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BULLETIN

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RECENT EMPLOYMENT LAW DECISIONS

UNITED STATES SUPREME COURT

BNSF RAILWAY CO. v. TYRRELL

Railroad Lacked Sufficient Contacts with Montana to Establish Personal Jurisdiction

"The Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq., makes railroads liable in money damages to their employees for on-the-job injuries. Respondent Robert Nelson, a North Dakota resident, brought a FELA suit against petitioner BNSF Railway Company (BNSF) in a Montana state court, alleging that he had sustained injuries while working for BNSF. Respondent Kelli Tyrrell, appointed in South Dakota as the administrator of her husband Brent Tyrrell's estate, also sued BNSF under FELA in a Montana state court, alleging that Brent had developed a fatal cancer from his exposure to carcinogenic chemicals while working for BNSF. Neither worker was injured in Montana. Neither incorporated nor

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LEGISLATIVE UPDATE

By Mariko Yoshihara,
CELA Legislative Counsel and Policy Director

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CELA Legislative Counsel
& Policy Director

June 2nd marked the deadline for the legislature to pass all bills out of their house of origin. As a result, over the past couple weeks, dozens of bills have stalled, and many were significantly amended in order to garner the support needed to advance. Notably, nearly all anti-worker bills that CELA opposed this year have died, including several measures aimed to weaken the Private Attorneys General Act ("PAGA"). Below is a list of the top 12 pro-worker bills that CELA is tracking and working on that have now advanced to the second house for review. Bills marked with an asterisk have been or will be amended based on opposition concerns. For a complete list of bills we are tracking, visit: www.cela.org/legislation or email: mariko@cela.org.

- Parental Leave – Under current state and federal family leave laws, only employees at companies with 50 or more employees are eligible for job-protected parental leave. SB 63 (Jackson) would expand the right to take up to 12 weeks of parental leave for employees at companies with 20-49 employees.
- Pay Equity – AB 46 (Cooper) would clarify that the California Equal Pay Act applies to public employees.
- Pay Data Transparency* – AB 1209 (Gonzalez Fletcher) would require very large employers to submit data on gender wage differentials to the State.
- Prior Salary – AB 168 (Eggman) will prohibit employers from asking applicants about salary history information and would require employers to provide applicants with a pay scale for the position.
- Emergency Medical Workers Meal and Rest Breaks – AB 263 (Rodriguez) would codify certain provisions of *Augustus et al. v. ABM Security Services, Inc.* (2016) and other existing laws to require that during rest or meal periods, employers must relieve the employee of all duties and shall not require that the employee remain "on call," except that an employer may interrupt a rest or meal

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DECISIONS (From Page 1)

headquartered there, BNSF maintains less than 5% of its work force and about 6% of its total track mileage in the State. Contending that it is not "at home" in Montana, as required for the exercise of general personal jurisdiction under *Daimler AG v. Bauman*, 571 U.S. ––––, ––––, 134 S.Ct. 746, 769, 187 L.Ed.2d 624 BNSF moved to dismiss both suits. Its motion was granted in Nelson's case and denied in Tyrrell's. After consolidating the two cases, the Montana Supreme Court held that Montana courts could exercise general personal jurisdiction over BNSF because the railroad both "d[id] business" in the State within the meaning of 45 U.S.C. § 56 and was "found within" the State within the compass of Mont. Rule Civ. Proc. 4(b)(1). The due process limits articulated in *Daimler*, the court added, did not control because *Daimler* did not involve a FELA claim or a railroad defendant."

Held:

[1] FELA does not authorize state courts to exercise personal jurisdiction over a railroad solely on the ground that the railroad does some business in their States, and

[2] Montana could not, consistent with due process, exercise general jurisdiction over railroad.

Reversed and remanded.

Andrew S. Tulumello, Washington, DC, for Petitioner. Julie A. Murray, Washington, DC, for Respondents.
Andrew S. Tulumello, Michael R. Huston, Sean J. Cooksey, Gibson, Dunn & Crutcher LLP, Washington, DC, for Petitioner. Fredric A. Bremseth, Bremseth Law Firm, P.C., Minnetonka, MN, Robert S. Fain, Jr., Billings, MT, Julie A. Murray, Scott L. Nelson, Allison M. Zieve, Public Citizen Litigation Group, Washington, DC, for Respondents.
USSC 5/30/17 opinion by Ginsberg, Roberts, Kennedy, Thomas, Breyer, Alito, Kagan and Gorsuch concurring, Sotomayor concurring in part and dissenting in part; ___ S.Ct. ___, 2017 WL 2322834, 41 IER Cases 1809.
https://goo.gl/zSB7ja

CALIFORNIA SUPREME COURT

DHILLON v. JOHN MUIR HEALTH

Trial Court's Issuance of Writ Remanding Case to Administrative Body Is an Appealable Order Under the Circumstances of this Case

"As a general rule, a litigant may appeal an adverse ruling only after the trial court renders a final judgment. (Code Civ. Proc., § 904.1.) The question in this case concerns the application of this general rule when a trial court has granted a petition for

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PRACTICE GUIDE: CALIFORNIA'S ANTI-SLAPP ACT WAS NOT INTENDED TO THWART FEHA CLAIMS

By Andrew Friedman, Esq.

Andrew Friedman

The United States of America was founded and the First Amendment ratified against the backdrop not only of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"[1] but also the recognition that speech and the right to petition the government for redress of grievances "are integral to the democratic process."[2] A strategic lawsuit against public participation ("SLAPP"),[3] on the other hand, is the antithesis of that for which America stands; it is a lawsuit filed to deter citizens and groups of citizens from exercising their constitutional rights to speak out on public issues and/or petition the government.[4] A SLAPP – usually masquerading as an ordinary lawsuit such as a claim for defamation or interference with prospective economic advantage[5] – is typically filed by a deep-pocketed corporation against a citizen or a group of citizens in order to silence criticism, punish a whistleblower, or win a commercial dispute.[6] Indeed, "[t]he quintessential SLAPP is filed by an economic powerhouse to dissuade its opponent from exercising its constitutional right to free speech or to petition. The objective of the litigation is not to prevail but to exact enough financial pain to induce forbearance. As its name suggests, it is a strategic lawsuit designed to stifle dissent or public participation."[7]

At the strong and repeated urging of then California State Senator Bill Lockyer (Chair of the California Senate Judiciary Committee), the California Legislature enacted Code of Civil Procedure Section 425.16, California's anti-SLAPP statute, "out of concern over 'a disturbing increase' in civil suits 'aimed at preventing ***citizens*** from exercising their political rights or punishing those who have done so.'"[8] Senator Lockyer commented that the anti-SLAPP legislation was needed to protect "ordinary citizens who are sued by well-heeled special interests."[9] The California Legislature was particularly concerned with ensuring "continued participation in matters of ***public*** significance and that this participation should not be chilled through abuse of the judicial process."[10]

Section 425.16 "requires that a court engage in a two-step process when determining whether a defendant's anti-SLAPP motion should be granted."[11]

First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity – *i.e.,* the defendant's free speech in connection with a public issue or petitioning of the government.[12] In making the determination as to whether or not the matter concerns an issue of public interest, the courts must keep in mind that "'public interest' does not equate with mere curiosity,"[13] "a matter of public interest should be something of concern to a substantial number of people,"[14] "the assertion of a broad and amorphous public interest is not sufficient,"[15] and an "issue of public interest must 'go beyond the parochial particulars of the given parties.'"[16] In making the determination as to whether or not the challenged

1 *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270.
2 *Borough of Duryea, Pa. v. Guarnieri* (2011) 564 U.S. 379, 388.
3 The "SLAPP" acronym was coined by Penelope Canan and George W. Pring, professors at the University of Denver. *See generally* Canan & Pring, *Strategic Lawsuits Against Public Participation* (1988) 35 Soc. Probs. 506; Pring & Canan, *SLAPPs: Getting Sued For Speaking Out, Temple University Press* (1996).
4 Pring & Canan, *SLAPPs: Getting Sued For Speaking Out*, Temple University Press (1996), pp. 1-2, 196. *See also Simpson Strong–Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 ("A SLAPP is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so.").
5 *Simpson Strong–Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.
6 *See U.S. needs an anti-SLAPP law like California's,* Los Angeles Times (August 16, 2015) accessible at http://www.latimes.com/opinion/editorials/la-ed-slapp-20150816-story.html.
7 *Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822, 830, *review granted* March 1, 2017 (S239686).
8 Id. quoting Simpson Strong–Tie Co., Inc. v. Gore (2010) 49 Cal.4th 12, 21 (emphasis added). *See* Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1264 (1991–1992 Reg. Sess.) as introduced Jan. 6, 1992, pp. 3–4 (highlighting the need to address unmeritorious tort suits filed against private citizens and associations for exercising their rights to seek changes in government policy). *See also* Code Civ. Proc., §425.16(a)("The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.").
9 Pring & Canan, *SLAPPs: Getting Sued For Speaking Out*, Temple University Press (1996), pp. 196 *quoting Deukmejian Vetoes Limits on SLAPP Suits*, SAN FRANCISCO DAILY JOURNAL, Sept. 27, 1990, at 8.
10 Code Civ. Proc., §425.16(a)(emphasis added).
11 *Episcopal Church Cases* (2009) 45 Cal.4th 467, 477 *quoting City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76. See also Code Civ. Proc., §425.16(e) ("A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.").
12 *Id.*
13 *Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822, 830, *review granted* March 1, 2017 (S239686), *quoting Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132–1133.
14 *Id.*
15 *Id.*
16 *Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822, 830, *review granted* March 1, 2017 (S239686), *quoting Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 33.

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cause of action is one "arising from" protected activity, the courts must keep in mind that the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.[17] Moreover, that a cause of action arguably may have been "triggered" by protected activity does not prove that it is one arising from such.[18] In the anti-SLAPP context, the critical consideration is whether the cause of action is based on the defendant's protected free speech (made in connection with a public issue) or petitioning activity.[19] Accordingly, "a claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted."[20]

If the court finds that the defendant has satisfied the first prong of the Section 425.16 test, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.[21] Only a cause of action that satisfies both prongs of the anti-SLAPP statute—*i.e.,* that arises from protected speech or petitioning ***and*** lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.[22]

Unfortunately, but not unexpectedly, deep-pocketed corporations and other economic powerhouses have attempted to corrupt the anti-SLAPP statute and turn what was supposed to be the "cure" into a "disease" by using it against ordinary citizens (consumers and employees) and citizen groups, in an effort to silence them.[23] Indeed, those powerhouses actually began to misuse the anti-SLAPP statute in an effort to thwart various civil and consumer rights lawsuits, including FEHA employment and housing discrimination claims. For example, in *Tuszynska v. Cunningham*[24], Danuta Tuszynska, an attorney, sued the Riverside Sheriffs' Association Legal Defense Trust ("RSA–LDT"), a prepaid legal services plan that provides legal representation and related services to Riverside Sheriffs' Association members, for violating FEHA and the Unruh Civil Rights Act. Tuszynska alleged that, because she was a woman, RSA-LDT assigned her fewer case referrals after defendant James Cunningham became its administrator, and that cases were, instead, referred to male attorneys with less experience than her. Defendants RSA-LDT and Cunningham filed an anti-SLAPP motion incredulously contending that Tuszynska was somehow chilling their First Amendment rights. The trial court correctly denied the motion on the ground that Tuszynska's allegations of gender discrimination did not arise from protected speech or petitioning activities. In its decision, the court wrote that the "gravamen" of Tuszynska's claims was that "because she is a woman, she is not getting cases," and reasoned that Tuszynska's claims were based on defendants' alleged "conduct" in failing to refer cases to her. On appeal, the Court of Appeal for the Fourth Appellate District erroneously failed to consider that Tuszynska was not an economic powerhouse (but, rather, an ordinary citizen who was supposed to be protected by the anti-SLAPP statute) and that she was not bringing the typical claims brought by SLAPPers (defamation or interference with prospective economic advantage). Next, the Court of Appeal erred by incorrectly concluding that RSA-LDT's motive to discriminate against Tuszynska was irrelevant in determining whether RSA-LDT had satisfied its threshold burden to prove that the gravamen Tuszynska's lawsuit was based on RSA-LDT's protected activity.

Likewise, in *DeCambre v. Rady Children's Hosp.-San Diego*,[25] a physician, Marvalyn DeCambre, sued her employer, the Rady Children's Hospital – San Diego, for retaliation and racial discrimination in violation of FEHA after the hospital made the decision to not renew Dr. DeCambre's employment contract. In response, the hospital filed an anti-SLAPP motion contending that, because the nonrenewal decision occurred as a result of the hospital's peer review process (a process which is privileged for anti-SLAPP purposes), DeCambre's lawsuit was a SLAPP. In opposition to the motion, DeCambre argued that the motive for her termination was unlawful discrimination and, therefore, the termination was not protected by the anti-SLAPP statute. The Court of Appeal erroneously rejected DeCambre's argument finding that because the hospital's decision to not renew DeCambre's contract stemmed from protected peer review activity, DeCambre's retaliation and discrimination lawsuit was a SLAPP.

17 *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.
18 *Id.*
19 *Id.*
20 *Park v. Bd. of Trustees of California State Univ.* (2017) 2017 WL 1737669, at *1.
21 *Navellier*, 29 Cal.4th at 89.
22 *Id.*
23 *Un Hui Nam v. Regents of the Univ. of California* (2016) 1 Cal.App.5th 1176, 1179 ("[t]he cure has become the disease—SLAPP motions are now just the latest form of abusive litigation.") *quoting Navellier v. Sletten* (2002) 29 Cal.4th 82, 96 (dis. opn. of Brown, J.).
24 (2011) 99 Cal.App.4th 257.
25 (2015) 235 Cal.App.4th 1.

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Additionally, in *Hunter v. CBS Broadcasting, Inc.,*[26] an employer being sued for discrimination in violation of FEHA filed an anti-SLAPP motion in an effort to thwart the claims of the plaintiff, Kyle Hunter. Hunter, a meteorologist, sued CBS Broadcasting Inc. (an economic powerhouse if there ever was one) for refusing to hire him as a weather news anchor because of his gender and age. In response to CBS's anti-SLAPP motion, Hunter argued that the "conduct" underlying his causes of action was not CBS's selection of its weather anchors, but rather CBS's decision to utilize discriminatory criteria in making those selections. As in *Tuszynska*, the Superior Court got it right, ruling that a discriminatory hiring decision is not protected activity. Misunderstanding and misciting a passage from *Navellier v. Sletten*,[27] the Court of Appeal for the Second Appellate District (Division 7), however, erroneously concluded CBS's alleged motive (*i.e.*, employment discrimination) in not hiring Hunter was irrelevant to the anti-SLAPP analysis and reversed the decision of the Superior Court.

Similarly, in *Daniel v. Wayans*[28], another employer also filed an anti-SLAPP motion in response to an employee's FEHA racial harassment lawsuit. In that case, Pierre Daniel, an actor working on "A Haunted House 2," alleged that Marlon Wayans, the writer, producer and star of the movie, racially harassed Daniel by, among other things, calling him a "nigga," a "black fat ass," making fun of his afro hairstyle, and referring to him as "Cleveland Brown," an African-American cartoon character in the adult cartoon comedy series "Family Guy." In affirming the Superior Court's grant of the employer's anti-SLAPP motion, the Court of Appeal for the Second Appellate District (Division 1) rejected Daniel's argument that "Wayans's conduct necessarily falls outside the protections of the anti-SLAPP statute because the gravamen of his complaint is race-based harassment and such conduct is not a protected activity."[29] In reaching its decision, the Court of Appeal incorrectly noted that motive was irrelevant as "[c]auses of action do not arise from motives; they arise from acts."[30]
The Courts of Appeal in *Tuszynska, DeCambre, Hunter,* and *Wayans* all made the same basic mistakes – failing to understand three propositions basic to any anti-SLAPP analysis: (1) private employment actions are not SLAPPs as they are not designed to prevent employers from exercising their First Amendment rights; (2) in FEHA cases, motive is critically important, and (3) it is the

26 (2013) 221 Cal.App.4th 1510.
27 (2002) 29 Cal.4th 82, 94.
28 (2017) 8 Cal.App.5th 367 *review granted* March 10, 2017 (2017 WL 1957126).
29 *Wayans*, 8 Cal.App.5th at 381.
30 *Wayans*, 8 Cal.App.5th at 380 *quoting People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 823.

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motive or *mens rea* of the SLAPPer (*i.e.*, the plaintiff) that is unimportant in the anti-SLAPP analysis; the motive of the SLAPPee (*i.e.*, the defendant) is, particularly in FEHA cases, extremely important. These mistakes are best explained by the Second Appellate District (Division 1) in *Wilson v. Cable News Network, Inc.*[31] where Stanley Wilson, a former Emmy-award winning television news producer, sued his employer, CNN, for employment discrimination and retaliation under FEHA. Wilson alleged that he was passed over for promotion because of his race (African-American) and that he was fired because of his race and complaints of race discrimination. In response, CNN (again, like CBS, an economic powerhouse if ever there was one) filed an anti-SLAPP motion arguing that because it is a news provider, all of its "staffing decisions" regarding Wilson were part of its "editorial discretion" and "so inextricably linked with the content of the news that the decisions themselves" are acts in furtherance its right of free speech that were necessarily in connection with a matter of public interest — news stories relating to current events and matter[s] of interest to CNN's news consumers. CNN also argued that its alleged discriminatory "motive" in making those "staffing decisions" was irrelevant. The Superior Court granted the anti-SLAPP motion and Wilson appealed. The Court of Appeal for Second Appellate District (Division 1) reversed. Initially, the Court of Appeal held that private employment discrimination and retaliation cases are not SLAPPs:

> This is a private employment discrimination and retaliation case, not an action designed to prevent defendants from exercising their First Amendment rights. Defendants may have a legitimate defense but the merits of that defense should be resolved through the normal litigation process, with the benefit of discovery, and not at the initial phase of this action.[32]

Next, the Court of Appeal explained why the motive of the SLAPPee (*i.e.*, the defendant) is an important factor in FEHA cases and must be considered during the analysis of an anti-SLAPP motion:

> An examination of the authorities upon which defendants base their argument that their alleged discriminatory and retaliatory "motives" are irrelevant reveals no support for the treatment of employment discrimination or retaliation as a mere motive of no consequence to the determination of the applicability of section 425.16.
>
> . . . .
>
> [D]efendant's argument finds some support in *Tuszynska v. Cunningham* and *Hunter v. CBS Broadcasting, Inc.*, wherein the Courts of Appeal translated subjective intent to mean motive and the mens rea of the SLAPPer [plaintiff] to mean the mens rea of the defendant employer. But equating a SLAPPer's subjective intent in filing the litigation to an employer's motive in subjecting an employee to a retaliatory grievance procedure is a mistake and does violence to the purpose of both the anti-SLAPP and anti-retaliation laws.
>
> Both the *Tuszynska* and *Hunter* courts purportedly based their conclusions that the employer's motive to discriminate was irrelevant in determining whether the defendant met its threshold burden to prove the conduct arose from protected activity on the Supreme Court's holding in *Navellier*. *Navellier*, however, did not involve harassment, discrimination, or retaliation. Nor did the Supreme Court address the defendant's subjective intent. Quite to the contrary, the Supreme Court determined that the SLAPPer's, not the defendant's, intent was irrelevant. Thus, in our view, *Navellier* does not require us to ignore the defendant's alleged motive in a harassment, discrimination, or retaliation case.
>
> . . . .
>
> In the typical employment discrimination or retaliation case involving at-will employees, the conduct breaching a duty is the discrimination or retaliation because an employer's firing, failure to promote, demotion, etc. breaches no duty to an at-will employee. Here, where plaintiff does not allege an employment contract and was employed by a private corporation, not a governmental entity, the only reason the defendants' failure to promote and firing of plaintiff are actionable is that they were allegedly acts of discrimination and retaliation. Absent these "motivations," Wilson's employment-related claims would not state a cause of action and defendants no doubt would have demurred, not filed an answer and anti-SLAPP motion. Discrimination and retaliation are not simply motivations for defendants' conduct, they are the defendants' conduct.[33]

Like *Wilson*, in *Un Hui Nam v, Regents of the Univ. of California*[34], the Court of Appeal for the Third Appellate District also held, correctly, that private employment discrimination and retaliation cases are not appropriate for resolution via an anti-SLAPP motion:

> In short, we conclude the anti-SLAPP statute was not intended to allow an employer to use a protected activity as the means to discriminate or retaliate and thereafter capitalize on the subterfuge by bringing an anti-SLAPP motion to strike the

31 (2016) 6 Cal.App.5th 822.
32 *Wilson*, 6 Cal.App.5th at 827.
33 *Wilson*, 6 Cal.App.5th at 834-35 (full citations and internal quotations omitted).
34 (2016) 1 Cal.App.5th 1176.

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> complaint. In that case, the conduct giving rise to the claim is discrimination and does not arise from the exercise of free speech or petition.[35]

Indeed, the Court of Appeal questioned whether Nam's lawsuit could even be classified as a SLAPP:

> Moreover, we question whether plaintiff's lawsuit for harassment and retaliation should be characterized as a SLAPP. The quintessential SLAPP is filed by an economic powerhouse to dissuade its opponent from exercising its constitutional right to free speech or to petition. The objective of the litigation is not to prevail but to exact enough financial pain to induce forbearance. As its name suggests, it is a strategic lawsuit designed to stifle dissent or public participation. It is hard to imagine that a resident's complaint alleging retaliatory conduct was designed to, or could, stifle the University from investigating and disciplining doctors who endanger public health and safety. The underlying lawsuit may or may not have merit that can be tested by summary judgment, but it is quite a stretch to consider it a SLAPP merely because a public university commences an investigation.[36]

Additionally, the Court of Appeal in *Nam* also explained why the motive or intent of the defendant employer is highly relevant:

> *Navellier* does not require us to ignore the defendant's alleged motive in a harassment, discrimination, or retaliation case.
>
> To conclude otherwise would subject most, if not all, harassment, discrimination, and retaliation cases to motions to strike. Any employer who initiates an investigation of an employee, whether for lawful or unlawful motives, would be at liberty to claim that its conduct was protected and thereby shift the burden of proof to the employee, who, without the benefit of discovery and with the threat of attorney fees looming, would be obligated to demonstrate the likelihood of prevailing on the merits. Such a result is at odds with the purpose of the anti-SLAPP law, which was designed to ferret out meritless lawsuits intended to quell the free exercise of First Amendment rights, not to burden victims of discrimination and retaliation with an earlier and heavier burden of proof than other civil litigants and dissuade the exercise of their right to petition for fear of an onerous attorney fee award.[37]

On May 4, 2017, the California Supreme Court issued an extremely important anti-SLAPP motion decision in an employment case – *Park v. Board of Trustees of The California State University*.[38] In *Park*, the Supreme Court agreed with the reasoning in *Nam* and specifically disapproved of *Tuszynska* and *DeCambre* (and expressed no opinion regarding whether *Hunter* was correctly decided).

In *Park*, the plaintiff, Sungho Park, was a tenure-track assistant professor of Korean national origin employed by California State University, Los Angeles. Mr. Park applied for tenure but his application was denied. Mr. Park sued the Board of Trustees of under FEHA alleging national origin discrimination. The Board of Trustees responded to the lawsuit with an anti-SLAPP motion contending that Mr. Park's claims arose from its decision to deny him tenure and the communications that led up to and followed that decision. The Board of Trustees argued that those communications were made in connection with an official proceeding, the tenure decision-making process, and therefore were "protected" for purposes of the anti-SLAPP statute. The Superior Court denied the motion finding that Park's lawsuit was based on the University's decision to deny him tenure, rather than any communicative conduct in connection with that decision, and that the denial of tenure based on national origin was not protected activity. A divided Court of Appeal reversed. The majority reasoned that, although the gravamen of Park's complaint was the University's decision to deny him tenure, that decision necessarily rested on communications the University made in the course of arriving at that decision and that such communications were protected activity for purposes of the anti-SLAPP statute. The dissent argued, in contrast, that because Mr. Park's lawsuit involved only the decision to deny tenure and not any arguably protected communications that preceded it, the trial court's ruling should have been affirmed.

The California Supreme Court, finding that the Courts of Appeal were hopelessly confused regarding what nexus a defendant must show between a challenged claim and the defendant's protected activity for the claim to be struck, granted review. The Supreme Court reversed holding that the Board of Trustees had failed to demonstrate that Park's lawsuit arose from protected activity. In so holding, the Supreme Court specifically approved *Nam* and held that "while discrimination may be carried out by means of speech, such as a written notice of termination, and an illicit animus may be evidenced by speech, neither circumstance transforms a

35 *Nam*, 1 Cal.App.5th at 1190–91.
36 *Nam*, 1 Cal.App.5th at 1193.
37 *Nam*, 1 Cal.App.5th at 1189.
38 2017, 2017 WL 1737669.

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discrimination suit to one arising from speech. What gives rise to liability is not that the defendant spoke, but that the defendant denied the plaintiff a benefit, or subjected the plaintiff to a burden, on account of a discriminatory or retaliatory consideration."[39] The Supreme Court then explained why an anti-SLAPP motion was ill-suited for FEHA claims:

> Failing to distinguish between the challenged decisions and the speech that leads to them or thereafter expresses them would chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power. Similar problems would arise for attempts to enforce the state's antidiscrimination public policy. Any employer who initiates an investigation of an employee, whether for lawful or unlawful motives, would be at liberty to claim that its conduct was protected and thereby shift the burden of proof to the employee who, without the benefit of discovery and with the threat of attorney fees looming, would be obligated to demonstrate the likelihood of prevailing on the merits. Conflating, in the anti-SLAPP analysis, discriminatory decisions and speech involved in reaching those decisions or evidencing discriminatory animus could render the anti-SLAPP statute fatal for most harassment, discrimination and retaliation actions against public employers.[40]

Unlike employment cases where the Courts of Appeal have struggled with the application of the anti-SLAPP act to FEHA claims, the courts have had no such difficulties in correctly concluding that the anti-SLAPP Act does not encompass FEHA housing discrimination claims.

For example, in *DFEH v. 1105 Alta Loma Rd. Apartments,*[41] a landlord filed an anti-SLAPP motion in response to a tenant's disability discrimination lawsuit. The landlord contended that it had engaged in protected activity when it sent the tenant an Ellis Act notice of its intention to remove its property from the rental market and then removed the tenant through an action for unlawful detainer and that the tenant's subsequent lawsuit was a SLAPP. The Superior Court denied the landlord's anti-SLAPP motion. The Court of Appeal for the Second Appellate District affirmed concluding that FEHA discrimination cases were not appropriately subject to anti-SLAPP motions:

> [I]f this kind of suit could be considered a SLAPP, then landlords and owners, if not Alta Loma, could discriminate during the removal process with impunity knowing any subsequent suit for disability discrimination would be subject to a motion to strike and dismissal. We are confident the Legislature did not intend for section 425.16 to be applied in this manner either. As the trial court aptly observed, "I just feel like to rule for the defendant in this case would be to say that section 425.16 provides a safe harbor for discriminatory conduct and I don't think that's what it's intended to do.[42]

Similarly, in *Blanton v. Torrey Pines Prop. Mgt., Inc.*,[43] the court denied the landlord's anti-SLAPP motion in FEHA housing discrimination case because "the eviction itself would appear to be ancillary to the gravamen of the suit – [defendant's] ostensibly discriminatory occupancy policy."[44] Moreover, this very issue was thoroughly discussed in *Radell v. Park Wilshire Homeowners Ass'n.*[45] In *Radell*, a former tenant of the defendant landlord sued claiming that it had evicted her from her home because of her Puerto Rican ancestry and gender in violation of the California Fair Employment and Housing Act. In response, the landlord filed an anti-SLAPP motion arguing that the tenant's lawsuit arose from the landlord's protected activity. In opposition, the plaintiff argued that the gravamen her FEHA lawsuit was the landlord's discrimination, rather than any activity protected by the anti-SLAPP statute. Holding that **"Housing Discrimination Is Not A Protected Activity,"** the Court of Appeal for the Second Appellate District (Division 4), in an unpublished but nonetheless persuasive decision, agreed:

> As in *Pearl Street* [109 Cal.App.4th 1308 (2003)] and *1105 Alta Loma Road* [154 Cal.App.4th 1273 (2007)], defendants in this case are not being sued for the exercise of protected rights. Defendants are being sued for discriminating against the Radells on the basis of their sex, race, ancestry, and national origin in violation of the FEHA and FHA. There is no constitutional right to engage in such conduct.
>
> Under the first prong of the anti-SLAPP statute, the critical issue is whether the Radells' claims are based on acts in furtherance of defendants' right of petition or free speech. We conclude that although the complaint might have been triggered

39 *Id.* at * 5.
40 *Id.* (internal citations and quotations omitted).
41 (2007) 154 Cal.App.4th 1273.
42 *1105 Alta Loma Rd. Apartments*, 154 Cal.App.4th at 1288.
43 (SD Cal Dec. 17, 2015) 2015 WL 9692737.
44 *Blanton*, 2015 WL 9692737 at * 8.
45 (2011) 2011 WL 2164014.

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> by defendants' protected activity, it is not based on such activity. The complaint is based on the Radells' claim that defendants discriminated against them because they are Hispanic females, which is not a protected activity.[46]

Most recently, on March 17, 2017, in *Pitts v. Financial Management Co.*[47], the Honorable Judge Ernest M. Hiroshige (Department 54 of the Los Angeles Superior Court) denied a landlord's anti-SLAPP motion filed in response to the plaintiffs' FEHA discrimination lawsuit. The landlord argued that the Pitts filed their lawsuit because the landlord engaged in protected activity – *i.e.,* serving them with a 60-day notice to quit (a statutorily mandated prerequisite to filing an unlawful detainer action). The Pitts, represented by the author of this article, argued that the Pitts' FEHA discrimination lawsuit arose from the landlord's allegedly discriminatory eviction and not any protected activity. In his decision, Judge Hiroshige agreed with the Pitts' arguments: "Defendant Frieda Rentie, individually and dba Financial Management Company, moves to strike the complaint under the anti-SLAPP statute (CCP § 425. 16). Defendant contends that Plaintiffs' action arises out of service of the 60-day notice to quit- a necessary prerequisite to filing an unlawful detainer action- and thus falls under the protection of the anti-SLAPP statute. The Court disagrees . . . Plaintiffs' are not challenging the eviction procedure but the eviction decision itself. Thus, while service of the 60-day notice is arguably a protected activity, Plaintiffs' complaint does not arise from this activity and thus is not subject to the anti-SLAPP statute. Accordingly, the motion is DENIED."

Indeed, in the housing context, the courts have gone far beyond holding that FEHA actions are not properly subject to anti-SLAPP motion and have recognized that the anti-SLAPP statute was not intended to and does not protect landlords from engaging in other forms of illegal conduct *even if that conduct is manifested as an unlawful detainer action or other protected activity.*[48]

With *Wilson* and *Daniel* up for review, it is high time for the California Supreme Court to expressly clarify that anti-SLAPP motions are not appropriate in the context of FEHA employment and housing discrimination, harassment, retaliation, and failure to accommodate cases.

46 *Radell*, 2011 WL 2164014 at * 7 (citations omitted).
47 Los Angeles Superior Court Case No. BC644978.
48 See *Ben–Shahar v. Pickart* (2014) 231 Cal.App.4th 1043, 1051–52 ("Numerous anti-SLAPP cases have discussed a landlord's unlawful detainer action that is followed by a tenant's lawsuit. Unless the sole basis of liability asserted in the tenant's complaint is the filing and prosecution of the unlawful detainer action, the tenant's action will not be targeted at protected activity. Where, however, the action is predicated upon conduct distinct from the prosecution of unlawful detainer action—even though the complaint is based upon the unlawful detainer action or arises from it—the tenant's action is not targeted at protected activity and thus does not meet the first prong of the anti-SLAPP analysis."); *Marlin v. Aimco Venezia LLC* (2007) 154 Cal.App.4th 154 (landlord's anti-SLAPP motion denied where tenants sued landlord after it served Ellis Act notices instructing tenants to vacate apartments – the court held that even if the service of the Ellis Act notices was protected activity, the tenants' action was directed at the landlord's wrongful reliance on the Ellis Act); *Santa Monica Rent Control Bd. v Pearl St.* (2003) 109 Cal. App. 4th 1308 (landlord's anti-SLAPP motion denied where rent control board sued landlord after it followed the statutory procedure for an upward adjustment of the amount of rental on the subject units – the court that the action was based on landlord unlawful conduct).

Author's Bio

Andrew H. Friedman is a partner with Helmer Friedman LLP in Beverly Hills. He received his B.A. from Vanderbilt University and his J.D. from Cornell Law School, where he was an Editor of the Cornell Law Review. Mr. Friedman clerked from the Honorable Judge John T. Nixon (U.S. District Court for the Middle District of Tennessee). Mr. Friedman represents individuals and groups of individuals in employment law, consumer rights and personal injury cases. Mr. Friedman served as Counsel of Record in *Lightfoot v. Cendant Mortgage Corp. et. al.* (Case No. 10-56068) where he successfully convinced the U. S. Supreme Court to grant the petition for certiorari that he filed on behalf of his clients. In January 2017, the Supreme Court, in a unanimous decision authored by Justice Sotomayor, reversed the Ninth Circuit and ruled in favor of Mr. Friedman's clients. Mr. Friedman is the author of *Litigating Employment Discrimination Cases* (James Publishing 2005 – 2016).

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