending cases.

¹⁶ *Gottwald*, 2023 N.Y. Lexis 913, at *18-19.

action beyond the effective date of the amendments.¹⁷ However, the amendments did not apply retroactively to the commencement of litigation.¹⁸

Therefore, in order to ensure that S4493A applies retroactively to pending litigation—dating not just to the effective date of this act, but to the beginning of the litigation—Legal Momentum recommends this change. Workers currently facing retaliatory defamation lawsuits deserve to be protected by New York’s anti-SLAPP law.

We strongly support S4493A and believe that in an environment where retaliation is already widespread, this type of legislation serves an essential role in ensuring that victims of workplace discrimination are not silenced when they seek to assert their rights under New York State’s Human Rights Law.

¹⁷ *Id.*

¹⁸ *Id.* at *19–20.