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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

STEVE GRIGGS, Plaintiff and Respondent, v. SOUTHWEST REGIONAL COUNCIL OF CARPENTERS et al., Defendants and Appellants.	B286193 (Los Angeles County Super. Ct. No. BC662532)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth Allen White, Judge. Affirmed.

DeCarlo & Shanley, Daniel M. Shanley and Yuliya S. Mirzoyan, for Defendants and Appellants.

Jay S. Rothman & Associates, Kenneth R. Myers, for Plaintiff and Respondent.

The trial court denied an employer's anti-SLAPP[1] motion to strike its employee's claim for wrongful termination because that claim arose from the employer's decision to terminate, which the court concluded was not "protected activity" under the anti-SLAPP statute (Civ. Proc. Code, § 425.16).[2] The employer appeals, arguing that the claim was based upon "protected activity" because the employee alleged that part of what made the termination wrongful was the employer's conduct in using subterfuge to secure an administrative decision finding the employee responsible for violating federal labor law. The anti-SLAPP statute applies only when the "[protected] activity *itself* is the wrong complained of" rather than "a step leading to [a] different act[ion] for which liability is asserted." (*Park v. Board of Trustees of Cal. State Univ.* (2017) 2 Cal.5th 1057, 1060 (*Park*).) Because the wrong complained of here was the termination, and the employer's conduct before the administrative agency was one of many alleged "step[s] leading" to that termination, the trial court correctly concluded that the employee's wrongful termination claim was not based upon "protected activity." We accordingly affirm.

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1 "SLAPP" is short for Strategic Lawsuit Against Public Participation.

2 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *Raytheon grievance*

In 2013, Raytheon had a collective bargaining agreement (Agreement) with Local 1553 Electronic and Space Technicians, which is affiliated with defendants Southwest Regional Council of Carpenters and United Brotherhood of Carpenters and Joiners of America (collectively, the Union). In 2013, the Union filed a general grievance (that is, a grievance not filed on behalf of specific employees) against Raytheon complaining that Raytheon violated the Agreement by using non-Union employees to staff its four-person Integrated Test Facility. In December 2014, Raytheon and the Union resolved the grievance in a settlement in which Raytheon agreed to use bargaining unit employees in the facility and to pay the Union $20,000. Although Raytheon's violation of the Agreement affected four Raytheon employees, the Union gave all $20,000 of the settlement proceeds to one of the employees, John Samoian (Samoian).

B. *National Labor Relations Board (Board) charges against Union*

Two of the Raytheon employees who were affected by the settlement but did not receive any of its monetary proceeds filed a complaint against the Union with the National Labor Relations Board (Board). The Board's General Counsel investigated the matter and ultimately filed two charges against the Union alleging that the Union's division of settlement proceeds to Samoian alone was (1) "discriminatory, arbitrary and/or capricious," and (2) impermissibly based on whether the affected employees were "member[s] in the Union and/or [their] perceived failure to pay [Union] dues."

The Union's position—as submitted through declarations as well as in testimony at a February 2016 hearing before an administrative law judge—was that (1) the Union had an unwritten policy of awarding the proceeds from a general grievance to the employees who helped the Union prosecute that grievance and then asking those employees not to tell anyone else that they got the proceeds, but that (2) the Union did not look to membership status or the currency of dues in distributing proceeds. This evidence also indicated that the decision to award the full $20,000 to Samoian was made by the three individuals—the Union's "business representative" Steve Griggs (plaintiff), the Union's "business agent" Kevin Dodd, and the Union's "senior steward" Phil Limon.

In early May 2016, the administrative law judge issued a written decision finding that the Union's "grievance participation policy" (1) violated the National Labor Relations Act because it "condition[ed] monetary benefit[s] on grievance participation," which arbitrarily and impermissibly penalized employees for "refrain[ing] from union activities," but (2) was not impermissibly based upon membership status or dues currency. In its decision, the judge noted that "[plaintiff] . . . [had] initially proposed Samoian's name as the bargaining unit employee who should receive the entire settlement because of his active participation in the grievance." The judge ordered the Union to "cease and desist" from its policy and to "make whole" the adversely affected Raytheon employees.

C. *Plaintiff's termination*

A few weeks later, the Union terminated plaintiff.

II. Procedural Background

A. *Plaintiff's complaint*

In May 2017, plaintiff sued the Union. As pertinent to this appeal, plaintiff alleged that (1) he had "complained" to the Union that its grievance participation policy was unlawful, which was protected whistleblower activity, and (2) the Union, in response to this whistleblowing activity, obtained a "false written determination" from the Board that plaintiff was "guilty of the very misallocation of settlement proceedings that he had complained about."

Plaintiff alleged 12 different claims, but two are pertinent to this appeal—namely, his fifth claim for "Whistleblower Retaliation" and his sixth claim for "Wrongful Termination in Violation of Public Policy."[3]

In his "Whistleblower Retaliation" claim, plaintiff alleged that he had "report[ed] illegal workplace practices" and that the Union retaliated against him by "engag[ing] in one or more adverse employment actions . . . as previously alleged." Plaintiff had "previously alleged" two "adverse employment actions": (1) the Union had "conspir[ed] or act[ed] to create a false determin[ation] that plaintiff was guilty of misconduct when [the Union] knew he was innocent"; and (2) the Union "terminat[ed]"

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[3] Plaintiff's other claims were for (1) age and disability discrimination in violation of the Fair Housing and Employment Act (FEHA) under theories of disparate treatment and disparate impact; (2) retaliation in violation of FEHA; (3) failure to take steps to prevent discrimination in violation of FEHA; (4) nonpayment of wages; (5) violation of overtime laws; (6) violation of wage statement laws; (7) waiting time penalties; (8) conversion; and (9) intentional infliction of emotional distress.

or laid him off. As pertinent to this claim, the "illegal workplace practices" plaintiff had reported included plaintiff's "protected complaints of disability discrimination and related violations of law" as well as his "protected whistleblower activities."

In his "Wrongful Termination in Violation of Public Policy" claim, plaintiff alleged he was terminated in violation of California's public policies "against termination of an employee motivated by discrimination, harassment or retaliation in violation of the [Fair Employment and Housing Act]" as well as "whistleblower retaliation." Plaintiff had preliminarily alleged discrimination and harassment on the basis of a "perceived [physical] disability" as well as being over 40 years of age.

B. *Anti-SLAPP motion*

The Union moved to strike plaintiff's fifth and sixth claims under the anti-SLAPP statute.[4] Plaintiff opposed the motion, and submitted a declaration indicating that the Union had "ordered [him] to testify [before the Board] that [he] thought the [settlement] payout had been correct."

After the Union submitted its reply, and the trial court held a hearing, the court issued an order partially granting and partially denying the Union's motion to strike.

The court granted the motion in part by dismissing plaintiff's fifth claim for "Whistleblower Retaliation" "to the

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[4] The Union also moved to strike plaintiff's third claim (for retaliation in violation of FEHA), his fourth claim (for failure to take steps to prevent discrimination under FEHA), and his twelfth claim (for intentional infliction of emotional distress). The trial court denied the motion as to the third and fourth claims but granted it as to the twelfth claim to the same extent as the fifth claim (which is discussed in the text).

extent it is based on the alleged scapegoating of plaintiff before the [Board]"—that is, to the extent it is based upon the Union's alleged acts of "falsely stat[ing] that plaintiff was to blame for the settlement misallocation." Because the alleged scapegoating occurred during an "official proceeding" before the Board, the court concluded it was "protected activity" under subdivisions (e)(1) and (e)(2) of section 425.16. The court went on to find that plaintiff had not shown that the scapegoating aspect of this claim had "minimal merit" because it was barred by the litigation privilege (Civ. Code, § 47).

The court denied the motion in part by declining to dismiss plaintiff's sixth claim for "Wrongful Termination in Violation of Public Policy." The court noted that this claim was not based on "protected activity" under the anti-SLAPP statute because it was "based on [plaintiff's] *termination*, not the [alleged] scapegoating at the [Board] hearing . . ." (emphasis in original). The alleged scapegoating, in the court's view, was at most a "step toward justifying the termination" but not the basis for the wrongful termination claim.

After the court issued its final order, the Union filed this timely appeal.

DISCUSSION

The Union argues that the trial court erred in denying its anti-SLAPP motion as to plaintiff's sixth claim for "Wrongful Termination in Violation of Public Policy" because that claim is based upon "protected activity" and lacks minimal merit. We independently review a trial court's denial of an anti-SLAPP motion. (*Park*, *supra*, 2 Cal.5th at p. 1067.)

The anti-SLAPP statute "provides a procedure for weeding out, at an early stage, *meritless* claims arising from" activity that

is protected by the statute. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) Accordingly, a trial court tasked with ruling on an anti-SLAPP motion must ask two questions: (1) has the moving party "made a threshold showing that the challenged cause of action arises from protected activity" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056), and, if so, (2) has the nonmoving party "established . . . a probability that [he] will prevail" on the challenged cause of action by showing that his claim has "minimal merit" (§ 425.16, subd. (b)(1); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 94)?

The first question entails two subsidiary inquiries: "(1) What conduct does the challenged cause of action 'arise[] from'; and (2) is that conduct 'protected activity' under the anti-SLAPP statute?" (*Mission Beverage Co. v. Pabst Brewing Co., LLC* (2017) 15 Cal.App.5th 686, 698.) A cause of action "arises from" protected activity only if the defendant's "core injury-producing conduct" is "*itself*" protected activity. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77; *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.) As our Supreme Court clarified in *Park*, *supra*, 2 Cal.5th at p. 1060, "a claim may be struck [under the anti-SLAPP law] only if the [protected conduct] *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." As pertinent to this appeal, "protected activity" under the anti-SLAPP law includes statements "made before . . . an[] official proceeding authorized by law" or "in connection with an issue under consideration" in "any . . . official proceeding authorized by law." (§§ 425.16, subds. (e)(1) & (e)(2).)

We independently agree with the trial court's conclusion that plaintiff's sixth claim for "Wrongful Termination in Violation

of Public Policy" does not "arise from" protected activity. As the name of the claim indicates (and as plaintiff alleges as part of that claim), the "core injury-producing conduct" in plaintiff's wrongful termination claim was the wrongful termination itself. (Accord, *Yau v. Santa Margarita Ford, Inc.* (2014) 229 Cal.App.4th 144, 154 [enumerating elements of wrongful termination claim].) To be sure, plaintiff alleges that one of the reasons why his termination was wrongful was because the Union allegedly manipulated the Board into finding that plaintiff was responsible for the Union's "grievance participation policy" that was found to be unlawful. The Union's alleged conduct before the Board may well involve protected activity. But this alleged conduct is merely a "step" (and, indeed, one of many steps) "leading to some different act for which liability is asserted"—namely, the termination itself. (*Park*, *supra*, 2 Cal.5th at p. 1060.) The Union's conduct before the Board is not *itself* "the wrong complained of." (*Ibid*.)

In *Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, the court held that a plaintiff's claim for being placed on administrative leave was not based on "protected activity," even though it followed the employer's internal investigation of the plaintiff for revealing to the juvenile court that her employer had manipulated evidence, because the claim "challenged the retaliatory employment decision, not the process that led up to that point." (*Id.* at pp. 357, 362.) The same is true here.

What is more, the distinction *Park* draws between an employment decision and the steps leading up to it is no accident. *Park* favorably cited *Nam v. Regents of Univ. of California* (2016) 1 Cal.App.5th 1176 (*Nam*) (*Park*, *supra*, 2 Cal.5th at p. 1066),

and *Nam* explained that "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 complaint." (*Nam*, at pp. 1190-1191.) This concern applies with full force here, where plaintiff alleges that the Union engaged in ostensibly protected activity (namely, subterfuge before the Board) as a means of justifying plaintiff's termination and the Union is now seeking to "capitalize on th[at alleged] subterfuge" by moving to strike plaintiff's claim attacking that termination as wrongful.

The Union makes what amount to four categories of arguments against this conclusion.[5]

First, the Union asserts that *Park* does not control this case because (1) *Park* relied in part on the definition of "protected activity" set forth in subdivision (e)(4) of section 425.16 rather than subdivisions (e)(1) and (e)(2) of section 425.16 at issue here; (2) *Park* involved a claim for denial of tenure rather than a claim for wrongful termination; (3) *Park* "left open" the possibility that the employer's "tenure decision and the communications that led up to it are intertwined and inseparable" (*Park*, 2 Cal.5th at p. 1069), and this possibility applies here; and (4) *Park* should not be read to immunize all wrongful termination claims from anti-

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[5] The Union, in a footnote, cites California Civil Code section 1714.10, subdivision (a)'s requirement that a plaintiff must obtain a court order before filing action against an attorney that includes a claim for civil conspiracy with a client, but this point does not speak to the issue of "protected activity" and was not raised before the trial court. We will not consider it further.

SLAPP scrutiny because such categorical immunities should be left to our Legislature.

We reject each of these arguments. The Union's first two assertions overlook that what makes *Park* relevant to this case is the distinction *Park* draws between employment decisions and the steps leading up to them, and this distinction is true regardless of the type of protected activity involved in the steps leading up to the employment decision or the type of the employment decision at issue. The Union's third assertion overlooks that *Park* rejected any "intertwined and inseparable" exception to the distinction it was drawing. (*Park*, *supra*, 2 Cal.5th at pp. 1069-1070.) And the Union's fourth assertion overlooks that the reach of anti-SLAPP statute, while to be "construed broadly" (§ 425.16, subd. (a)), is limited to its statutory scope. We are only applying *Park*'s central principle to the case before us; to the extent the Union disagrees with that principle, we are not at liberty to disagree with our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455-456.) What is more, courts have on many occasions recognized that the anti-SLAPP law is not well suited to reach entire categories of claims (e.g., *Bonni v. St. Joseph Health System* (2017) 13 Cal.5th 851, 864 ["Discrimination and retaliation claims are rarely, if ever, good candidates for the filing of an anti-SLAP motion."]; *Yeager v. Holt* (2018) 23 Cal.App.5th 450, 457 ["a typical attorney malpractice suit is not subject to the anti-SLAPP procedures"]), and this recognition is neither inconsistent with the statute's plain language nor an affront to the separation of powers.

Second, the Union contends that a ruling that plaintiff's sixth claim for "Wrongful Termination in Violation of Public

Policy" does not rest on protected activity is inconsistent with the trial court's ruling that plaintiff's fifth claim for "Workplace Retaliation" *does* rest in part on protected activity. We perceive no inconsistency because the two claims do not target the same conduct by the Union. In his "Workplace Retaliation" claim, plaintiff alleges that the Union retaliated against him by taking *two* different "adverse employment actions"—namely, by "scapegoating" him before the Board and by terminating him—and the trial court ruled that the former constituted "protected activity" under the anti-SLAPP statute. In his "Wrongful Termination in Violation of Public Policy" claim, plaintiff alleges only one "adverse employment action"—namely, his termination. Where, as here, "different causes of action are not based on the same underlying conduct," it is "proper" to look at the conduct underlying each "individual cause[] of action" to assess whether it is protected conduct. (*City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 768 (*City of Colton*); *CompterXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1004.)

Third, the Union cites several cases that, in its view, dictate a ruling in its favor. None of these cases addresses the issue presented in this case—namely, whether a wrongful termination claim arises from "protected activity" because one of the alleged reasons that makes the termination wrongful entails protected activity. More to the point, each of these cases is distinguishable; their conclusions that the claims at issue arise from "protected activity" rest on the case-specific determination that the injury-producing conduct alleged to underlie those claims is itself "protected activity." (See *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 610-611 [retaliation claim arises from protected activity where "the fundamental basis for

[that] claim . . . is [an] allegedly pretextual investigation" conducted by the defendant-supervisors]; *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 582, 592 [discrimination, harassment and retaliation claims arise from protected activity where "[p]laintiff's claims . . . are not based on a specific . . . adverse employment action[]" giving rise to their claims and the "wide array of [alleged] adverse employment actions" include protected activity]; *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1390, 1397, 1399 [civil rights claim arises from protected activity where plaintiff sues hearing officer who denied plaintiff's grievances in an official proceeding]; *City of Colton*, *supra*, 206 Cal.App.4th at pp. 767-768 [claims for unlawful business practices and injunctive relief arise from protected activity where those claims are based upon party's initiation of a lawsuit]; *MMM Holdings, Inc. v. Reich* (2018) 21 Cal.App.5th 167, 172, 178-179 [claims for conversion and civil theft arise from protected activity where plaintiffs are suing opposing counsel from a prior qui tam action for his actions during the prior qui tam litigation]; *Golden Eagle Land Investment, L.P. v. Rancho Santa Fe Assn.* (2018) 19 Cal.App.5th 399, 419-421 [claim against a county alleging violation of Open Meeting Law on an issue involving land use in a community is based upon "protected activity" because it is a matter of 'public interest' under subdivision (e)(4) of section 425.16].)

Lastly, the Union posits that the anti-SLAPP law applies even where, as here, the moving party is a proverbial Goliath rather than a David. This argument is of no assistance because our analysis turns, as it must, on the language of the statute as interpreted by our Supreme Court, not the relative stature of the litigants.

For these reasons, we conclude that the conduct underlying plaintiff's sixth claim for "Wrongful Termination In Violation of Public Policy" does not arise from protected activity. We therefore have no occasion to decide whether that claim has minimal merit.

DISPOSITION

The order is affirmed. Plaintiff is entitled to his costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST