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When Anti-SLAAP And Employment Bias Laws Collide

By **Lisa Coyle and Vincent Licata** (March 25, 2020, 5:28 PM EDT)

Lisa Coyle

Vincent Licata

In an effort to deter and redress strategic lawsuits against public participation, or SLAPPs, a majority of states have adopted anti-SLAPP laws.[1]

Designed with the aim of protecting individuals who speak out on matters of public concern against more powerful corporate interests that may be negatively affected by such speech, these statutes typically provide qualifying defendants with an early stage procedural mechanism to stay discovery, force the plaintiff to show a probability of prevailing, and (if successful) recover costs and attorney fees.[2]

Employment discrimination laws, of course, were also designed to protect, and provide a mechanism for redress, to individuals (employees) against typically more powerful and well-funded parties (employers) engaged in discrimination or harassment based on sex, race, age or a host of other protected characteristics.

But what happens when these two areas of law intersect? Are there unintended consequences that flip the script between the less powerful parties each set of laws was originally designed to protect and their more powerful adversaries?

How have different states approached this conflict? And what lessons can be gleaned by both employers and employees from recent decisions and proposed changes in law affecting the intersection of these two bodies of law? This article seeks to explore those questions.

Broad Versus Narrow Anti-SLAPP Laws

Although all anti-SLAPP laws were adopted to rectify abuses perceived to have chilled freedom of speech, the breadth and impact of these statutes differs significantly from state to state, with states like California having perhaps the broadest scope and states like New York the narrowest.[3]

Specifically, defendants in California may make a special motion to strike any action arising from any act by a "person in furtherance of the person's right of petition or free speech ... in connection with a public issue."[4] The filing of the motion stays discovery and, unless the plaintiff is able to show a probability that he will prevail on his claims at the pleading stage, the case will be dismissed and the plaintiff required to pay the

defendants' attorney fees.[5]

New York's anti-SLAPP statute, on the other hand, is only applicable to actions brought by public applicant or permittee plaintiffs, and requires the defendant — who must be an individual who has spoken out about the potential issuance of such application or permit — to show that the claim is materially related to such speech in order to invoke the statute's protections.[6] In other words, the law does not protect defendants who speak out about a matter unrelated to a government application.[7]

These differences in the scope of anti-SLAPP statutes across states can have a dramatic effect on whether and to what extent they come into play in the context of the enforcement of those states' employment discrimination laws.

Applying California Anti-SLAPP Law to Employment Bias Claims: Wilson v. CNN

In Wilson v. Cable News Network Inc. — an action brought by a longtime producer for the news agency who had been terminated, purportedly as a result of plagiarism — the plaintiff, Stanley Wilson, argued that application of the anti-SLAPP statute in the employment discrimination context would be a perversion of its purpose and antithetical to the legislators' intentions.[8]

The California Supreme Court rejected such a categorical approach, holding that the statute

> contains no exception for discrimination or retaliation claims, and … the plaintiff's allegations about the defendant's invidious motives will not shield the claim from the same preliminary screening for minimal merit that would apply to any other claim arising from protected [speech] activity.[9]

The Supreme Court went on to hold that the case was subject to such preliminary screening because: (1) plagiarism involves a "serious breach of journalistic ethics," the discipline of which "furthers [the] organization's exercise of editorial control"; (2) the decision to administer such discipline thus constitutes protected conduct in furtherance of the organization's speech rights; and (3) CNN had made out a prima facie case that Wilson's termination was based on its decision to discipline him for plagiarism.[10]

In its recent decision on remand interpreting the scope of the Supreme Court's opinion in Wilson, the California Court of Appeal's Second Appellate District acknowledged that review under the anti-SLAPP statute was triggered, but observed that was not the end of the inquiry.[11] Rather, the appellate court held, if the plaintiff employee makes a prima facie factual showing that the defendant employer's proffered motive is pretextual, then the case will survive preliminary screening under the anti-SLAPP law.[12]

Moreover, the plaintiff's burden on this second step of the anti-SLAPP analysis is a limited one, requiring only a demonstration of minimal merit.[13] Indeed, only if evidence proffered by the defendant defeats the plaintiff's claim as a matter of law should the anti-SLAPP special motion to strike be granted.[14]

Ultimately, the Court of Appeal held that Wilson had made out a prima facie case that CNN's proffered reason for firing him (i.e., plagiarism) was pretextual, and therefore reversed the trial court's order granting CNN's special motion to strike, thereby paving the way for the discrimination suit to go forward.[15]

New York's Potential Move Toward California-Style Anti-SLAPP Law

New York courts, in contrast, have refused to enforce the state's narrow anti-SLAPP law

absent an imbalance of power between the parties that would align application of the statute with its intended purpose.

In 149 Mercer Owner LLC v. 151 Mercer Retail LLC, for instance, the New York Supreme Court refused to apply New York's anti-SLAPP statute where the dispute was "between presumably well-funded commercial entities" and the defendant was not "being harassed by a financially superior opponent."[16]

Thus, as it stands, an employee suing an employer in New York for actions that might be protected by the First Amendment if not motivated by discriminatory animus generally does not need to worry about being hit with an anti-SLAPP motion; conversely, an employer in New York being sued for such actions is unlikely to have the anti-SLAPP statute as a tool in its defense arsenal.

That all may be about to change, however, as New York legislators are considering amending the state's anti-SLAPP statute in a way that would render it much more akin to California's. Indeed, S.B. S52 would, if adopted, require "awarding of costs and attorney fees" and expand application to all speech regarding "any issue of public concern."[17] The proposed bill "imposes no limitation on what kinds of parties may be deemed to have filed a sanctionable SLAPP suit."[18]

If enacted, therefore, the amendment could render irrelevant any financial or power differentials between the parties, and provide protection for defendants such as CNN facing employment discrimination suits by employees such as Wilson.

Considerations for Lawmakers, Employers and Employees

As the above discussion makes clear, state legislatures considering whether to enact or amend anti-SLAPP statutes — including the New York Legislature as it considers S.B. S52 — should carefully analyze the interplay of such statutes with employment discrimination laws and weigh competing policy considerations with respect to promoting freedom of speech and deterring employment discrimination.

Moreover, employers — and employees weighing whether to assert discrimination claims — should be aware of and thoroughly familiar with the existence and scope of anti-SLAPP statutes in their states. In states with narrow or no anti-SLAPP laws, the issue is unlikely to come into play. But in states such as California, Oregon, Nevada, Colorado, Oklahoma, Texas and Washington, D.C., (and, if S.B. S52 passes in New York), it is important for both constituencies to be cognizant of the risks and opportunities such statutes can provide in employment discrimination litigation.[19]

For instance, both employers and employees should consider whether a particular adverse employment action can arguably be viewed as an act in furtherance of the employer's free speech rights. Although this may be more obvious in a case such as Wilson v. CNN, where the defendant is a member of the press, there are many employees whose responsibilities may involve speaking on behalf of their employer, and disputes can arise as to whether adverse employment decisions against such employees are motivated by the employer's desire to control its own speech or discriminatory animus.

Accordingly, both employers and employees should be diligent about documenting workplace incidents, performance, and actual or perceived discrimination. As the recent decision in Wilson v. CNN counsels, one party's possession of a strong set of evidence at the outset of a case will impact the plaintiff's ability to survive an anti-SLAPP motion, particularly in light of the McDonnell-Douglas burden-shifting framework applicable to employment discrimination cases.

If CNN had not had contemporaneous documentation of Wilson's alleged plagiarism, it

might not have been able to make a prima facie showing of a nondiscriminatory intent for firing him, and thus might not have been entitled to invoke the anti-SLAPP statute in the first place. And although Wilson was ultimately able to make out a prima facie showing that CNN's proffered justification was pretextual through his own detailed sworn affidavit, CNN challenged the sufficiency of that evidence, and the availability of contemporaneous notes and correspondence evidencing pretext would have made it a less close call for Wilson on this issue.

Lisa M. Coyle is a partner and Vincent Licata is an associate at Robins Kaplan LLP.

[1] Public Participation Project, State Anti-SLAPP Laws, https://anti-slapp.org/your-states-free-speech-protection#reference-chart (last accessed March 2, 2020).

[2] See, e.g., Cal. Civ. Proc. Code § 425.16.

[3] Public Participation Project, State Anti-SLAPP Laws, https://anti-slapp.org/your-states-free-speech-protection#reference-chart (last accessed March 2, 2020). Other states with broad protections include Oregon, Nevada, Colorado, Oklahoma, Texas, and D.C.

[4] Cal. Civ. Proc. Code § 425.16(b).

[5] Cal. Civ. Proc. Code § 425.16(b), (c), (g).

[6] N.Y. Civ. Rights Law § 76-a(1).

[7] "[T]he New York anti-SLAPP law protects activists, whistleblowers, and others who, for example, oppose a restaurant's request for a liquor license; but it does not protect persons who speak out on matters of public concern unrelated to permits, licenses, or other similar requests to the government for 'permission to act.'" Derek Borchardt and Adam P. Cohen, Proposed Reform to New York's Anti-SLAPP Laws May Bring Big Changes, New York Law Journal (August 20, 2019) ("New York's anti-SLAPP law is one of the narrowest in the country.").

[8] Wilson v. Cable News Network, Inc., et al., 7 Cal. 5th 871 (Cal. 2019).

[9] Id. at 881.

[10] Id. at 898.

[11] Wilson v. Cable News Network, Inc., et al., No. B264944, 2020 Cal. App. Unpub. LEXIS 800, at *8-9 (Cal. App. Feb. 4, 2020).

[12] Id. at *2, *6.

[13] Id.

[14] Id. at *6.

[15] Id. at *32-33. Texas courts have also applied that state's broad anti-SLAPP law to employment claims. Jana Baker and Victoria Vish, The Burgeoning Use Of Strong Anti-

SLAPP Statutes In Employment Law, Mondaq Business Briefing (March 15, 2019).

[16] No. 656649/2016, 2017 WL 6047562 (N.Y. Sup. Ct., Dec. 5, 2017).

[17] The New York State Senate, Senate Bill S52, https://www.nysenate.gov/legislation/bills/2019/s52 (last accessed March 2, 2020); NY Senate Bill S52 was introduced by Sen. Brad Hoylman (D-Manhattan) on Jan. 9, 2019, and as of August 2019 was in the Senate Codes Committee.

[18] Derek Borchardt and Adam P. Cohen, Proposed Reform to New York's Anti-SLAPP Laws May Bring Big Changes, New York Law Journal (August 20, 2019) ("California's anti-SLAPP law, by contrast, explicitly disclaims application to 'enforcement action[s] brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor," meaning that Senate Bill S52 would broaden New York's anti-SLAPP statute beyond that of California's).

[19] Derek Borchardt and Adam P. Cohen, Proposed Reform to New York's Anti-SLAPP Laws May Bring Big Changes, New York Law Journal (August 20, 2019) ("S52 will likely usher in a sea change with respect to the availability of damages for SLAPP victims" and "[p]ractitioners should be aware . . . that if reform passes this year, anti-SLAPP law will likely be significantly expanded.").