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VIA E-MAIL

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Special Deputies to the
First Deputy Attorney General
Office of the Attorney General
The Capitol
Albany, NY 112224-0341

Re: Response to Allegations of Retaliation by the Executive Chamber of the State of New York Against Lindsey Boylan

Dear Counsel:

Now that the testimony from all the witnesses has concluded and you are presumably in the process of drafting your report, we write to address an issue that you have made clear in your communications with us — that is, that one focus of your investigation is the response by the Executive Chamber (the "Chamber") to a series of public statements that Lindsey Boylan posted on Twitter in December 2020, shortly after announcing her candidacy for public office. Following those tweets, which included several false or misleading statements of purported fact, the Chamber released two documents related to Ms. Boylan's employment with the Chamber. In addition, certain senior Chamber employees and others drafted, discussed, and ultimately decided not to publish a letter (the "Unpublished Letter") disputing Ms. Boylan's allegations and expressing support for the Governor and his staff.

We write because we are surprised that you would even consider concluding that the Chamber's conduct constituted unlawful retaliation under federal or state law. As you know, Ms. Boylan's claims of harassment came at the end of a week-long series of tweets in December 2020 shortly after she had launched her campaign for Manhattan Borough President. We are aware of no evidence that she previously had complained formally or informally about such harassment, either during her employment in state government or in the two years that followed her resignation from the Chamber after numerous employees had lodged credible allegations of misconduct against her. Ms. Boylan's messages were particularly jolting because they followed previous tweets in which she had praised the Governor and his leadership, and her tone changed only after she appeared to believe that the Governor was not supporting her political campaigns.

Significantly, Ms. Boylan's December 2020 tweets contained serious falsehoods and misrepresentations. She suggested that her job performance had been "very good"; she implied that she had resigned from the Chamber as a result of her being harassed; she suggested that she had been asked and had refused to sign an exit agreement; and she said that she had "tried to quit three times before it stuck," implying that the Chamber somehow had prevented her from leaving sooner. In fact, Ms. Boylan resigned in September 2018 in the face of serial complaints about her own abusive workplace behavior. And when she asked for her job back a few days later, the Chamber declined her request for reinstatement. Nor are we aware of any support for Ms. Boylan's claim that anyone discussed or asked her to sign any agreement at the time or after she left.

Given this background, we believe that any conclusion of unlawful retaliation would be based on a misunderstanding of the facts and a misapplication of the law. We write to clarify both and to make plain that the Chamber did not unlawfully retaliate against Ms. Boylan.

I. Factual Background[1]

From March 2015 through April 2018, Ms. Boylan served as Chief of Staff and Executive Vice President at the Empire State Development Corporation ("ESD"). In April 2018, she was appointed as Deputy Secretary for Economic Development and Special Advisor to the Governor. She remained in that position until her resignation in September 2018.

In January 2018, while she was still the ESD Chief of Staff, Counsel to the Governor Alphonso David interviewed her regarding a variety of inter-office interactions. As part of Ms. Boylan's interview, Mr. David asked whether she believed that she had experienced any discrimination, sexual harassment, or retaliation. Ms. Boylan denied that she had been the subject of any such treatment. She also denied having felt any pressure or duress in this regard.

Nevertheless, Mr. David informed Ms. Boylan of the Executive Chamber's anti-harassment, discrimination, and retaliation policy, including the provision that she should report any such claims to her supervisor, the agency's EEO officer, or the agency's human

[1] Given your admonitions that we not speak to other lawyers about their clients' testimony, we largely gathered the facts in this letter early in our representation. Needless to say, to the extent the facts in this letter are inconsistent with any that you have learned through the course of your investigation, please let us know, and we would be happy to engage in further discussion.

resources department, or externally to the New York State Division of Human Rights or the EEOC. Mr. David also explained that Ms. Boylan could report any such issue to the ESD's general counsel or to Mr. David himself. Ms. Boylan responded that she understood her rights. Mr. David documented the substance of that conversation in a January 16, 2018, memorandum.

In September 2018, three ESD colleagues made separate complaints regarding Ms. Boylan's behavior in the workplace. Each described that Ms. Boylan had been verbally abusive and treated administrative staff as if they were children. They also explained that her behavior had caused them significant stress and anxiety — so much so that one had needed a medical leave, and another had indicated that she might resign rather than continue working with Ms. Boylan. Those allegations were summarized in a September 20, 2018, memorandum to Mr. David from Camille Varlack, Deputy Director of State Operations.

On September 26, 2018, Mr. David and Julia Pinover Kupiec (Assistant Counsel to the Governor and the Chamber's Ethics Officer) spoke with Ms. Boylan regarding her workplace behavior. In that conversation, Mr. David covered not only Ms. Boylan's behavior toward the three complainants, but also her improper solicitation of an administrative assistant's resignation, as well as her failure to comply with the Chamber's protocols regarding the timely submission of expenses, timesheets, training records, and employee reviews. During the meeting, Ms. Boylan did not raise any allegations of harassment. Instead, she reacted by immediately tendering her resignation, even though Mr. David did not request it and it had not been part of the meeting's agenda. The same day, Ms. Kupiec memorialized these events in a memorandum.

Several hours after her meeting with Mr. David and Ms. Kupiec, Ms. Boylan sent an email to staff members announcing her departure from the Chamber. However, just four days later, on Sunday morning, September 30, 2018, Ms. Boylan called Mr. David and asked for her job back. In that call, she accepted some responsibility for the conduct Mr. David had raised during their meeting, but did not fully acknowledge her conduct. Mr. David advised Ms. Boylan that he would get back to her about her request to rescind her resignation. Mr. David then sent his notes of that conversation to Ms. Kupiec and Ms. Varlack.

Without waiting for his response, Ms. Boylan then tried to contact the Governor's assistant and asked to speak with the Governor to get her job back, but the Governor was advised not to respond. The Chamber ultimately concluded that, in light of her behavior, it would be inappropriate to have her return.

During the period after her departure, Ms. Boylan's public statements about the Governor were positive:

- In November 2018, for example, Ms. Boylan tweeted that Governor Cuomo "is New York's Best Choice for Governor 👏👏👍👍," and linked to his endorsement by the *New York Times*.

- Two months later, in January 2019, Ms. Boylan publicly posted a photo of Governor Cuomo holding her young daughter at an event.

Ms. Boylan seemed to take a more confrontational tone in connection with her April 2019 announcement that she would mount a primary challenge against incumbent Representative Jerry Nadler in New York's 10th Congressional District. For example, in a May 2019 tweet, Ms. Boylan responded to a *New York Post* article on sexual harassment: "As if we needed any more proof that politics is still very much in need of new voices seated at the table. This kind of mentality is exactly why people, even women who've had senior roles in politics and beyond like me, are still experiencing harassment." She provided no details and made no reference to the Governor or to the Chamber.

A few weeks later, Ms. Boylan tweeted again, but this time more pointedly referred to her time in the Chamber: "I was the only mother of young children on senior staff in my last job in politics. They didn't 'get it' even with all the 'right' policies. It was such a toxic and demoralizing experience. Now I run my own company full of, especially moms. #lindseyboylanforcongress #primarynadler." Again, however, her criticism of the Chamber included no implication of sexual harassment.

In March 2020, Ms. Boylan sent threatening text messages to two of her former Chamber colleagues after Governor Cuomo adjusted certain ballot-access petitioning deadlines as part of a series of emergency measures to fight the COVID-19 pandemic. Ms. Boylan apparently interpreted this change in state policy, which had been sought by the Legislature and state elections officials, as a personal attack on her candidacy for a congressional seat. Ms. Boylan texted Robert Mujica (New York State Budget Director): "Absolutely not helpful please relay that while we are ok, I see what the point is here and I will find ways to respond. [¶] Life is long. [¶] And so is my memory. [¶] And so are my resources." She separately texted Dani Lever (then the Governor's press secretary) a substantially similar message; this text included a picture of Ms. Boylan and her young daughter wearing face paint and the additional message to Ms. Lever that "[t]he future is coming after assholes."

Despite her threats, Ms. Boylan continued her public support for the Governor. For example, on March 20, 2020, Ms. Boylan approvingly tweeted about his leadership regarding the COVID-19 stay-at-home order: She quoted the Governor's declaration, "I accept full responsibility," and added her own supportive commentary: "This is what we need in leadership. Thankfully we have it … Leadership is not perfect. But it takes responsibility and accountability and forthright communication. All of the above are on short supply in our federal leadership. But I am seeing it with our Governor."

On June 10, 2020, Ms. Boylan tweeted for the first time that the Chamber had been a toxic workplace environment, a statement she reiterated in an article that came out a few weeks later. Bruce Hardy, *How to Run a Grassroots Campaign in a Pandemic*, THE NEW YORKER, (June 22, 2020), https://www.newyorker.com/magazine/2020/06/29/how-to-run-a-grassroots-campaign-in-a-pandemic Specifically, in response to a tweet by a member of the public about being "saved from so many toxic workplaces," Ms. Boylan tweeted: "I felt this way after working for Cuomo. It was the best blessing ever." Later that month, Ms. Boylan lost the 10th District's Democratic primary to Representative Nadler, and she posted no further tweets referring to the toxic workplace environment for several months.

On November 23, 2020, Ms. Boylan announced that she would be a candidate in the June 2021 Democratic primary for Manhattan Borough President. Less than two weeks later, on December 5, 2020, she tweeted the first in a series of statements reiterating her earlier characterizations of the Chamber as a toxic environment and expressing personal and professional frustrations with working in the Chamber. As in all of her previous public statements, however, she still did not mention or allude to sexual misconduct:

> "Most toxic team environment? Working for @NYGovCuomo" […] "Don't be surprised that it's the same small group of white people sitting alongside him at every presser. The same group that he has had by him the whole time, doing his dirty work. If you're not one of those handful, your life working for him is endlessly dispiriting." [¶] "That environment is beyond toxic. I'm still unwrapping it years later in therapy!" […].

Ms. Boylan's December 5 tweets also included two claims of purported fact: first, that "[she had] tried to quit three times before it stuck," and second, that "[she] did not sign whatever they told me to sign when I left."

Later that week, December 11, 2020, Ms. Boylan tweeted her own commentary on top of a news story that President-elect Biden was considering nominating Governor Cuomo for Attorney General. For the first time, her tweets labeled Governor Cuomo a

"sexual harasser": "@JoeBiden if you make this man Attorney General, some women like me will be bringing the receipts. We do not need a sexual harasser and abuser as 'the law,' of the land."

Two days later, on December 13, she claimed for the first time that the Governor had sexually harassed *her* specifically: "Yes, @NYGovCuomo sexually harassed me for years. Many saw it, and watched. I could never anticipate what to expect: would I be grilled on my work (which was very good) or harassed about my looks. Or would it be both in the same conversation. This was the way for years." Ms. Boylan also tweeted: "I know I am not the only woman." She did not limit her allegations to the Governor alone. On Twitter, Boylan implied that the Governor's close aides were enablers: "no one would do a damn thing even when they saw it."

The same day, Judy Mogul (Special Counsel to the Governor) and Linda Lacewell (Superintendent of the Department of Financial Services) discussed with Michael Volforte (the Director of the Governor's Office of Employee Relations) the prospect of rebutting Ms. Boylan's false or misleading public statements by releasing the September 2018 memoranda that documented the several allegations about Ms. Boylan's own workplace misconduct and the actual circumstances of her resignation.

On the evening of December 13, following that meeting, Richard Azzopardi, Senior Advisor to the Governor, sent emails to five reporters (from the *Wall Street Journal*, *Albany Times Union*, *New York Post*, *The New York Times*, and Associated Press); each email contained (i) the September 20, 2018, memorandum describing complaints against Ms. Boylan (with Mr. Azzopardi's handwritten redactions of the complainants' identities); (ii) the memorandum detailing the September 26, 2018, meeting at which Mr. David had attempted to counsel Ms. Boylan about her workplace behavior; and (iii) the email of Mr. David's notes of his September 30, 2018, telephone conversation in which Ms. Boylan had asked for her job back. Mr. Azzopardi apparently emailed the documents only after at least one journalist would not accept the Chamber's representation that Ms. Boylan had resigned in the wake of a series of allegations of workplace bullying and abuse.[2]

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[2] The media began reporting on the memos that same day. For example, the *Albany Times Union* ran a story noting that the newspaper had obtained Ms. Boylan's "internal personnel records" "which show that Boylan, herself, was accused of bullying, harassing behavior while she worked for the governor, which ultimately led to her resignation. Three Black women reported that Boylan had yelled at them and 'treated them like children.' This led to a meeting with Cuomo's head lawyer where Boylan offered to resign. Boylan told the lawyer that she regretted that 'her directness can be perceived in a certain, negative way (contrary to her intentions).'" Edward McKinley, *On Twitter, former Cuomo aide alleges sexual harassment by governor*,

Within the next day or two, the Governor and a small group of Chamber staff and advisors considered whether it would be helpful to disseminate a public letter from current and/or former Chamber staff. This group included Chamber counsel and certain senior staff, as well as other lawyers and advisors to whom the Chamber and the Governor often have turned for guidance. The group discussed drafting a letter from Ms. Boylan's former Chamber colleagues that would seek to rebut Ms. Boylan's allegations and describe the actual circumstances of her resignation. To that end, a draft was prepared that incorporated input from the Governor and others. Over the next day, various iterations were discussed among a group of advisors that included Steven Cohen, Roberta Kaplan, Alphonso David, Judy Mogul, and Linda Lacewell (all attorneys), as well as Dani Lever, Annabel Walsh, Josh Vlasto, and Richard Bamberger (all public relations professionals). As this group deliberated and exchanged ideas, suggestions, and drafts, they recast the Unpublished Letter from a detailed and pointed rebuttal of Ms. Boylan's allegations into a positive statement of support for the Governor.

Over the next several days, various Chamber employees and others reached out to current and former colleagues whom they believed might have been interested in signing such a letter. While a significant number of people agreed to do so, those responsible for drafting it ultimately concluded not to publish any version. As a result, although *The New York Times* subsequently obtained a copy of an early draft (in March 2021), no version of the Unpublished Letter was ever circulated publicly, or even beyond a relatively small circle.

II. The Chamber's Response To Ms. Boylan's Allegations are not Retaliation Under Federal, State, or City Law

We are deeply troubled by the suggestion that either of the Chamber's actions — the release of certain documents related to Ms. Boylan's employment, or the participation by a handful of its employees and their outside advisors in drafting or editing the discarded Unpublished Letter — could constitute retaliation. The *prima facie* elements of a retaliation claim are the same under Title VII of the Civil Rights Act and the New York State Human Rights Law: (i) the plaintiff must have engaged in protected activity; (ii) the employer was aware of the protected activity; (iii) the plaintiff suffered an adverse employment action; and (iv) there was a causal connection between the protected activity and the adverse employment action. *Littlejohn v. City of New York*, 795 F.3d 297, 315-16 (2d Cir. 2015) (Title VII); *Moccio v. Cornell Univ.*, 889 F. Supp. 2d 539, 591-92 (S.D.N.Y.

ALBANY TIMES UNION, (Dec. 13, 2020), https://www.timesunion.com/news/article/On-Twitter-former-Cuomo-aide-alleges-sexual-15798159.php

2012) (NYSHRL and New York City Human Rights Law).[3] In other words, not every reaction to a claim of sexual harassment is actionable. To the contrary, Title VII's "antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006).[4]

Proving such injury or harm is particularly difficult when the alleged retaliation involves post-employment conduct. In those cases, the alleged retaliatory conduct must have some impact on the plaintiff's new or prospective employment to qualify as an adverse employment action. *See Harewood v. New York City Dep't of Ed.*, No. 18-cv-05487 (KPF) (KHP), 2019 WL 3042486, at *9 (S.D.N.Y. May 8, 2019) ("Former employees can sue for retaliation insofar as they are complaining of retaliation that impinges on future employment prospects or otherwise has a nexus to employment.").

For example, in *Marchuk v. Faruqi & Faruqi, LLP*, 100 F. Supp. 3d 302, 311 (S.D.N.Y. 2015), the defendant responded to the plaintiff's sexual harassment claim by bringing a counterclaim for defamation and tortious interference. The defendant, believing in good faith that the plaintiff had disseminated her complaint outside the judicial process, then *issued a press release* about it. The court found that the filing of the counterclaim and issuing of the press release were not adverse employment actions because they did not result in "a materially adverse change in working conditions more disruptive than a mere inconvenience or an alteration of job responsibilities." *Id.* (citing *Galabya v. N.Y.C. Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir.2000)); *see Jetter v. Knothe Corp.*, 200 F. Supp. 2d. 254, 267 (S.D.N.Y. 2002) (merely informing a firm's client about an employee's retirement could not be said to damage the employee's reputation in the industry), *aff'd*, 324 F.3d 73 (2d Cir. 2003). The *Marchuk* court specifically noted the lack of connection between the defendant's actions and the plaintiff's job prospects or current employment:

> In this case, [Plaintiff] had not been Defendants' employee for more than a year by the time the counterclaims were filed. By then, she was working at

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[3] While we refer to cases analyzing retaliation claims under the NYSHRL and the NYCHRL, we note that the Chamber, as an instrumentality of the State, is not subject to the NYCHRL under principles of sovereign immunity. *See Jattan v. Queens College of City Univ. of New York*, 64 A.D. 3d 540, 541-42 (2d Dep't 2009).

[4] To qualify as an adverse employment action, the challenged action must be one that "might have dissuaded a reasonable worker from [engaging in protected activity]." *Id.* at 68. *See Reichman v. City of New York*, 117 N.Y.S.3d 280, 286 (N.Y. Sup. Ct., App. Div. 2020) (citing *Keceli v. Yonkers Racing Corp.*, 66 N.Y.S.3d 280, 283 (N.Y. Sup. Ct., App. Div. 2017) and *White*, 53 U.S. at 67); *Malena v. Victoria's Secret Direct, LLC*, 886 F. Supp. 2d 349, 362 (S.D.N.Y. 2012) (NYCHRL prohibits conduct that "would be reasonably likely to deter a person from engaging in protected activity").

> a different job in a different field in a different state. Defendants lacked control over any aspect of [Plaintiff's] working conditions, and indeed [Plaintiff] does not identify any aspect of her working conditions that changed after the counterclaim was filed."

100 F. Supp. 3d at 311.

For several reasons, it is clear that neither the release of the documents nor the drafting of the Unpublished Letter resulted in any actual "injury or harm" to Ms. Boylan with respect to her present or prospective employment. *White*, 548 U.S. at 67. First, Ms. Boylan had not worked in the Chamber for more than two years at the time of her allegations, and so the Chamber's actions had no impact on her current employment situation. *See Patel*, 753 F. Supp. at 1074. In *Marchuk*, the court held that the post-employment counterclaims and corresponding press release did not constitute adverse employment action, in part because the defendant filed the counterclaims and issued the press release more than a year after plaintiff's separation of employment. *See* 100 F. Supp. 3d at 311.

Second, there is no identifiable current or future employment as to which Ms. Boylan can claim injury. Her LinkedIn page identifies two post-Chamber, non-public office "experiences" (Run for Something and the National Alliance on Mental Illness of NYC), both of which she commenced prior to the release of the records and (as of now) are ongoing experiences. *See* https://www.linkedin.com/in/lindsey-boylan-3477bb3/ (last accessed July 17, 2021). Thus, the Chamber's actions clearly had no impact on her employment in 2020 or 2021.

Third, because Ms. Boylan has apparently been focused on her campaign for Manhattan Borough President (at least through last month's primary), neither the release of the documents describing her conduct and her resignation, nor the draft Unpublished Letter, has had any tangible impact on her prospective employment opportunities. *See Patel*, 753 F. Supp. at 1074 (post-employment conduct not an adverse employment action when plaintiff was not "undertaking efforts to find a new job, so the alleged act in no way hindered prospective employment"). And there is simply no caselaw that even hints that the federal or state law bans on retaliation have ever applied to the pursuit of an elected office.

Nor could either the release of the documents or the drafting of the Unpublished Letter have dissuaded a reasonable worker from engaging in protected activity — particularly given the context surrounding the release. Here, again, the *Marchuk* decision is illustrative. Noting that retaliation "is to be weighed in a context-specific assessment of

whether conduct had a 'chilling effect' on protected activity," the court held that plaintiff there had not presented credible evidence that the counterclaims and press release by the defendant had "in fact deterred [p]laintiff from maintaining her lawsuit or deterred anybody else from filing a lawsuit." 100 F. Supp. 3d at 311 (citing *Williams v. New York City Housing Auth.*, 61 A.D. 3d 62, 70-71 (1st Dept. 2009)). Significantly, the court emphasized that the plaintiff's initiation of a public and salacious lawsuit precluded her theory that the defendant's counterclaims and corresponding press release had exposed her to unwelcome attention.

Ms. Boylan's tweets about her allegations were, of course, far more public than the filing of a civil lawsuit for harassment. She did not use her Twitter account to vindicate her legal rights; rather, her initial salvo in the spring of 2019, and her even more provocative volley in December 2020, both occurred during the opening weeks of her political campaigns for public office. The Chamber's response, therefore — which was to dispute the misstatements of fact in those tweets by distributing documentary evidence — was not retaliation under the law. Similarly, no one ever publicly disseminated the Unpublished Letter; rather, drafts were circulated through emails only to a very small and discrete group of trusted advisors. As the Supreme Court has made clear, "the significance of any given act of retaliation will often depend upon the particular circumstances." *White*, 548 U.S. at 68. The same standard applies in retaliation claims under the NYSHRL.

Here, the "particular circumstances" include that Ms. Boylan was already a public figure and well-versed in politics. It is therefore hard to imagine that the Chamber's actions would dissuade a reasonable worker in *her* position from continuing to engage in protected conduct. Indeed, one of the many post-Twitter press features on Ms. Boylan described her awareness of her status: "As a public figure, Boylan said she knew she was 'fair game' to attempt to discredit."[5] And, of course, the release of the documents did not dissuade others from raising claims. In fact, after the Chamber released the documents related to Ms. Boylan's employment and resignation, several other individuals came forward with allegations of harassment.

Just as the Chamber's actions did not constitute retaliation, they also did not violate Ms. Boylan's privacy rights.[6] The released records would have been available for public

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[5] https://www.cityandstateny.com/personality/2021/06/why-lindsey-boylan-spoke-up/182803/ (last accessed July 12, 2021).

[6] New York does not recognize a common-law right to privacy. *See Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111, 119 (N.Y. 2018) (citing *Shields v. Gross*, 58 N.Y.2d 338, 344 (N.Y. 1983)). And New York's "limited statutory right of privacy" contained in New York Civil Rights Law sections 50

disclosure had the journalists (or anyone else) made a FOIL request. *See Obiajulu v. City of Rochester*, 625 N.Y.S.2d 779, 780 (1995) ("Disciplinary files containing disciplinary charges, the agency determination of the charges, and the penalties imposed . . . are not exempt from disclosure under FOIL").

Moreover, it is well-established that an employer is entitled to take certain reasonable measures to defend itself against charges of discrimination, as long as the comments do not cross the line into threatening, intimidating, or defamatory conduct. The reason is clear: "the person or entity accused of discrimination must be allowed to defend himself or itself." *Dixon v. Int'l Bhd. of Police Officers*, 504 F.3d 73, 84 (1st Cir. 2007); *see also Melman v. Montefiore Med. Ctr.*, 946 N.Y.S.2d 27, 42 (1st Dep't 2012) ("Plainly, an employer is entitled to defend itself against an employee's charges, even if the employee finds it searingly painful to hear himself criticized.").

In *Hughes v. Twenty-First Century Fox, Inc.*, for example, the court held that it was a reasonable defensive measure for an employer expecting an allegation of sexual harassment to preemptively release a statement to the National Enquirer "to blunt the inflammatory force of [plaintiff's] allegations [in] a colorable defense to protect their business." 304 F. Supp. 3d 429, 449 (S.D.N.Y. 2018) (citing *Richardson v. Comm. on Human Rights & Opps.*, 532 F.3d 114, 123 (2d Cir. 2008)). As a result, the *Hughes* court dismissed the retaliation claim, even though the employer had leaked the otherwise anonymous plaintiff's name to the press. *Id.* at 449. Here, far from seeking to interfere with any of Ms. Boylan's current or future employment opportunities — or even from "outing" any secret harassment claims — the Chamber released the documents to correct the misleading narrative that Ms. Boylan had framed over the course of weeks, culminating with her tweets in mid-December.

Labeling the drafts of the Unpublished Letter as retaliatory is even more frivolous. Even had they been released or published, they would merely have "blunt[ed] the

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and 51 prohibits only the use of "a living person's name, portrait or picture for advertising or trade purposes without having obtained the written consent of such person, or if a minor of his or her parent or guardian." *Id.* (quoting *Messenger v. Gruner + Jahr Print. & Public.*, 94 N.Y.2d 436, 441 (N.Y. 2000) (internal quotations omitted)); *see also Arrington v. New York Times Co.*, 55 N.Y. 2d 433, 439 (N.Y. 1982) (New York's privacy statutes were "drafted narrowly to encompass only the commercial use of an individual's name or likeness and no more"). Nor did the dissemination of the memoranda violate any other statutory privacy rights, such as those set forth Public Officers Law section 96 or Labor Law section 203-d. Indeed, we note that the New York State legislature is currently considering a bill that *would* make the "release of personnel records to discount victims of workplace discrimination count [] as a retaliatory action under the Human Rights Law" demonstrating that at the time Ms. Boylan's documents were released, such release was not unlawful. *See* S5870.

inflammatory force" of Ms. Boylan's allegations." *See id.* at 449. In the end, however, the drafts were just that — *drafts* — that were never released. In *Hughes*, for example, the court found that there was no retaliation because, among other things, the plaintiff's name was "not published" as part of the draft statement released to the press. *See id.* Here, of course, nothing in the Unpublished Letter was published at all. Its circulation among a close circle of trusted advisers, a number of whom were attorneys, was a legitimate exercise to present strategic options for dealing with allegations they did not believe from a person they did not trust. *See United States v. N.Y.C. Transit Auth.*, 97 F.3d 672, 677 (2d Cir. 1996) ("But it cannot be doubted that an employer may retain legal counsel to deal with discrimination claims and take other steps reasonably designed to prepare for and assist in the defense. An employer has latitude in deciding how to handle and respond to discrimination claims . . .).[7] Indeed, it would be a dangerous precedent to hold an employer legally liable for merely contemplating proposed response strategies that were never actually implemented.

Moreover, the Chamber's actions were reasonable because there was abundant evidence from which the Chamber could have concluded that Ms. Boylan's sexual harassment allegations were tied to her political ambition. She first raised her allegations about the Chamber's alleged toxicity and the general environment of sexual harassment in government soon after declaring her candidacy for Congress in 2019. And she then made her more specific claims about the Governor as she launched her campaign for Manhattan Borough President in late 2020.[8]

In that light, the Chamber's response was measured and narrow — it released only documents that were already subject to release under FOIL, and only to correct the false

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[7] Although the released memoranda were accurate, courts have held that even "false accusations by an employer against a former employee, without more, [are] insufficient to establish an adverse action." *Johnson v. Summit Acquisitions, LLC*, 5:15-CV-1193 (LEK/ATB), 2019 WL 1427273, at *8 (N.D.N.Y. Mar. 29, 2019) (citing *Giarrizzo v. Holder*, No. 07-CV-801, 2011 WL 4964945, at *6 (N.D.N.Y Oct. 19, 2011).

[8] As it turns out, the Chamber's suspicion about Ms. Boylan's political motivations were reinforced by subsequent evidence. On February 24, 2021, Ms. Boylan published an essay on Medium detailing additional allegations against the Governor. Lindsey Boylan, *My Story of Working with Governor Cuomo*, MEDIUM (Feb. 24, 2021), https://lindseyboylan4ny.medium.com/my-story-of-working-with-governor-cuomo-e664d4814b4e. Ms. Boylan's campaign finance records reflect that Cade Leebron—a writer who has written about rape, rape culture, assault, and trauma, and whose pieces have also been posted in Medium—was paid $10,500 by Ms. Boylan's campaign prior to the publication of Ms. Boylan's Medium essay, and nearly $32,000 by the campaign in total. *Search Candidate: Expenditures*, N.Y.C. Campaign Fin. Bd., https://www.nyccfb.info/FTMSearch/Candidates/Expenditures?ec=2021&cand=2465&ir=Leebron%2C%20Cade&trans=F (last accessed July 9, 2021).

narrative of a public attack against one public official by another public figure seeking her own election. And the Chamber drafted, but ultimately decided *not* to release, the Unpublished Letter, even after it had passed muster with a number of highly regarded attorneys and public relations experts with excellent judgment. The law cannot, and does not, preclude such a response.

We hope this information is helpful. We look forward to working with you throughout the remainder of your investigation.

Very truly yours,

s/Paul Fishman
s/Dipanwita Deb Amar
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