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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

NORMA MONTES, Plaintiff and Respondent, v. BELLFLOWER UNIFIED SCHOOL DISTRICT et al., Defendants and Appellants.	B289325 (Los Angeles County Super. Ct. No. BC657588)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard E. Rico, Judge. Affirmed.

Roche & Associates and Robert J. Roche for Defendants and Appellants.

Alexander Krakow + Glick, J. Bernard Alexander, III and Tracy L. Fehr for Appellant and Respondent.

An anti-SLAPP motion (Code Civ. Proc., § 425.16) presents a means by which a defendant, sued for conduct in furtherance of the constitutional right of petition or free speech, can require a plaintiff to establish that there is a probability of prevailing on the claim or face early dismissal of the action.[1] If the defendant first establishes a prima facie showing that a claim is based on so-called "protected activity," the burden switches to the plaintiff to establish the lawsuit has at least minimal merit. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*).)

Here, plaintiff Norma Montes sued defendants Sulema Holguin and Bellflower Unified School District for, among other things, defamation. Montes's defamation cause of action lacked sufficient specificity from which it could be determined whether that cause of action arose from protected activity. Defendants nonetheless filed an anti-SLAPP motion with respect to that cause of action. In opposition, Montes identified two specific defamatory statements, which defendants then argued constituted protected activity. The trial court denied the anti-SLAPP motion, concluding defendants did not establish the defamation cause of action arose from protected activity. We agree with the trial court and affirm.

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[1] A "SLAPP" is a Strategic Lawsuit Against Public Participation. (*Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1111.) All further undesignated statutory subdivisions are to Code of Civil Procedure section 425.16.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Underlying Facts*

The underlying facts are largely irrelevant to our resolution of the appeal. We review them only as necessary to give context to our discussion.

Montes was employed by the District as a Community Services Worker or Case Manager at Washington Elementary School. She was responsible for all of the approximately 1000 students at the school, and her duties included referring families to local agencies and school services as necessary. Defendant Holguin was the principal at Washington Elementary.

The record shows a course of less-than-impressive performance evaluations, written memoranda, reprimands, and notices of unsatisfactory performance issued by Holguin to Montes, over approximately one year. Montes was then terminated from District employment on Holguin's recommendation. It seems that Holguin first took issue with Montes's absences, which negatively impacted her ability to deliver necessary services to students. From there, Holguin's concerns regarding Montes blossomed into what might be considered micro-management – requiring, among other things, that Montes: (1) keep regular logs of her contacts with parents; (2) not communicate with anyone via text message; and (3) provide doctors' notes indicating the nature of her illnesses when absent. The latter became a significant bone of contention, with Montes willing to provide doctors' notes, but refusing to disclose the nature of her illness to Holguin. Eventually, Holguin issued a memo to Montes, stating that failure to "turn in a doctor's note stating the nature of illness" would be considered insubordination. A subsequent notice of unsatisfactory

performance reprimanded Montes for both unsatisfactory job performance and for supplying a doctor's note that did not indicate the nature of her illness. Montes was eventually terminated for a number of purported reasons.

Montes takes a different view of the facts. She believes that Holguin's behavior toward her changed once she took leave to care for her ailing brother and (other) personal reasons. When Montes complained about receiving a negative evaluation for taking leave, Holguin retaliated against her by, among other things: (1) heavily monitoring and scrutinizing her behavior; (2) shunning her at meetings; and (3) changing expectations and chastising her for not meeting the changed expectations.

Ultimately, whether Montes was a problem employee who was properly terminated, or whether she was the victim of illegal retaliation for taking family and/or medical leave, is beyond the scope of this appeal.

2. *Montes's Complaint*

Montes's original complaint (which is not the operative complaint) was filed on April 12, 2017. It alleged numerous causes of action arising from her termination. It also included a cause of action for defamation. Montes alleged in general terms that the District and Holguin defamed her "to third persons and to the community. These false and defamatory statements included express and implied accusations that [Montes] was a liar, and a poor employee, and a bad role model."

3. *Defendants' Demurrer*

Defendants demurred to the complaint. As to the defamation cause of action, defendants asserted the allegations were insufficient to state a claim, in that the allegedly defamatory statements were unactionable statements of opinion,

not actionable statements of fact. The demurrer did not assert specifically that the defamation cause of action lacked the necessary particularity to survive demurrer.[2] (See, e.g., *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 628 [a plaintiff is required to specifically plead defamatory statements].)

The trial court overruled the demurrer as to seven of the eight causes of action, including defamation, only sustaining a demurrer with leave to amend a single cause of action, not related to this appeal. The trial court's ruling on the demurrer to the defamation cause of action did not discuss the specificity, or lack thereof, of the defamation allegation. Instead, the court concluded the alleged defamatory words were not protected statements of opinion.

4. *The Operative First Amended Complaint*

The operative complaint is Montes's first amended complaint. Montes alleges the same eight causes of action, including defamation.

As to defamation, the First Amended Complaint contained virtually the identical, vague allegations found in her initial complaint: "On or about August 31, 2016, Plaintiff first became aware that [Holguin] had and was making statements about [Montes], that: (1) [Montes] was a poor employee and failed to adequately perform her job duties; and (2) [Montes] was disloyal and had told lies about [Holguin]. Each of these statements of fact, as made by [Holguin], was false." She alleged that the

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[2] In support of its demurrer to Montes's Fair Employment and Housing Act cause of action, the District alone argued that, as a public entity, all causes of action against it had to be pled with specificity.

District and Holguin "did negligently, recklessly, and intentionally cause excessive and unsolicited internal and external publications of defamation, of and concerning [Montes], to third persons and to the community. These false and defamatory statements included express and implied accusations that [Montes] was a liar, and a poor employee, and a bad role model. These and other similar false statements expressly and impliedly stated that Plaintiff was dishonest and a poor performer."

She also alleged that the statements were made "in response to and in retaliation for [Montes]'s complaints of discrimination and harassment and [Montes]'s requests for reasonable accommodation for her disability and her requests for protected leave."

Montes added, "While the precise dates of these publications are not known to [Montes], she is informed and believes the publications were for the improper purpose of retaliating against [Montes] for her complaints and reports of discriminatory treatment and harassment, and were later published and foreseeably republished to justify Plaintiff's wrongful and illegal termination."

Finally, she claimed, "Defendants, and each of them, conspired to, and in fact, did negligently, recklessly, and intentionally cause excessive and unsolicited publication of defamation, [of] and concerning [Montes], to third persons, who had no need or desire to know. Those third person(s) to whom these Defendants published this defamation are believed to include, but are not limited to, coworkers, and other agents and employees of Defendants, and each of them, and the community,

all of whom are known to Defendants, and each of them, but unknown at this time to Plaintiff."

5. *Defendants' Anti-SLAPP Motion*

Defendants did not again demur, but filed an anti-SLAPP motion as to the defamation cause of action only.[3]

"Anti-SLAPP motions are evaluated through a two-step process. Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims 'aris[e] from' protected activity in which the defendant has engaged. [Citations.] If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least 'minimal merit.' [Citations.]" (*Park, supra*, 2 Cal.5th at p. 1061.)

Defendants' anti-SLAPP motion was geared, in large part, to the second prong of the anti-SLAPP analysis. That is, defendants sought to establish that the defamation cause of action lacked minimal merit. Specifically, although not exclusively, defendants took the position that all of the allegedly defamatory statements in fact were true, which would be a defense to defamation. They therefore supported the motion with a great deal of evidence designed to establish that Montes was, in fact, a liar, a poor employee, and a bad role model.

But whether or not the statements were true goes to the merits of the cause of action and thus to the second prong of anti-

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[3] An anti-SLAPP motion "may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." (Subd. (f).) Defendants' anti-SLAPP motion was not filed within 60 days of the original complaint, but, according to defendants' brief on appeal, the court had previously orally granted defendants leave to pursue a late anti-SLAPP motion. Montes does not dispute this representation.

SLAPP analysis. Before a court can proceed to the second prong, the moving defendant must satisfy the first prong – that is, establish that the defamation cause of action arose from protected activity, as the term is defined in the anti-SLAPP statute. Subdivision (e) is the operative provision and describes four categories of protected speech and conduct: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or issue of public interest." (Subds. (e)(1)-(e)(4).)

Defendants argued below that any statements they made fell within the protection of all four categories of protected speech under subdivisions (e)(1)-(e)(4). Without admitting that any of the statements were defamatory, defendants argued that the statements qualified under subdivisions (e)(1) and (e)(2) of the statute because they were made in connection with an official proceeding authorized by law – specifically, the proceeding by which Montes was disciplined and terminated. Defendants denied they made any statement to the public, but if they had, such public statements would have satisfied subdivisions (e)(3) and (e)(4) because they were related to a matter of public interest

– specifically, the failure of a public employee to do her job on behalf of at-risk children.

6. *Montes's Opposition*

In opposition, Montes for the first time identified two specific defamatory statements she claimed Holguin had made. She explained that, in late 2015, when she still worked at Washington Elementary, she applied for a job with the Head Start program. The program was not part of Washington Elementary but was within the District. She was offered the job conditioned on a reference check, and she provided a list of references which did not include Holguin. Later, Montes was notified that she was denied the position because Holguin had told the prospective Head Start employer that Montes was a troublemaker and unreliable. We refer to this as the "Head Start" statement.

The second Holguin statement Montes identified was that in August 2016, after she had been terminated, a former colleague, Claudia Bravo, informed her that Holguin had given her (i.e., Bravo) a poor performance evaluation due to her association with Montes. Holguin had told Bravo that Montes was dishonest, a poor employee, a bad role model, and disloyal. We refer to this as the "Bravo Evaluation" statement.[4]

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[4] Montes described both statements in her opposition to the anti-SLAPP motion. She also submitted a declaration in which she testified to her knowledge of both statements. Defendants would subsequently object to this portion of Montes's declaration as hearsay. The trial court did not rule on these objections, and defendants pursue them on appeal. We will ultimately conclude that defendants have failed to establish the defamation cause of action arises from protected activity – regardless of whether the defamatory statements were those in the general allegations of

7. *Defendants' Reply*

In reply, defendants argued that the two alleged statements mentioned in the opposition were also protected activity. Specifically, they claimed the Head Start statement was protected under subdivision (e)(2) as it was related to an official proceeding – either the progressive discipline which would lead to Montes's termination or the official proceeding in which she was being considered for District employment with the Head Start program. They argued the Bravo Evaluation statement was also protected under (e)(2), as it was connected to the official proceeding of Bravo's performance evaluation. They also re-asserted that both statements were protected under (e)(3) and (e)(4) as relating to an issue of ongoing public interest, specifically "whether a public employee responsible for the well-being of disadvantaged young children at an elementary school was actually performing her duties."

Defendants also submitted declarations denying that the two identified statements had in fact occurred. Curiously, in an amended declaration, Holguin denied even conducting Bravo's evaluation, stating that she only oversaw the evaluation – a declaration which arguably undermined defendants' argument that the Bravo Evaluation statement occurred during the course of an official proceeding because it had occurred during Bravo's performance evaluation.

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the complaint or the two specific statements identified in Montes's opposition. In that sense, whether Montes possesses admissible evidence of the Head Start and Bravo Evaluation statements at this early stage of the litigation is beside the point.

8. *Hearing, Ruling & Appeal*

At the hearing on the anti-SLAPP motion, defendants argued that the defamation cause of action arose from statements they made during the protected activity of Montes's evaluation. The trial court disagreed, explaining that Montes's claim "is that [defendants] made statements to third parties badmouthing the plaintiff outside of the context of the evaluation; that's all that's necessary for them to defeat the claim." Defendants argued that there was no admissible evidence of such statements; the trial court responded that it was relying on the allegations of the complaint. The court denied the anti-SLAPP motion.

The court's ruling, expressed in a tentative ruling it later adopted as final, explained that defendants did not establish the defamation arose from protected activity – rejecting both defendants' "official proceeding" and "public interest" arguments.

Defendants filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review*

"We review de novo the grant or denial of an anti-SLAPP motion. [Citation.] We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. [Citations.] In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based. [Citations.] We do not, however, weigh the evidence, but accept plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law. [Citation.]" (*Park, supra*, 2 Cal.5th at p. 1067.)[5]

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[5] In their opening and reply briefs, defendants state that they "appeal from the denial of their Motion on the grounds that

2. *First Prong of Anti-SLAPP Analysis*

As discussed, the first prong of the anti-SLAPP analysis requires the moving defendant to establish the challenged claim arises from protected activity. The defendant bringing a motion to strike must make a prima facie showing that the allegations forming the basis of the plaintiff's claims arise from conduct that falls under one of the subdivision (e)(1)-(e)(4) categories. (*Laker v. Board of Trustees of California State University* (2019) 32 Cal.App.5th 745, 760 (*Laker*).)

Our inquiry covers three separate topics. First, we address and reject defendants' preliminary argument that we can simply presume that prong one has been established. Second, we consider whether defendants met their burden with respect to the allegations of the complaint, and conclude that, given the broad language of the complaint, it was simply impossible to do so. Finally, we perform the prong one analysis with respect to the two statements identified in opposition to the anti-SLAPP motion, and conclude that the Head Start and Bravo Evaluation statements do not constitute protected activity. We therefore affirm the trial court's denial of the anti-SLAPP motion.

3. *Prong One Is Not Presumed*

Preliminarily, defendants argue that "a Defendant's threshold showing (the first prong of the Anti-SLAPP analysis, i.e., that the Defendants' speech was protected) should generally be presumed." The authority on which defendants rely for this proposition does not support it.

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the trial court erred by applying the wrong standard, the wrong burden of proof, relying on case law not cited by Plaintiff, and failing to review Defendants' evidence." As our review is de novo, these arguments are not directly cognizable on appeal.

Defendants direct our attention to *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 590 (*Okorie*) and *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 458 (*Davis*). Both cases state the principle that the court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and permit the parties to address the issue in the second step. But stating that the *validity of the claimed constitutional right* is to be presumed is a far cry from stating the *first prong of the anti-SLAPP analysis* is to be presumed. *Okorie* gets its language from *Davis*. (*Okorie, supra*, at p. 590.) *Davis*, in turn, quotes from *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305. (*Davis, supra*, 102 Cal.App.4th at p. 458.) *Fox Searchlight* explains the principle. There, the plaintiff corporation (Fox) sued its former employee for disclosing confidential information; the employee brought an anti-SLAPP motion. The corporation responded that the first prong was not satisfied because the defendant had no constitutional right to disclose the confidential information. The court rejected this argument, stating, "The same argument could be made by the plaintiff in a defamation suit—the defendant has no First Amendment right to engage in libel or slander. Yet, defamation suits are a prime target of SLAPP motions." (*Id*. at p. 305.) "The problem with Fox's argument is that it confuses the threshold question of whether the SLAPP statute applies with the question whether Fox has established a probability of success on the merits. The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law. If this were the case then the inquiry as to

whether the plaintiff has established a probability of success would be superfluous." (*Ibid.*)

Applying *Fox* to the present case, defendants' authority would be meaningful if Montes had taken the position that, since the First Amendment does not protect defamation, defendants could not establish protected activity without establishing that their statements were not defamatory. That legerdemain would move prong two into prong one and make the former superfluous. But Montes does not make that argument. She argues that assuming the constitutionality of the speech, the statements here do not fit into any of the four categories of subdivision (e). The notion that we should presume the validity of the claimed constitutional right is simply not at issue. It is defendants who must establish a prima facie showing of protected activity.

Likewise, we reject any implication that *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13 establishes that a plaintiff's complaint is not sufficient to withstand an anti-SLAPP motion if the pleadings are inadequate to state a cause of action. That case establishes that, to satisfy the prong two burden of showing a probability of success, the plaintiff must demonstrate both that the complaint is legally sufficient and that it is supported by sufficient facts to sustain a favorable judgment. (*Id*. at p. 26.) *Gilbert v. Sykes, supra*, only addresses the second prong; we do not consider the merits of the plaintiff's complaint until the defendant has successfully established the first prong. (*Martin v. Inland Empire Utilities Agency, supra,* 198 Cal.App.4th at p. 628.)[6]

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[6] We appreciate defendants' difficulties in developing its first prong argument in the trial court when Montes's complaint contained only vague allegations of defamation. But an anti-

4. *A Preliminary Observation about Defendant's Dilemma in Challenging the First Amended Complaint by Anti-SLAPP Motion*

"The first step of the anti-SLAPP analysis 'turns on two subsidiary questions: (1) What conduct does the challenged cause of action "arise[] from"; and (2) is that conduct "protected activity" under the anti-SLAPP statute?' [Citation.]" (*Laker, supra*, 32 Cal.App.5th at p. 760.)

Defendants' anti-SLAPP motion was directed to the first amended complaint. We therefore look first to the complaint itself to determine the conduct from which the defamation cause of action arose. Indeed, at this stage in the analysis, we accept as true the well-pleaded facts. (*Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203, 217.) But here, there is something of a problem; the pleaded facts identify no specific defamatory statements. While the operative complaint identifies the speaker (Holguin) and the broad subject matter (that Montes was a poor employee, disloyal, a liar, and a bad role model), it does not specify the exact or approximate words used, or, more importantly, to whom the statements were made. Indeed, the complaint alleges that the defendants caused "excessive and unsolicited internal and external publications of defamation . . . to third persons and to the community." These defamatory

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SLAPP motion is not a demurrer. In any event, by the time defendants filed their reply in the trial court defendants had before them the specific statements claimed to be defamatory, and argued that prong one had been satisfied as to those statements. As we observe next in the text, whether we consider the allegations of the first amended complaint alone, or as augmented by the declaration filed by Montes, our conclusion is the same.

statements were allegedly made "to third persons, who had no need or desire to know."

Rather than attempt to argue that all of the statements conceivably encompassed by these broad allegations constituted protected activity, defendants' motion argued (1) Holguin's statements were made in connection with the official proceeding of Montes's termination and (2) although Holguin denied making any statements to the public, any public statements would have necessarily been related to the failure of Montes to do her job with respect to at-risk children; therefore they addressed a matter of public interest.

In other words, defendants attempted to recharacterize Montes's broad allegations of defaming her to uninterested parties into two different (and purportedly more easily defeated) allegations: (1) that Holguin defamed her in the context of the official termination proceedings; and (2) that Holguin defamed her in statements to the public regarding her failure to protect children. Those allegations are not found in the complaint. A defendant faced with a complaint lacking the necessary specificity cannot simply redraft it in order to force the allegations within the confines of protected activity. (*Central Valley Hospitalists v. Dignity Health, supra*, 19 Cal.App.5th at p. 218 [when the complaint contained broad allegations and specifically disclaimed being based on a type of protected activity, the defendant could not prevail on the first prong of anti-SLAPP by arguing the complaint must, in fact, be based on the disclaimed protected activity].)

In this respect, we find the language of *Martin v. Inland Empire Utilities Agency, supra*, 198 Cal.App.4th 611 particularly apt. There, the defendants' anti-SLAPP motion directed to a

defamation cause of action failed to establish the cause of action arose from protected activity. Division Two of this court explained, "Indeed, it is difficult, if not impossible, to see how defendants could have met this burden with plaintiff's failure to specifically plead the allegedly defamatory statements." (*Id.* at p. 628.) *Central Valley Hospitalists, supra*, 19 Cal.App.5th 203 is in agreement: " 'If there are no acts alleged, there can be no showing that alleged acts arise from protected activity.' " (*Id.* at p. 218.)

It may appear counterintuitive that a plaintiff whose complaint is too vague to survive demurrer can rely on that same vagueness to defeat an anti-SLAPP motion. But the remedy for this problem is clear: the defendant can first demur on the basis of uncertainty to obtain an amended complaint specific enough to allow a first prong analysis. (See *Central Valley Hospitalists, supra*, 19 Cal.App.5th at pp. 206-207; *Martin, supra*, 198 Cal.App.4th at p. 631.) Defendants did not pursue their demurrer on this basis, and thereafter faced a complaint against which their anti-SLAPP motion was doomed to fail.

5. *Defendants' Dilemma Is Solved By Montes's Declaration Identifying the Alleged Defamatory Statements*

In opposition to the anti-SLAPP motion, Montes identified the Head Start statement and the Bravo Evaluation statement as two specific defamatory statements on which her complaint was based – in effect, representing that she could amend her complaint to allege those two statements in her defamation cause of action. We therefore consider whether those two statements constitute protected activity. We address each statement in terms of each type of protected activity set forth in subdivision (e).

A. *Subdivisions (e)(1) and (e)(2) – Before, or in Connection With, an Official Proceeding*

Subdivision (e)(1) defines as protected activity "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law." Subdivision (e)(2) defines as protected activity "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." The clauses " 'safeguard free speech and petition conduct aimed at advancing self-government, as well as conduct aimed at more mundane pursuits' and 'all that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding.' [Citation.]" (*Laker, supra*, 32 Cal.App.5th at p. 764.)

The phrase "official proceeding" applies to "proceedings required by statute." (*Laker, supra*, 32 Cal.App.5th at p. 764.) Internal investigations also constitute official proceedings authorized by law. (*Okorie, supra*, 14 Cal.App.5th at p. 594.)

Defendants argue that these subdivisions apply to both statements.

The Head Start Statement. As to the Head Start statement, defendants argue that it must have been made in connection with one of two official proceedings: Montes's termination or the review of her job application with Head Start. We find no merit to the contention.

The process that culminated in the actual termination of Montes's employment commenced in June 2016, when she was placed on administrative leave and served with a statement of charges. She was granted a pre-termination hearing and had an

opportunity to pursue post-termination administrative review. Assuming, without deciding, that this process at some point became "official proceedings" within the meaning of subdivisions (e)(1) and (e)(2), those proceedings were not existent in late 2015 when the Head Start statement was allegedly made. As of the Head Start interview Holguin had given Montes an average annual evaluation, had involuntarily put her on a flexible schedule so she could attend post-school activities on paid time, and had sent her e-mails seeking to improve her performance. There is no indication that these communications, which appear to be a regular part of the supervisor/subordinate relationship, were, in fact, preliminary to termination proceedings such that they must be considered protected activity under section 425.16, subdivision (e). (Cf. *People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 824 [prelitigation statements are protected activity under subdivision (e)(2) if they concern the subject of the dispute and are made in anticipation of litigation contemplated in good faith and under serious consideration].) Thus, the Head Start statement was not part of an official proceeding in Montes's termination.

Nor could it be said that the Head Start statement was protected activity because it was made in a different "official proceeding" namely Montes's application for employment with Head Start. Defendants have not cited, nor has independent research disclosed, any authority that the routine review of applications for employment with public entities constitutes an official proceeding. Head Start's review of Montes's application was not a *proceeding* at all; it did not implicate the constitutional right of petition.

The Bravo Statement. Turning to the Bravo Evaluation statement under subdivisions (e)(1) and (e)(2), we again note that defendants' own evidence, in the form of Holguin's amended declaration, is that Holguin did not evaluate Bravo at all. Thus, if the statement was made by Holguin, as Montes alleged, it was not made in the course of any official evaluation of Bravo. In any event, even if the statement were made in the course of an evaluation of Bravo, there is no evidence that Bravo's evaluation was anything other than a regular performance evaluation, not an official proceeding.

B. *Subdivision (e)(3) – in a Public Forum, in Connection With an Issue of Public Interest*

Subdivision (e)(3) defines as protected activity "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." The Head Start statement, allegedly made by Holguin to a Head Start supervisor considering Montes's employment, was not made in a place open to the public or a public forum. As for the Bravo Evaluation statement, which was a claimed conversation between Holguin and Bravo in the course of their employment, it was also not made in a place open to the public or a public forum. Subdivision (e)(3) therefore does not apply.

C. *Subdivision (e)(4) – Other First Amendment Conduct in Connection With an Issue of Public Interest*

Subdivision (e)(4) defines as protected activity "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or issue of public interest." Defendants argue that the Head Start and Bravo Evaluation statements constitute protected speech under this definition because they were made in

connection with an issue of public interest – either because "the behavior of public employees in general in performing, or failing to perform their duties" is a matter of public interest, or because "the conduct of school employees . . . [is] a matter of public interest when that conduct had an impact on a large number of public school students or young charges."

Our Supreme Court recently wrote, "The inquiry under [subdivision (e)(4)] calls for a two-part analysis rooted in the statute's purpose and internal logic. First, we ask what 'public issue or [] issue of public interest' the speech in question implicates—a question we answer by looking to the content of the speech. [Citation.] Second, we ask what functional relationship exists between the speech and the *public* conversation about some matter of public interest." (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 149 (*FilmOn.com*).) Subdivision (e)(4) demands that there be some degree of closeness between the challenged statements and the asserted public interest. A defendant can always draw a line, "however tenuous" connecting its speech "to an abstract issue of public interest." (*Id.* at pp. 149-150.) But it is not enough that the statement *refer* to a subject of widespread public interest; it must in some manner *itself* contribute to the public debate. The meaning of this contribution requirement "will perhaps differ based on the state of public discourse at a given time, and the topic of contention. But ultimately, our inquiry does not turn on a normative evaluation of the substance of the speech. We are not concerned with the social utility of the speech at issue, or the degree to which it propelled the conversation in any particular direction; rather, we examine whether a defendant—through public or private speech or conduct—participated in, or furthered, the

discourse that makes an issue one of public interest. [Citations.]" (*Id*. at p. 150.) The inquiry involves looking not only at the content of the speech, but its context, to discern whether the conduct "further[s] the public conversation on an issue of public interest." (*Id*. at p. 153.)

It is precisely because of the "furthering" part of the analysis that defendants' claim of purported public interest in this case fails. Defendants cite authority to support the proposition that the behavior of public employees is a matter of public interest, but the cases on which defendants rely for this proposition involved speech which furthered the public conversation on that topic. (E.g., *Maranatha Corrections, LLC v. Department of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1075, 1079, 1089 [director of Department of Corrections published a letter terminating the state's contractor on the grounds that the contractor had misappropriated public funds; the public official was keeping the public informed of the management of public business]; *Bradbury v. Superior Court*, *supra*, 49 Cal.App.4th at pp. 1112, 1115-1117 [Ventura County D.A. conducted an investigation and issued a report investigating a shooting by an L.A. County deputy, exculpating the deputy but questioning his motives; the report related to an official investigation into a shooting which had garnered local and national publicity].) Here the nexus identified by the Supreme Court is missing. The Head Start statement, in which Holguin allegedly told Montes's prospective employer that Montes was "a troublemaker and unreliable" only tangentially addressed the topic of public employees performing their duties. But even if it did, the context of the statement – a single comment from Montes's supervisor to her prospective employer about a single

employee not in the public eye – shows that it did nothing to further the public conversation on the topic. The same is true with respect to the Bravo Evaluation statement – in which Holguin's alleged statement to Bravo that Montes was dishonest, a poor employee, a bad role model, disloyal, and had been feeding Bravo lies – was a single comment personally warning Bravo about Montes. It did not contribute to a public discussion of public employee job performance.

The analysis repeats with the same result with respect to the asserted public interest of conduct of school employees when that conduct has an impact on a large number of public school students or young charges. We have no doubt that generally how a public school employee handles her responsibilities to students is a matter of public interest. But that does not prove that defendants' speech furthered that public debate here.

The cases that defendants cited as examples of furthering public interest involved statements with a much closer connection to the actual public debate on the issue. (E.g., *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 466 [defendants sued for communications "concern[ing] the well-being of young children in an after school sports program, as discussed between and among members of the [Parent Teacher Organization], parents of the young team members, and league officials"]; *Morrow v. Los Angeles Unified School District* (2007) 149 Cal.App.4th 1424, 1429, 1436-1437 [in the aftermath of racial brawls at a local High School, the School District reported to the press that the principal would be retiring early; the communication told the public how the district was responding to the violence]; *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1539-1540,

1543 [church investigated allegations of an inappropriate sexual relationship between youth group leaders and a member of the group, and shared the report with church members and non-member parents; church was responding to inquiries from concerned parents].) In contrast, the Head Start statement and the Bravo Evaluation statements – which did not specifically address Montes's behavior with respect to children at all – were not made to a concerned public, but to two individuals.

As the court stated in *FilmOn.com*, when the statements are made "privately, to a coterie" of individuals, the test of public interest is difficult to meet. We do not believe the content of the challenged statements embraced this public interest at all; but even if it somehow did, the statements simply did not further the public debate on that topic. The statements were therefore not protected conduct under subdivision (e)(4).

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DISPOSITION

The order denying the anti-SLAPP motion is affirmed. Montes shall recover her costs on appeal.[7]

RUBIN, P. J.

WE CONCUR:

BAKER, J.

KIM, J.

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[7] In her respondent's brief, Montes seeks attorney fees on the basis that defendants' appeal is frivolous and solely intended to cause delay. We deny the request which is, in any event, procedurally improper. Subdivision (c)(1) of the anti-SLAPP statute provides, "[i]f the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to [Code of Civil Procedure] Section 128.5." This subdivision provides for an award of fees if the *motion* is frivolous, not if the *appeal* is. A request for sanctions for a frivolous appeal must be made by separate motion, accompanied by a declaration supporting the amount of fees sought. (Cal. Rules of Court, rule 8.276(b).)