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Does Calif.'s Anti-SLAPP Law Apply To Discrimination Claims?

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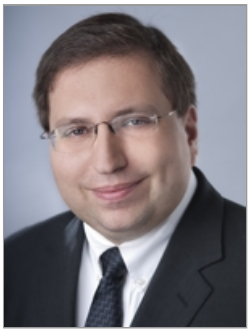
Law360, New York (June 9, 2017, 7:18 PM EDT) -- California's anti-SLAPP statute "allows a court to strike any cause of action that arises from the defendant's exercise of his or her constitutionally protected rights of free speech or petition for redress of grievances."[1] Despite this "statute's broad reach,"[2] the law's scope "is not without limits."[3] In particular, defendants must demonstrate that the allegedly unlawful conduct in question fits within one of the four categories of protected activities spelled out in the anti-SLAPP statute.[4]



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For years, California courts of appeal have disagreed over whether claims alleging discrimination under California's Fair Employment and Housing Act are covered by the anti-SLAPP statute. The California Supreme Court recently provided guidance on this question, holding in Park v. Board of Trustees of the California State University that such claims fall outside the anti-SLAPP law's scope if they simply contest an action or decision that was arrived at following speech or petitioning activity or subsequently communicated by means of such activity.[5] However, the Supreme Court declined to disapprove case law applying the anti-SLAPP statute to claims where the allegedly discriminatory statements or conduct furthered speech or petitioning activity in connection with an issue of public interest, and expressly left open the possibility that it may later agree with this line of authority.

Before Park, Courts of Appeal Disagreed Over Whether the Anti-SLAPP Statute Applies to Discrimination Claims

The "critical" question in deciding if the anti-SLAPP law applies to a claim "is whether the plaintiff's cause of action itself was based on an act" that fits within the categories of protected activities expressly enumerated in the statute,[6] none of which "categorically exclude[] any particular type of action from [the anti-SLAPP law's] operation."[7] Courts have no authority to rewrite the anti-SLAPP law to render it categorically inapplicable to particular types of claims.[8] Furthermore, whether the anti-SLAPP statute applies does not turn on the motives, good faith, or intent of either the plaintiff or defendant.[9] Rather, this determination focuses on "the defendant's activity that gives rise to his or her asserted liability — and whether that activity constitutes protected speech or petitioning."[10]

Applying these principles, several courts of appeal have held that discrimination, harassment and retaliation claims arising under FEHA or the Unruh Civil Rights Act fell within the scope of the anti-SLAPP statute. For example:

- In Ingels v. Westwood One Broadcasting Services Inc.,[11] the court of appeal decided that the anti-SLAPP statute applied to an Unruh Act claim alleging age discrimination where a radio station and call-in show host ridiculed the plaintiff, who had called into the show, on air about his age.[12]

- In Gallanis-Politis v. Medina,[13] the court of appeal held that the anti-SLAPP statute applied to a FEHA claim alleging retaliation based on an investigation by the plaintiffs' supervisor into whether she was not entitled to a bonus for being bilingual, since the investigation was undertaken in response to the plaintiff's discovery request in litigation.[14]

- In Nesson v. Northern Inyo County Local Hospital District,[15] the court of appeal applied the anti-SLAPP statute to FEHA and Unruh Act claims where the plaintiff physician alleged that a hospital discriminated against him based on a perceived disability when the medical executive committee suspended his medical staff privileges, since the claims arose from a challenge to official proceedings consisting of hospital peer review activities.[16]

Several courts of appeal, however, have refused to apply the anti-SLAPP statute to such claims. For example:

- In Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments LLC,[17] the court of appeal held that the anti-SLAPP statute did not apply to FEHA and Unruh Act claims alleging housing discrimination where an apartment building tenant asked for an extension of the deadline to find alternative housing due to a disability after the landlord sent her a removal notice but the tenant rejected the landlord's request for detailed information about her disability and the landlord therefore removed her via an unlawful detainer action.[18]

- In Martin v. Inland Empire Utilities Agency,[19] the court of appeal determined that the anti-SLAPP statute was inapplicable to FEHA claims alleging racial and age discrimination as well as retaliation where the claims asserted that the plaintiff's supervisor directed him to take retaliatory measures against another employee for filing a racial discrimination complaint against the supervisor's assistant but the plaintiff failed to do so.[20]

Tuszynska v. Cunningham[21] and Nam v. Regents of University of California[22] illustrate the split of authority over whether the anti-SLAPP statute applies to discrimination claims.

In Tuszynska, an attorney who provided legal representation to members of a sheriff's association under the auspices of a legal defense fund sued the fund and its administrator for gender discrimination, alleging that they violated FEHA and the Unruh Act by purportedly referring fewer cases to her and instead referring them to male attorneys with less experience.

The court of appeal held that the anti-SLAPP statute applied to these claims because "attorney selection and litigation funding decisions" constituted protected activities.[23] The court explained: "Whether defendants had a gender-based discriminatory motive in not assigning new cases to plaintiff or in defunding her existing cases is a question that is entirely separate and distinct from whether, under the anti-SLAPP statute, plaintiff's gender discrimination claims are based on defendant's selection and funding decisions. Courts must be careful not to conflate such separate and distinct questions."[24]

By contrast, Nam held that the anti-SLAPP statute did not apply to a plaintiff's claims for

discrimination, harassment and retaliation. The plaintiff, a new resident at a university medical center, sent an email disagreeing with any policy requiring residents to wait for an on-call team to perform a particular medical procedure in an emergency. The plaintiff complained that she was thereafter subjected to sexual harassment and retaliation, and sued under FEHA. The defendant filed an anti-SLAPP motion, arguing that the claims were subject to the anti-SLAPP statute because they were based on its duty to investigate and discipline unprofessional conduct. The trial court disagreed and denied the motion.

The court of appeal affirmed.[25] In doing so, the court rejected Tuszynska. Nam found that "[t]o conclude otherwise would subject most, if not all, harassment, discrimination, and retaliation cases to motions to strike," and concluded this result would be "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" under the anti-SLAPP statute.[26]

The California Supreme Court Weighs In on Anti-SLAPP Statute's Application to FEHA Discrimination Claims

As the foregoing split of authority continued to grow, the California Supreme Court recently provided guidance about the interplay between the anti-SLAPP statute and FEHA claims in Park.

There, a former tenure-track assistant professor sued a state university under FEHA, alleging it discriminated against him based on his national origin when it denied his tenure application and terminated his employment. The university filed an anti-SLAPP motion, arguing that the lawsuit was based on communications protected by the anti-SLAPP statute. The trial court denied the motion but a divided court of appeal reversed, holding that the anti-SLAPP statute applied because the denial of tenure rested on communications made in connection with an official proceeding: the tenure decision-making process. The California Supreme Court reversed.

The court held that "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."[27] "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."[28]

Applying these principles, the court held that the plaintiff's claim fell outside the anti-SLAPP statute's scope because it did not depend on "any specific evaluations of him in the tenure process, but only on the denial of tenure itself and whether the motive for that action was impermissible."[29] The court explained that although the "tenure decision may have been communicated orally or in writing," this communication did "not convert Park's suit to one arising from such speech."[30]

The court disapproved in certain respects prior cases that had given a broader reading to the anti-SLAPP statute. For example, the court disapproved Nesson to the extent it indicated that "disciplinary decisions reached in a peer review process, as opposed to statements [made] in connection with that process, are protected" by the anti-SLAPP statute.[31] Similarly, the court disapproved Tuszynska to the extent it "presuppose[d] courts deciding anti-SLAPP motions cannot separate an entity's decisions from the communications that give rise to them, or that they give rise to."[32]

The court emphasized 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 discrimination suit to one arising from speech."[33] The anti-SLAPP statute is inapplicable where the activity "giv[ing] 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."[34]

The court, however, left open for a future case the question of whether the anti-SLAPP statute applies to a lawsuit where, unlike in Park, the alleged basis for the FEHA claim may well be protected conduct, as had been the case in Hunter v. CBS Broadcasting Inc.[35]

In Hunter, a job candidate for a weather news anchor position sued CBS Broadcasting for age and gender discrimination under FEHA after unsuccessfully seeking a position with two local CBS television stations. The court of appeal held, pursuant to the anti-SLAPP statute, that the decision to hire a young, female weather news anchor rather than an older, male applicant was protected conduct in furtherance of the exercise of free speech rights in connection with an issue of public interest.

As Hunter explained, "the injury-producing conduct underlying [the plaintiff's] employment discrimination claims consist[ed] of CBS's decisions about whom to hire as the on-air weather anchors" for its stations' "prime time newscasts."[36] The court held that "'reporting the news'" and creating a television show were exercises of free speech, the selection of anchors to report the news "'helped advance or assist' both forms of First Amendment expression," and this selection therefore constituted a protected activity.[37]

The Park court distinguished Hunter on the ground that, unlike Hunter, the state university defendant had not demonstrated the "choice of faculty involved conduct in furtherance of University speech on an identifiable matter of public interest."[38] The court "express[ed] [no] opinion concerning whether" Hunter "was correctly decided."[39]

The Anti-SLAPP Statute's Application to Discrimination Claims After Park

Although Park left open whether the anti-SLAPP statute applies to FEHA claims where, as in Hunter, the alleged injury-producing conduct consists of activities furthering free speech rights, the California Supreme Court or California Court of Appeal will soon have an opportunity to explore this issue in proceedings arising from Daniel v. Wayans[40] and Wilson v. Cable News Network Inc.[41]

In Wilson, a divided court of appeal held that a news agency's alleged discriminatory and retaliatory conduct toward a behind-the-scenes producer and article writer were not acts in furtherance of the news agency's free speech rights and therefore the plaintiff's FEHA claims fell outside the anti-SLAPP statute's scope. The majority opinion, written by Justice Elwood Lui, rejected Hunter as having adopted an erroneous interpretation of the anti-SLAPP law and concluded "that the gravamen of plaintiff's employment-related causes of action was defendants' allegedly discriminatory and retaliatory conduct against him, not the particular manifestations of the discrimination and retaliation, such as denying promotions, assigning him menial tasks, and firing him."[42]

Justice Frances Rothschild dissented, explaining that the news agency's decision to fire the plaintiff constituted a protected activity under the anti-SLAPP statute since acts that help advance or assist the agency in reporting the news are activities in furtherance of free speech.[43] Her dissent followed Hunter and explained that the majority's analysis was contrary to California Supreme Court precedent: "By considering the merits of whether the defendant's acts were unlawful — i.e., whether they were discriminatory, harassing, or retaliatory — the court 'confuse[d] the threshold question of whether the SLAPP statute applies with the question whether [the plaintiff] has established a probability of success on the merits.'"[44]

By contrast, in Wayans, the same court of appeal affirmed an order granting an anti-SLAPP motion that challenged an actor's complaint alleging the defendant had racially harassed the actor while filming a movie, in violation of FEHA. In another 2-1 decision, the majority opinion held that the anti-SLAPP statute applied to the claims because the defendant's alleged on-set activities were undertaken to assist with the "creative process" inherent in making the movie and were therefore activities in furtherance of free speech on an issue of public interest.[45]

Justice Lui dissented in part. The dissent maintained that "the important distinction for purposes of

defining the contours of the creative process is between creative collaboration, even if it includes offensive topics, and demeaning conduct that is directed at a specific person. The latter is outside the bounds of constitutionally protected free speech."[46]

The California Supreme Court granted review in both Wilson and Wayans but deferred action in either case pending its decision in Park. Once Park becomes final, the California Supreme Court will have an opportunity to address whether, after Park, FEHA claims fall within the anti-SLAPP statute's broad scope where, as in Hunter, the claims are based on activities that are themselves taken in furtherance of free speech or petitioning rights in connection with an issue of public interest. But even if the court declines to decide that question in the first instance and remands Wilson and Wayans for reconsideration in light of Park, the court of appeal will have a chance to revisit Hunter's continuing vitality in those cases.

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[1] Flatley v. Mauro (2006) 39 Cal.4th 299, 311-312

[2] City of Montebello v. Vasquez (2016) 1 Cal.5th 409, 418

[3] Flatley, at p. 313

[4] City of Montebello, at pp. 421-422

[5] Park v. Board of Trustees of the California State University (May 4, 2017, S229728) 2 Cal.5th 1057 [393 P.3d 905]

[6] City of Cotati v. Cashman (2002) 29 Cal.4th 69, 78

[7] Navellier v. Sletten (2002) 29 Cal.4th 82, 92

[8] Ibid.

[9] See Equilon Enterprises v. Consumer Cause Inc. (2002) 29 Cal.4th 53, 61-62

[10] Navellier, at p. 92

[11] Ingels v. Westwood One Broadcasting Services Inc. (2005) 129 Cal.App.4th 1050

[12] Id. at pp. 1062-1064

[13] Gallanis-Politis v. Medina (2007) 152 Cal.App.4th 600

[14] Id. at pp. 604-606, 610-611

[15] Nesson v. Northern Inyo County Local Hospital Dist. (2012) 204 Cal.App.4th 65

[16] Id. at pp. 72-75, 78-84

[17] Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments LLC (2007) 154 Cal.App.4th 1273

[18] Id. at pp. 1275-1280, 1284-1288

[19] Martin v. Inland Empire Utilities Agency (2011) 198 Cal.App.4th 611

[20] Id. at pp. 615-621, 624-625

[21] Tuszynska v. Cunningham (2011) 199 Cal.App.4th 257

[22] Nam v. Regents of University of California (2016) 1 Cal.App.5th 1176

[23] Tuszynska, supra, 199 Cal.App.4th at pp. 267-268

[24] Id. at p. 269

[25] Nam, supra, 1 Cal.App.5th at p. 1179

[26] Id. at p. 1189

[27] Park, supra, 393 P.3d at p. 907

[28] Ibid.

[29] Park, supra, 393 P.3d at p. 912

[30] Ibid.

[31] Park, supra, 393 P.3d at p. 913

[32] Id. at p. 914

[33] Park, supra, 393 P.3d at p. 911

[34] Ibid.

[35] Hunter v. CBS Broadcasting Inc. (2013) 221 Cal.App.4th 1510

[36] Hunter, supra, 221 Cal.App.4th at p. 1521

[37] Ibid.

[38] Park, supra, 393 P.3d at p. 915

[39] Ibid.

[40] Daniel v. Wayans (2017) 8 Cal.App.5th 367

[41] Wilson v. Cable News Network Inc. (2016) 6 Cal.App.5th 822

[42] Wilson, supra, 6 Cal.App.5th at p. 836

[43] Wilson, supra, 6 Cal.App.5th at pp. 840-846 (dis. opn. of Rothschild, P.J.)

[44] Id. at pp. 841-843

[45] Wayans, supra, 8 Cal.App.5th at pp. 383-387

[46] Wayans, supra, 8 Cal.App.5th at pp. 404-405 (conc. & dis. opn. of Lui, J.)