Filed 2/8/18 Choi v. Board of Trustees etc. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MYUNG CHOI, Plaintiff and Appellant, v. BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Defendant and Respondent.	B260510 (Los Angeles County Super. Ct. No. BC554054)
MYUNG CHOI, Plaintiff and Appellant, v. BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Defendant and Respondent.	B265461

APPEALS from orders of the Superior Court of Los Angeles County, William F. Fahey, Judge. Reversed.

Law Office of Juan Hong and Juan Hong for Plaintiff and Appellant.

Paul, Plevin, Sullivan & Connaughton, Sanda L. McDonough, Corrie J. Klekowski and Michael J. Etchepare for Defendant and Respondent.

INTRODUCTION

Dr. Myung Choi sued the Board of Trustees of the California State University (the University) alleging race discrimination and retaliation culminating in its decision to deny her tenure and terminate her from employment. The University filed a special motion to strike Choi's complaint under the anti-SLAPP statute (Code Civ. Proc., § 425.16)[1] on the ground that its tenure decision was an act in furtherance of its free speech rights. The trial court granted the motion and Choi appeals. Exercising our de novo review, we conclude that Choi's complaint does not arise from activity protected by the anti-SLAPP statute.[2] In her related appeal, Choi challenges the trial court's order awarding attorney fees to the University. We reverse both orders.

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1 All further statutory references are to the Code of Civil Procedure, unless otherwise noted.

2 " ' " 'SLAPP is an acronym for "strategic lawsuit against public participation." ' [Citation.]" ' " (*Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 116, fn. 2.)

FACTUAL AND PROCEDURAL BACKGROUND

1. *Choi's complaint*

Cast in four causes of action for race discrimination, retaliation, and failure to prevent or to rectify discrimination and retaliation, Choi's complaint alleged she is Asian and was hired in 2005 onto the tenure track as an assistant professor of Spanish in the Department of World Languages and Literature at California State University, San Bernardino, operated by the University, a public entity.

The complaint outlined the process and criteria for faculty retention, promotion, and tenure (RPT), under which committees from the candidate's department, college, and university rate the candidate's teaching, professional growth, and university or community service as either "incompetent," "competent," or "superior." When the recommendations are not unanimous, and in cases involving non-retention and denial of tenure or promotion, the final decision is made by the Provost.

Choi alleged that in June 2010, she filed an internal, "informal complaint of discrimination" against Dr. Terri Nelson, chair of Choi's department, and Dr. Aurora Wolfgang, chair of Choi's department review committee, alleging that Nelson and Wolfgang were racially prejudiced against Choi. Choi quoted from e-mails, comments, and conduct by Nelson and Wolfgang as evidence that the two "harass[ed] and discriminate[d] against Dr. Choi because she is Asian." An internal investigation found that Choi's claims were unsubstantiated. Choi disagreed.

Choi twice requested that Nelson and Wolfgang recuse themselves from Choi's RPT committees. The complaint alleged that Wolfgang refused and retaliated against Choi by requesting an external review of Choi's book.

In her sixth-year at the University, during the 2010-2011 academic year, Choi applied for promotion to associate professor and tenure. She alleged that after her RPT review, Provost and Vice President for Academic Affairs, Dr. Andrew Bodman, "pretextually concluded that Dr. Choi, although competent in all the evaluation categories, had not demonstrated that she was superior in any category." On that basis, Bodman denied Choi's application for tenure and promotion.

Choi filed a discrimination complaint with the Equal Employment Opportunity Commission (EEOC) and the California Department of Fair Employment and Housing (DFEH).

Choi also filed a grievance with the University, "claiming the Provost's . . . denial of tenure and promotion violated the [collective bargaining agreement (CBA)]" in "managing the Performance Review process." Her grievance went to arbitration. On May 29, 2012, the arbitrator found that the University conducted a "flawed evaluation process that adversely affected Dr. Choi's rights with respect to her application for tenure and promotion," because it "failed to comply with the express requirement of Article 15.45 [of the CBA] to include reasons" for the decision. The arbitrator ordered a new performance review of Choi's application for tenure and promotion.

In the new RPT review, held in 2013, Choi's chair, department, college, and university committees recommended promotion and tenure. Choi alleged that within two months of being interviewed by the EEOC investigator about Choi's discrimination complaint, Bodman retaliated by denying Choi promotion and tenure, contrary to the majority of the committees'

recommendations, but in reliance on the evaluation of Dr. Eri Yasuhara, Dean of the College.

The complaint then lists statements made and acts taken by Wolfgang, Nelson, Yasuhara, Bodman, and others throughout the eight years of Choi's employment at the University, which she alleged, evince discriminatory animus.

Choi was terminated from her employment in 2013, and filed the instant complaint. She alleged that the University discriminated against her because of her race, which "was a motivating reason for [her] discharge." She next alleged that the University retaliated against her for "fil[ing] complaints disclosing race discrimination against her," which complaints were "a motivating reason for defendant's decision to discharge" her. She also alleged that the University failed to take steps to prevent discrimination and retaliation.

2. *The University's anti-SLAPP motion*

The University specially moved to strike Choi's complaint on the ground her claims arose from the protected activity of the academic peer-review proceedings and the numerous communications involved in the decision to deny her tenure. The University argued that such decision and associated communications qualified as protected activity within the meaning of section 425.16 subdivision (e) in two ways: (1) the peer-review process is an "official proceeding authorized by law" (§ 425.16, subd. (e)(2)); and (2) the decision and statements at issue were "conduct in furtherance of the exercise of the constitutional right of . . . free speech in connection with . . . an issue of public interest." (*Id.*, subd. (e)(4).) The public interest, the University argued, was Choi's "professional competence and merits for tenure as a publicly paid professor."

In support of its motion, the University presented Bodman's declaration and attached exhibits. These documents outlined the procedures for yearly RPT peer-review of probationary tenure-track professors required by the Education Code and the California Code of Regulations. Bodman detailed Choi's RPT evaluations over the six years that she was employed at the University. Those reviews had common themes: Choi was repeatedly advised to make her teaching more "student-centered," to "focus her scholarship on a narrow field in which she [could] write and present" to peer-reviewed scholarly journals, and to "become more engaged in department committees and faculty governance." She was "encouraged . . . to 'initiate additional scholarship so that she would not come up short when she applie[d] for tenure.' " Yasuhara could not "stress strongly enough the need for Professor Choi to aggressively seek . . . continuing improvement in her teaching and peer-reviewed publications . . . ." Bodman listed the criticisms of and deficiencies in Choi's record that he found justified his conclusion that her work fell below "the threshold of superiority needed to justify tenure." Bodman's supplemental declaration compared Choi's qualifications with those of another professor who was granted tenure around the same time as Choi was denied tenure.

The University also argued in its anti-SLAPP motion that Choi could not make a prima facie showing of her retaliation and discrimination causes of action.

3. *Choi's opposition to the University's anti-SLAPP motion*

Choi responded that her claims did not arise from protected activity because "the injury-producing conduct underlying her employment discrimination and retaliation claims consists of [the University's] *decisions* to terminate CHOI in 2011 and 2013."

(Italics added.) That is, her complaint attacked the University's discriminatory and retaliatory termination of her on the basis of race. She argued that the University "employees' speech related to Choi's tenure and promotion is not protected by the First Amendment." While the statements and writings were helpful in establishing the events and telling her story, she argued, her claims were not based on those communications.

4. *The trial court's ruling*

The trial court granted the University's special motion to strike, ruling that Choi's claims arose from her statutorily-mandated peer-review RPT process, which process was protected activity under the anti-SLAPP statute (§ 425.16, subd. (e)(2)), and that Choi could not show a likelihood of success on the merits. Choi's timely appeal followed. The court thereafter awarded the University $53,259.83 in attorney fees pursuant to section 425.16, subdivision (c)(1). Choi filed her timely appeal from that award.

CONTENTIONS

Choi contends the trial court erred in ruling that her complaint arose from activity protected by the anti-SLAPP statute and that she had no probability of prevailing on the merits of her causes of action. Choi separately appeals from the order granting attorney fees to the University contending the trial court lacked jurisdiction because she had already filed her notice of appeal by the time the court ruled on the motion. We consolidated the appeals for purposes of oral argument and opinion.

DISCUSSION

1. *The special motion to strike*

The anti-SLAPP statute allows for early dismissal of unmeritorious claims filed to interfere with a valid exercise of the constitutional rights of free speech and petition. (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 312; § 425.16, subd. (b)(1).) Section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

The evaluation of an anti-SLAPP motion involves two steps: First, the court determines whether the moving defendant has made "a threshold showing that the challenged . . . action arises from protected activity," that is, activity in furtherance of the rights of petition or free speech. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; § 425.16, subd. (e).) If the threshold showing is made, the burden shifts to the plaintiff to " 'demonstrate[] a probability of prevailing on the claim.' [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819-820.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute – i.e., that arises from protected speech or petitioning *and* lacks even minimal merit – is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, italics in original.)

We review an order granting or denying a special motion to strike de novo. (*Oasis West Realty, LLC v. Goldman*, *supra*, 51

Cal.4th at p. 820.) We consider the "pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) We examine the complaint in a fair and commonsense manner and we broadly construe the anti-SLAPP statute (*id*., subd. (a)). We neither weigh credibility nor compare the weight of the evidence. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

2. *Protected activity*

When evaluating the moving party's threshold showing, the court answers two questions: "(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 (*Mission*); *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062-1063 (*Park*).)

Analysis of the first question focuses on the substance of the lawsuit; we disregard the claim's labels. (*Aguilar v. Goldstein* (2012) 207 Cal.App.4th 1152, 1160.) "A cause of action 'arises from' protected activity when the 'cause of action *itself*' is '*based on*' protected activity. [Citations.] Whether a cause of action is itself based on protected activity turns on whether its ' " '*principal thrust or gravamen*' " ' is protected activity—that is, whether the ' "core injury-producing conduct" ' warranting relief under that cause of action is protected activity. [Citation.]" (*Mission*, *supra*, 15 Cal.App.5th at p. 698.) The decisive question is not what the defendant's motive was for the act, but whether "the plaintiff's cause of action *itself* was *based on* an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 74, 78, first

italics added, second italics in original.) Protected activity must supply elements of the challenged claim. (*Park*, *supra*, 2 Cal.5th at p. 1064.)

"[W]hether [activity] is protected under the anti-SLAPP statute" turns "not [on] First Amendment law, but [rather on] the statutory definitions in section 425.16, subdivision (e)." (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 422.) Section 425.16, subdivision (e) defines four categories of protected activity.[3]

The focus of this appeal is on two of the four statutory definitions, specifically whether the University's core injury-producing conduct qualifies as protected activity as defined by subdivision (e)(2) and (4) of section 425.16. The parties do not dispute that Choi's claims arise from the University's *decisions* to deny her tenure and to terminate her from employment, which she alleged was done on the basis of race discrimination and in

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[3] Subdivision (e) of section 425.16 sets forth four definitions of acts in furtherance of a person's right of free speech in connection with a public issue. Subdivision (e) reads: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (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 an issue of public interest."

retaliation for her grievance and complaints to the EEOC and the DFEH. That is, the injury-producing event underlying Choi's discrimination and retaliation claims is the University's decision to deny her tenure and discharge her from employment. The University contends that its conduct qualifies as protected activity as defined by subdivision (e) of section 425.16 in two ways. First, the University argues that its RPT process, in which it decided to deny Choi tenure and discharge her from employment, is an "official proceeding authorized by law," under subdivision (e)(2) of section 425.16. Second, the University argues that its tenure decision and associated communication constitute conduct "in furtherance of the exercise of . . . the constitutional right of free speech in connection with a public issue" as defined in subdivision (e)(4) of section 425.16.

a. *Choi's claims do not arise from protected activity under subdivision (e)(2) of section 425.16.*

Recently, our Supreme Court addressed the parameters of subdivision (e)(2) of section 425.16 in *Park*, *supra*, 2 Cal.5th 1057, a case factually similar to this lawsuit. As with Choi, the University denied the plaintiff tenure and he sued alleging national origin discrimination and failure to prevent discrimination. (*Id*. at p. 1061.) The University moved to strike the plaintiff's complaint arguing that his lawsuit arose from its decision to deny him tenure and from its various statements and writings made during the grievance and tenure review process. (*Ibid*.)

The Supreme Court granted review in *Park* to consider what nexus a defendant must show between the plaintiff's claim and the defendant's protected activity to succeed on a special motion to strike. (*Park*, *supra*, 2 Cal.5th at p. 1060.) The *Park*

court underscored the " 'careful distinction' " between speech that provides the *basis for liability*, and speech that provides *evidence* of liability. (*Id*. at pp. 1064 & 1065.) "[W]hile 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." (*Id*. at p. 1066.) *Park* noted, "to read the 'arising from' requirement differently, as applying to speech leading to an action or evidencing an illicit motive, would, for a range of publicly beneficial claims, have significant impacts the Legislature likely never intended. Government decisions are frequently 'arrived at after discussion and a vote at a public meeting.' [Citation.]" (*Id*. at p. 1067.) "Conflating, in the anti-SLAPP analysis, discriminatory decisions and speech involved in reaching those decisions or evidencing discriminatory animus could render the anti-SLAPP statute 'fatal for most harassment, discrimination, and retaliation actions against public employers.' [Citation.]" (*Ibid*., quoting from *Nam v. Regents of University of California* (2016) 1 Cal.App.5th 1176, 1179.)

Thus, the Supreme Court explained, "a claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park*, *supra*, 2 Cal.5th at p. 1060.)

Applying this distinction between evidence of liability and the basis for liability, *Park* held that the plaintiff's claim there

did not arise from an act in furtherance of speech. (*Park*, *supra*, 2 Cal.5th at pp. 1060-1061.) The elements of the plaintiff's discrimination claim were that, " '(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive.' [Citation.]" (*Id*. at pp. 1067-1068, quoting from *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 355.) The Supreme Court held that the plaintiff could have omitted allegations about communicative acts or filing a grievance and still state the same claim. (*Park,* at p. 1068.) The reason was that the plaintiff's claim "depend[ed] not on the grievance proceeding, any statements, or 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." (*Ibid*.) "What gives rise to liability is not that the defendant spoke, but that the defendant denied the plaintiff a benefit, or subjected the plaintiff to a burden, on account of a discriminatory or retaliatory consideration." (*Id*. at p. 1066.) The "tenure decision may have been communicated orally or in writing, but that communication does not convert Park's suit to one arising from such speech. The dean's alleged comments may supply evidence of animus, but that does not convert the statements themselves into the basis for liability." (*Id*. at p. 1068.) Hence, the plaintiff's claim in *Park* did not arise from protected speech and was not susceptible to a special motion to strike.

Park was issued by the Supreme Court while Choi's appeal was pending. We invited the parties to submit supplemental letter briefs addressing the impact of that decision on this case.

The University's supplemental brief acknowledged that, although its decision to deny Choi tenure may have occurred in a peer review proceeding protected by subdivision (e)(2) of section 425.16, after *Park*, Choi's complaint did not arise from the tenure proceeding.

However, the University also observed in its supplemental brief that *Park* did not involve a retaliation cause of action; it suggested that Choi's *retaliation* claims arose from protected activity as defined in section 425.16, subdivision (e)(2). We disagree.

The elements of a cause of action for retaliation in violation of the Fair Employment and Housing Act (Gov. Code, § 12940) are that: "(1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.]" (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1042.) Choi alleged that (1) she brought a grievance and filed discrimination claims with the EEOC and the DFEH and that (2) in retaliation, Bodman denied her tenure and terminated her from employment (3) within two months after he and Yasuhara were investigated by the EEOC. The gravamen of this cause of action is that the University retaliated against her for her grievance and complaints by denying her tenure. This claim does not rely on any allegations about communicative acts by the University; Choi could have omitted all allegations about statements and writings in, or communications about, the review process and still state the same retaliation claim. Although the grievance and complaints to the EEOC and DFEH were included in Choi's complaint, they were filed by *Choi* and hence were *her* acts,

whereas our focus is on the communicative acts of the defendant *University*. Choi's retaliation claim does not depend on any communicative acts, statements, or specific evaluations *made by the University* in those proceedings. "What gives rise to liability is not that the defendant spoke, but that the defendant denied the plaintiff a benefit, or subjected the plaintiff to a burden, on account of a discriminatory or retaliatory consideration." (*Park*, *supra*, 2 Cal.5th at p. 1066.) Therefore, neither Choi's discrimination nor her retaliation claims *arise from* the University's peer review, even if that process was protected activity under section 425.16, subdivision (e)(2).

b. *Choi's claims do not arise from conduct qualifying as protected activity under subdivision (e)(4) of section 425.16.*

In its supplemental brief, the University argued additionally that *Park* left open the question of whether a tenure decision could be protected by subdivision (e)(4) of section 425.16. That subdivision defines protected activity as "conduct in furtherance of the exercise of . . . the constitutional right of free speech in connection with a public issue or an issue of public interest." Although *Park* did not base its decision on subdivision (e)(4) of section 425.16, its discussion elaborated on the showing a defendant must make under that subdivision. In *Park*, the University had raised this contention relying principally on *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510 (*Hunter*). (*Park*, *supra*, 2 Cal.5th at p. 1071.)[4]

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[4] Since *Park* was issued, the Supreme Court has granted review in a series of cases applying *Hunter*. (See *Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822, review granted Mar. 1, 2017, S239868; *Bonni v. St. Joseph Health System* (2017) 13 Cal.App.5th 851, review granted Nov. 21, 2017, S244148;

Hunter did not involve claims against a public university. The plaintiff in *Hunter* sued CBS Broadcasting for its alleged discriminatory refusal to hire him as a weather news anchor. Reporting news and creating a television show both qualify as exercises of free speech, *Hunter* observed. (*Hunter*, *supra*, 221 Cal.App.4th at p. 1521.) The *Hunter* court explained that " '[a]n act is in furtherance of the right of free speech if the act helps to advance that right or assists in the exercise of that right.' [Citation.]" (*Ibid.*) The selection of CBS's weather anchors, essentially a casting decision about who could *report* the news, " 'helped advance or assist' . . . First Amendment expression" (*ibid.*), qualifying such decisions as protected activity. (*Ibid.*) Thus, the *Hunter* court held, the plaintiff's discrimination claims asserting that CBS did not hire him to serve as a weather anchor because of his age and gender were based squarely on CBS's decisions about its choice of a weather anchor, which decisions were acts in furtherance of CBS's constitutional right of free speech. (*Id.* at p. 1523.) Whether CBS had a discriminatory motive in not selecting the plaintiff was irrelevant to the question whether, under the anti-SLAPP statute, the plaintiff's discrimination claims were based on CBS's employment decisions. (*Ibid.*) *Hunter* clarified that "the proper inquiry is not

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Esquith v. Los Angeles Unified School Dist. (July 20, 2017, B276432) [nonpub opn.], review granted Nov. 1, 2017, S244026.) The Supreme Court's statement of the issue presented is: "In deciding whether an employee's claims for discrimination, retaliation, wrongful termination, and defamation arise from protected activity for purposes of a special motion to strike (Code of Civ. Proc., § 425.16), what is the relevance of an allegation that the employer acted with a discriminatory or retaliatory motive?"

whether CBS's selection of a weather anchor was itself a matter of public interest; the question is whether such conduct was 'in connection with' a matter of public interest." (*Id*. at p. 1527.) "[W]eather reporting is [speech in connection with] a matter of public interest," with the result that "CBS's decisions [about] who would *present* those reports to the public during its broadcasts was necessarily 'in connection' with that public issue." (*Ibid.,* italics added.) The *Hunter* court declined to consider the public significance of the hiring decision itself. (*Id*. at p. 1527, fn. 3.)

Analogizing to *Hunter*, the University argued in *Park* that the decision about who should have tenure implicates the public interest as much as does the decision about who should present a news broadcast, and hence tenure decisions are equally entitled to protection as acts defined by subdivision (e)(4) of section 425.16. (*Park*, *supra*, 2 Cal.5th at p. 1071.) Our Supreme Court in *Park* rejected the analogy on the ground the University "fail[ed] to appreciate the underlying structure of the position accepted in *Hunter* and thus offer[ed] a mismatched analogy." (*Id*. at pp. 1071-1072.) To make a similar argument, the Supreme Court in *Park* instructed, the University would have to explain "*what University expression on matters of public interest the retention or nonretention of this faculty member might further*," and to discuss "the circumstances in which a court ought to attribute the speech of an individual faculty member to the institution with which he or she is affiliated." (*Id.* at p. 1072, italics added.) *Park* explained that the relevant questions were "whether the *tenure decision furthers particular University speech*, and whether that speech is on a matter of public interest." (Italics added.) The court clarified that whether denial of tenure to this faculty member is "itself a matter of public interest" could

not "alone establish the tenure decision is protected activity under section 425.16, subdivision (e)(4)." (*Ibid.*)

The Supreme Court in *Park* declined to "consider the scope of [the] free speech protection for professors, the potential liberties at stake in a university's choice of faculty (cf. *University of Pennsylvania v. E.E.O.C.* (1990) 493 U.S. 182, 195-198 & fn. 6; *Sweezy v. New Hampshire* (1957) 354 U.S. 234, 262-263 (conc. opn. of Frankfurter, J.)), or under what circumstances the protected speech of an individual professor might be attributable to a private or public university for either free speech or anti-SLAPP purposes." (*Park*, *supra*, 2 Cal.5th at p. 1072.) Indeed, the Supreme Court declined to express an opinion about whether *Hunter* was correctly decided. (*Ibid.*)[5] The *Park* court held "simply that the assertion the University's hiring decision is a matter of public interest does not suffice to bring that decision within the scope of protected activity defined by section 425.16, subdivision (e)(4)." (*Ibid.*)

Here, the University's supplemental brief attempts to follow the roadmap set out in *Park's* statements about *Hunter* to expand on the contention the University made in *Park*, namely that its tenure decisions qualify as protected speech under subdivision (e)(4) of section 425.16. The University argues thusly: Decisions concerning faculty hiring and retention are important components of essential academic freedoms. (*Regents of University of California v. Bakke* (1978) 438 U.S. 265, 312 [" ' "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university – to determine for itself on academic

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[5] See footnotes 4 *ante*, pages 15-16, and 6 *infra*, page 19.

grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." ' "], quoting from *Sweezy v. New Hampshire*, *supra*, 354 U.S. at p. 263.) Furthermore, the University posits, the public has an interest in the governance of educational entities, especially of public institutions where a professor's lifetime salary is drawn from public funds, with the result that deciding who will educate students is an issue of public interest. Therefore, the University argues, it exercises free speech in choosing what may be taught, how it will be taught, and who will teach it.

Next, the University asserts, just as anchors are the face of the news and deliver the news (see *Hunter*, *supra*, 221 Cal.App.4th at p. 1527),[6] tenured professors are the "face" of a university when they teach, publish, and present throughout the world as a professor of that university. The University quotes *Demers v. Austin* (9th Cir. 2014) 746 F.3d 402, 411 (*Demers*) ("teaching and academic writing are at the core of the official duties of *teachers and professors"* and "are 'a special concern of the First Amendment,' " italics added) and *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1725 (*Pomona College*) ("[t]hose granted tenure define the intellectual character of the institution for decades after their selection," especially in small colleges and universities). Relying on these cases, the University contends that making decisions about what

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[6] On this point, the University's supplemental brief also analogized to *San Diegans for Open Government v. San Diego State University Research Foundation* (2017) 13 Cal.App.5th 76, review granted August 16, 2017, S242529. However, the Supreme Court has since granted review in *San Diegans* pending its disposition of *Wilson v. Cable News Network, Inc.*, *supra*, 6 Cal.App.5th 822, S239868.

faculty should be given tenure is conduct in furtherance of *University speech* on a matter of public interest.

Replete with such sweeping principles, the argument falls short because neither *Demers* nor *Pomona College* involved the anti-SLAPP statute and the Supreme Court in *Park* focused the question in the anti-SLAPP context more sharply on the plaintiff himself, asking the University to explain "what *University expression* on matters of public interest the retention or nonretention of *this* faculty member," namely Park, or here Choi, "might further." (*Park*, *supra*, 2 Cal.5th at p. 1072, italics added.) As *Park* explained, the fact the University's hiring decision may be a matter of public interest is insufficient to bring that decision within the scope of protected activity defined by section 425.16, subdivision (e)(4). (*Id.* at p. 1072.)

Certainly, granting a faculty member tenure confers *on that professor* the right of academic freedom and free expression. (*Demers, supra*, 746 F.3d at p. 411.) Yet, as *Demers* observed, "not all speech by a . . . professor addresses a matter of public concern." (*Id.* at p. 415.) Tenure bestows on the faculty member the freedom to make statements and take positions that are contrary to those of the university. But, the University has omitted to explain, as it was directed to do in *Park*, how this particular tenure decision furthers the *University's* speech on a matter of public interest. (*Park*, *supra*, 2 Cal.5th at p. 1072.) Through scholarship and teaching, faculty in general may "define the intellectual character of the institution" (*Pomona College*, *supra*, 45 Cal.App.4th at p. 1725), but that fact does not ipso facto transform the decision whether to retain Choi into conduct that assists *University speech* on a matter of public interest for purposes of the anti-SLAPP statute. As it failed to do in *Park*,

the University has not demonstrated "the circumstances in which [we should] attribute [Choi's] speech to that of [the University]." (*Park*, at p. 1072.) Accordingly, we conclude that the decision to deny Choi tenure and to terminate her from employment did not qualify as protected activity under section 425.16, subdivision (e)(4).

In sum, the University has failed to make its threshold showing that its tenure and discharge decision arose from protected activity and so the burden never shifted to Choi to demonstrate a probability of prevailing on her discrimination and retaliation causes of action. (*Oasis West Realty, LLC v. Goldman*, *supra*, 51 Cal.4th at pp. 819-820; § 425.16, subd. (b)(1).) The trial court erred in granting the University's special motion to strike.

5. *The attorney fee award must be reversed.*

On November 14, 2014, the trial court issued its order granting the University's anti-SLAPP motion. Choi filed her notice of appeal on December 1, 2014. The following month, the University moved for attorney fees pursuant to section 425.16, subd. (c)(1). Choi opposed the motion on the ground that her appeal divested the trial court of jurisdiction to consider the attorney fee motion. The trial court granted the University's motion for attorney fees, and Choi timely appealed.

Choi raises the same challenge to the attorney fee award on appeal as she did below. We need not address the contention. Subdivision (c)(1) of section 425.16 reads in relevant part, with certain exceptions not pertinent here, that "in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." We reverse the order granting the anti-SLAPP motion and so the University is not a prevailing defendant.

DISPOSITION

The orders granting the University's special motion to strike and awarding attorney fees and costs to the University are reversed. Choi is to recover her costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.