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Employee's Report to Human Resources is Protected by SLAPP Statute

Always remember when reviewing a complaint to see if it is a potential SLAPP that the anti-SLAPP statute is not only about speech, it includes the "freedom of petition for the right of grievances", or simply the right of redress. Then, whenever you see that the defendant has complained to someone -- anyone -- consider whether that is a natural step one would pursue in seeking redress.

We were the first firm (that we know of anyway) to successfully pursue an anti-SLAPP motion based on a report by a customer to his bank. Our client's partner had opened a credit card in the name of the company, and when our client found out, he went to the bank and closed the account, informing the bank personnel that his partner had committed fraud. The partner sued for defamation, and we successfully brought an anti-SLAPP motion on the grounds that reporting the fraud to the bank was the first logical step to deal with the fraud. Stated another way, all would recognize that if our client had gone to the police and reported the fraud, that would be protected, but who would go directly to the police without first running to the bank to get the card cancelled in order to stop any fraudulent charges? The court agreed with my argument that the report to the bank is part of the same right of redress.

And so it was found in the just reported case of *Aber v. Comstock*. There, an employee brought a claim against her employer and two of its employees for sexual assault. Comstock, one of the employees who Aber was suing, filed a cross-complaint against Aber for defamation and intentional infliction of emotional distress.

Comstock's case was likely doomed from the start, because as I have already explained [here](#), suing someone for suing will almost always be a SLAPP, and he even alleged that part of the defamation was the report to the police, which is clearly protected. Specifically, Comstock alleged that Aber "orally published false statements about COMSTOCK to third parties, including but not limited to, friends, employees of Wolters Kluwer, health care practitioners, and the police." The court reviewed the law that applied to each of these statements, and the most interesting was the analysis of the statement Aber made to her employer's HR representative.

Were Aber's statements to the HR department protected under the SLAPP statute?

An earlier case (*Olaes v. National Mutual Ins. Co.*) had found that statements to a company's HR department were not part of "an official proceeding authorized by law" and therefore did not fall under the SLAPP statute. Here, however, the court noted that a U.S. Supreme Court case (*Faragher v. City of Boca Raton*) had found that the failure of an employee to take advantage of

corrective opportunities afforded by the employer could be used as an affirmative defense against a claim by the employee. So, put them together. Aber did not have to report the alleged assault to HR, but had she failed to do so, then her subsequent action for the assault could have been defeated. Bingo. That makes the report to HR a necessary part of the right of redress, and pulls it into the anti-SLAPP statute.

The case was properly decided, but is a little concerning given the course the court followed. The justices shoe-horned the report to HR into the SLAPP statute by finding it was necessary in order to preserve the ultimate legal action. As we demonstrated with [our credit card case](#), the standard need not be so stringent, and instead the determining factor should be whether the conduct was a natural part of the process.

[Go here to see the complete decision in Lisa Aber v. Michael Comstock.](#)