How Research Misconduct Proceedings Can Invoke Defamation Claims

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Research misconduct is a high-stakes concern for all connected to the underlying research. For research institutions committed to detecting and preventing research-based fraud, the discovery of manipulated results – putative research misconduct – initiates an unstoppable wave of decisions and potentially career-ending investigations yielding immortal results shared with co-authors, funders, collaborators, and no doubt the scientific community at large. The stakes are equally high for individual authors/investigators who build their academic careers on the principles of ethical research and for whom even a single intimation of fabricated data may irreparably tarnish their reputation, impact their good standing and employment, and jeopardize future opportunities to continue publishing and conducting research.

While investigators and institutions are aligned in the need for a comprehensive (and confidential) process that ferrets out actual research misconduct from unsubstantiated allegations and unintentional errors, their interests more often than not diverge rather than stay in sync. That is because the harsh reality is that institutions are rarely permitted to keep their probes confidential until an end result is reached. Whether it is the need to inform federal oversight agencies like the Office of Research Integrity, or the public more generally, that the institution is aware and responding to publicly-made concerns (i.e. PubPeer) by one of its faculty – avoiding the appearance of "doing nothing" – or the legal obligation to report an internal decision to move from an inquiry to a full investigation, or alert other third-parties of potential threats to health, safety or welfare of the public, the harsh reality is that individuals charged with misconduct are often guilty until proven innocent in the eyes of the research community. This is particularly problematic when one considers that a finding of research misconduct may not be made at the end.

AVENUES OF RECOURSE IN RESEARCH MISCONDUCT

How do we avoid irreversible damage to one's reputation and career in the face of concerns about research integrity?

For the accused, the road to dismantling a formal research misconduct investigation is lengthy, and the immunities that protect institutions carrying out the reviews are strong. For one, final findings of research misconduct typically take years to issue and are subject to an institutional appeal. Thereafter, institutions carrying out the proceeding enjoy qualified protections for their good faith efforts to address misconduct allegations and remit the necessary reports to third parties, presenting an uphill legal battle for disgruntled respondents who wish to challenge the findings made against them.

Perhaps more importantly, accused investigators rarely wish to sit idly and wait for the outcome of a lengthy investigation, informed by the reality that in a large percentage of cases, some finding of misconduct is made at the end of the multi-month or multi-year process. In light of these harsh realities, a second type of legal challenge has become popular among accused investigators wishing to clear their name and rehabilitate damaging characterizations of their research and honesty – a legal claim of defamation. Indeed, a growing number of researchers have turned to the legal doctrine of defamation to hold accountable those who have unfairly spoken out against them in connection with allegations of research misconduct, whether it be a complainant, an institution, or a colleague.

A prime example is an ongoing lawsuit filed in federal court in Massachusetts in August 2023 in which a tenured professor of business administration at Harvard Business School sued Harvard University and three prominent bloggers behind the blog Data Colada – Uri Simonsohn, Leif Nelson, and Joseph Simmons – for defamation. The plaintiff, Francesca Gino, alleged she was defamed by the bloggers' and the University's claims that she manipulated data (in a study about honesty, of all things) when the bloggers urged the University to investigate Gino's work, prompting a formal investigation by the University that resulted in Gino being put on administrative leave without pay. It also led the University to send retraction notices for the studies in question and the researchers to post about her allegedly manipulated data on their blog.

In her 12-count, 100-page complaint, Gino alleges, among other claims, that the University defamed her by sending retraction notices concerning her published study to her editors, co-authors, and collaborators. She claims the University sent these notices without a full and fair adjudication that she had, in fact, committed research misconduct given that the process and conclusions of its internal review were flawed and, therefore, the statements in the retraction notices were false. She claims the bloggers defamed her in a report they made to Harvard Business School in December 2021 raising claims that Gino had committed data fraud. She also claims they defamed her in a series of four blog posts published on their blog Data Colada in which

they discussed how Gino allegedly "faked data" in her published study. The defendants have filed motions to dismiss that are awaiting adjudication.

ELEMENTS OF DEFAMATION

With many following the Gino lawsuit, the possibility of using defamation to attach research misconduct proceedings stands to shake the process through which we oversee scholarly and scientific integrity.

While the First Amendment familiarly protects the right to make certain "free speech" statements, a well-known limitation on that right is the prohibition on defamatory speech. In the context of statements made about data integrity, a claim for defamation poses unique challenges.

To win a claim for defamation, the aggrieved researcher must establish certain basic elements. The same elements must be shown whether you are moving for written (libel) or spoken (slander) statements, both of which are included under the term "defamation."

- First, the statement must have been published. The "publication" requirement does not mean that it needs to have been printed in a newspaper, posted in a blog, or in a forum such as PubPeer, or, as in the case discussed above, on a scientific publication's website. Rather, only that it was made available to a wider audience than just the person bringing the lawsuit. An institution's direct communication to a scientific journal reporting findings of misconduct in a publication would likely meet the publication requirement.
- Second, the statement must identify the person being defamed, either directly by name or in a way that makes it clear who is being discussed (for instance, by job title at a specific organization).
- Third, the statement needs to have negatively impacted the person's reputation. Accusations of research improprieties, fraud, and dishonesty have a direct and devastating impact on an author.
- Fourth, and lastly, the statement must be false. Truth of a statement is an absolute defense to a defamation claim. And the law does not require absolute truth, only *substantial* truth. With an allegation of research misconduct, meeting this element requires showing the allegation made is incorrect.

An important exception to the above criteria is that statements of opinion are categorically not subject to challenges of defamation, only statements of "fact." In that vein, a 2020 Ohio federal court decision dismissed a defamation claim against a cancer researcher at Ohio State University because the judge found the statements that the researcher was "knowingly engaging in scientific misconduct and fraud" was a protected opinion.

While the specter of defending a costly defamation lawsuit may be daunting to a researcher speaking out on valid scientific criticism, the law does provide some relief in the form of anti-SLAPP laws. SLAPP stands for "strategic lawsuit against public participation," and states that have enacted anti-SLAPP laws provide a special mechanism to seek expedited dismissal of a lawsuit when it concerns an attack on a protected right. Today, about 33 states and the District of Columbia have enacted anti-SLAPP laws, but those laws vary by how much protection they provide. Massachusetts, where the Gino lawsuit was filed, has a relatively narrow anti-SLAPP law that only allows for the expedited dismissal procedure when a lawsuit involves a defendant's exercise of his or her right to petition the government. Likely because it would not apply, none of the defendants in the Gino case moved to dismiss under the anti-SLAPP law.

DEFAMATION CLAIMS AGAINST A PUBLIC FIGURE

A defamation claim against a public figure, which includes traditionally public figures (*i.e.*, politicians or celebrities) as well as an individual who has gained prominence in a particular field (*i.e.*, a prolific author or a Nobel Prize nominee), must also prove that the allegedly defamatory statement was made with "actual malice." Actual malice is defined as knowledge by the person making the statement that, at the time made, the statement was false or with reckless disregard as to whether it was true or false. This is a high burden to meet in a case in which an allegation or subsequent communication relating to research misconduct claim is the subject of this analysis. It is rarely the case that a third-party notice or retraction notice made by the investigating institution in connection with a research misconduct proceeding is so untethered to facts as to be known to be false. Similarly, complainants reporting concerns of data manipulation often base their initial accusations on AI-driven reports of similarity among figures, which, even if disproven, purport to prevent this last element from being met in cases where the author is deemed a public figure.

A review of these basic elements underscores the inherent tensions in applying defamation law to a research misconduct proceeding. Particularly with allegations of research misconduct, proving the element of "falsity" would likely prove the most challenging. In the context of research misconduct claims, a plaintiff is effectively required to prove the ultimate issue: whether his or her research is valid and accurate, as opposed to manipulated or the byproduct of fraud. Thus, to prove the falsity of the negative comment involves a lengthy and costly endeavor and often further forensic and scientific analysis, all to invalidate the original concern. Proving actual malice poses an increased challenge, as many institutional policies require that, as a threshold matter, allegations of research misconduct be brought "in good faith" before the institution will initiate its own process.

Despite the legal obstacles to making a successful defamation claim, investigators subject to research misconduct allegations are still continuing to bring defamation suits against their individuals and institutions involved in adjudicating adverse findings, forcing defendants to re-litigate the original question of whether the data under scrutiny were fabricated, falsified, and/or plagiarized.

What does this mean for institutions and journals balancing legal risks moving forward? We encourage them to stay the course. Institutions navigating allegations of research misconduct must continue to meet the full plethora of disclosure and reporting obligations set by institutional policy and funding agencies. However, they should remain vigilant about honoring strict confidentiality requirements and be cognizant of both the manner and extent to which information is externally reported. Even where defamation claims are not likely to succeed in litigation, lawsuits grounded in defamation may nevertheless have a chilling effect on complainants and those raising and investigating good faith concerns, and at the very least, bring unwanted scrutiny to the research misconduct process, jeopardize the outcomes, and require a substantial investment of time and resources to combat.

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