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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

JASON CHRISTOPHER DUCHAN, Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B279524 (Los Angeles County Super. Ct. No. BC591524)

APPEAL from an order of the Superior Court of Los Angeles County. Deirdre Hill, Judge. Affirmed.

Hadsell Stormer & Renik, Dan Stormer and Caitlan McLoon; Toni J. Jaramilla, May Mallari, and Francis Agcaoili for Plaintiff and Appellant.

Charlie L. Hill and Alexander Molina for Defendant and Respondent.

Appellant Jason Christopher Duchan (appellant) appeals from an order dismissing two of his claims, and portions of his remaining claims, against Los Angeles Unified School District (LAUSD), pursuant to Code of Civil Procedure section 425.16, subd. (a) ("section 425.16" or "anti-SLAPP statute").[1] We find no error in the trial court's ruling, and therefore affirm the order.

FACTUAL BACKGROUND

The underlying incidents

Appellant is an art teacher who started working for LAUSD in 2007. In the spring of 2013, when appellant was working at East Virgil Middle School, he disciplined a student for drawing a penis on a desk. In retaliation for the discipline, the student created a false Facebook profile for appellant which displayed appellant's name and photograph. Appellant had no idea of the existence of the Facebook profile. The Facebook page contained the following lewd and sexually explicit posts: "Ahh, my nipples hurt, my nipple senses must be activated, there is trouble in the art universe"; "Apparently the suspects for the tagging of the penis, to which I masturbated to, weren't guilty after all"; and, "Today in class I was really disgusted see that someone tagged a penis on one of my tables."

In the fall of 2014, appellant became a ninth-grade teacher at John H. Francis Polytechnic Senior High School (Polytechnic). The ninth grade classes are located in an area known as the Freshman Center.

In November 2014, a ninth-grade student at Polytechnic named Alex C. discovered the fake Facebook profile for appellant and shared it with other students and a teacher at the Freshman Center. The teacher, James Deschenes, taught English as a

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[1] "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

Second Language, and noted that the students in this particular class were difficult to manage. The students were "riled up" about the discovery of the Facebook page. Alex C. rushed into the classroom, shouting "'I just found out my teacher is gay!'" One girl stated, "'everybody knows about this already.'" The students began making threatening comments about appellant's sexuality. Alex C. said something along the lines of, "'If that guy messes with me, I wouldn't have any problem fucking him up.'" Deschenes was concerned about both appellant and the students, who had the tendency to "be really disruptive and make trouble." Deschenes immediately contacted the Vice Principal, Lourdes De Santiago, and informed her of the events of that day. De Santiago alerted the principal, Ari Bennett, the same day.

Bennett reviewed the Facebook profile and informed LAUSD administrators about the incident on the afternoon of November 5, 2014. On the same day, Bennett and De Santiago were informed of another recent incident involving appellant. A student, Jose C., asked to see a counselor and De Santiago regarding an incident in class involving a known pornography photographer, Robert Mapplethorpe. Appellant told the students he could never show them Mapplethorpe's pictures and that they should never search him in class. However, Jose C. proceeded to look up the photographer in class, and got in trouble with appellant. Principal Bennett reported this additional incident to LAUSD administrators.

The investigation and parent notification

LAUSD Northeast Operations Director Rhonda Sparks directed Bennett to complete a suspected child abuse report and to prepare to send a "72-hr parent notification letter" and "provide the employee with a 5-day home assignment letter if he returns tomorrow."

At the time Policy Bulletin 6211.0 set forth LAUSD's procedures regarding allegations of inappropriate conduct by employees. The bulletin provided that "[w]hen credible allegations of employee misconduct arise that threaten students, staff or workplace safety, District leaders must take appropriate and timely administrative action." The allowable procedures included a five working day temporary removal of the employee. The bulletin further directed that for allegations of sexual misconduct, "Unless otherwise advised by law enforcement agencies within the 72-hour turn-around time, LAUSD **will** notify parents and guardians of alleged employee misconduct." Such notification is known as a "72-hour letter." The policies allowed that if there were "extenuating reasons not to send notification," the Administrator of Operations would inform the site administrator.

In compliance with LAUSD's direct instructions, Principal Bennett contacted the police. However, the police declined to get involved, stating that no crime had been committed. Law enforcement gave the school permission to proceed with an administrative investigation.

On November 6, 2014, appellant was informed by letter that he was removed from the worksite for five days while an investigation was undertaken into "a recent incident that was reported on November 5, 2014."

Principal Bennett and Vice Principal De Santiago conducted the investigation, which consisted of student interviews.

On the evening of November 6, 2014, Principal Bennett emailed Sparks and Administrator of Operations Daryl Narimatsu regarding the results of the investigation. He intended to send out the 72-hour letters "during 2nd period tomorrow," but he had reservations about doing so. Bennett stated:

> "The amount of fear and chaos the letters will garner seems completely out of proportion to the allegation made and any of the facts uncovered at this point. There is not an allegation of sexual abuse, yet everyone who reads the letter will assume this is the [case]."

Bennett explained that it appeared that appellant "introduced a photography assignment in which the students were to research three famous photographers. It seems likely that he used extremely poor judgment by mentioning an inappropriate photographer amongst a list of famous photographers." He then told the students "not to search the inappropriate photographer in class or at home." This motivated a ninth grader to research the photographer. Unfortunately, almost every ninth grader had heard about the inappropriate Facebook posting. However, "[n]o student at this point has indicated any social media or inappropriate contact with [appellant]."

In response to Bennett's email, Narimatsu responded, "The district's policy is that whenever there is a sexual allegation -- we need to send the 72 hour letter out. . . . If the allegations are unfounded -- the letter will not be sent." Bennett felt that he had provided his professional input, but ultimately "the district has

their protocol."[2] On November 7, 2014, as directed, Bennett sent out the 72-hour letters to parents, along with "robocalls." The letter did not identify appellant by name. Instead, it stated:

> "The purpose of this letter is to inform you of an investigation involving alleged misconduct by a school employee who has been removed from campus pending the results of the District's administrative investigation."

Although appellant was not mentioned by name, the environment at Polytechnic is "tight knit," and "everyone knew" of the allegations. Due to this tight knit environment, one administrator opined that "[appellant] should not remain at Poly; this is not a viable option."

Appellant is instructed to return to his classroom

On November 11, 2014, appellant learned for the first time of the Facebook profile. He emailed Bennett, informing him that this was a "horrific" act of "Cyber Bullying" and that he had contacted Facebook about the false page.[3]

After the five-day leave had expired, LAUSD administrators instructed appellant to return to his classroom at Polytechnic. Appellant alleges that LAUSD had taken no steps to inform the parents or the students that appellant had been cleared of the allegations of misconduct. Further, appellant alleges that LAUSD instructed appellant not to discuss the pending investigation against him, preventing him from

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[2] Bennett stated that the district "made an accommodation" for his opinion and "at least revised the letter."

[3] Appellant alleges that on March 2, 2015, the student who created the fake Facebook page was identified and arrested. The student pled guilty to the charge of impersonating appellant online.

defending himself. Appellant feared that returning to his position at Polytechnic without being cleared would invite hostility and disrespect. As a result, appellant suffered a severe panic attack.

Appellant's doctor subsequently informed LAUSD that appellant was suffering from acute stress disorder stemming from his abrupt leave initiated on November 6, 2014. The stress disorder lasted for more than one month and became an episode of Post Traumatic Stress disorder (PTSD).

Appellant's doctor opined that returning to Polytechnic would exacerbate appellant's episode of PTSD.

Appellant requests reasonable accommodations

On December 12, 2014, Demetrius Patrick, Disability Coordinator in the Integrated Disability Management Branch of LAUSD, received an application for reasonable accommodation from appellant. Appellant stated that his medical conditions were acute stress disorder, PTSD, and Depression. Appellant requested to be transferred to another campus or to the main campus of Polytechnic, and be allowed to take his support pet (a Siberian cat) to work. Appellant stated that he could not drive unless the cat was with him in the car. The cat was "attuned to [his] emotions and health" and was trained to alert appellant when something was wrong, as well as comfort him when he was in distress or having panic attacks.

The reasonable accommodation hearing was held on January 20, 2015. Appellant's request to have a service animal at work was approved subject to certain conditions. Appellant was assigned to a substitute teaching post at ArTES School at Cesar Chavez Learning Academy (ArTES).

Appellant's experiences at ArTES and withdrawal of accommodation

Appellant reported harassment and insensitivity to his disability while he was working at ArTES. Appellant reported to the principal, John Lawler, that two employees mocked him and made fun of him. He also reported that employees spoke of his attorney in a condescending manner. Since appellant sensed hostility when he went to the main office, he requested that his time card be kept in the library. That request was denied.

On February 23, 2015, Lawler informed appellant in writing that he could no longer bring his assistive pet to class. Several staff members and students had complained about cat allergies, and a student at a neighboring academy had a severe reaction brought on by cat hair. While it was unclear whether the reaction was brought on specifically by appellant's assistive pet, it was clear that there was at least one student on campus with severe allergies to cats. Appellant was directed to stop bringing the pet to campus.

On March 20, 2015, appellant was placed on administrative leave and directed to attend a fitness for duty examination. In a letter dated March 24, 2015, appellant's attorney demanded that LAUSD justify its direction that appellant submit to a fitness for duty examination. The letter accused LAUSD of engaging in "ongoing and traumatizing harassment of [appellant]" since its decision to suspend him in November 2014. The letter accused LAUSD of "warehousing" appellant at his new position, "confined to sit in one room each and every day, with no work to do." Appellant also argued that the denial of the use of his support and service animal was a violation of federal and California law.

On September 25, 2015, appellant entered into a "Compromise and Release" settling appellant's workers'

compensation claims against LAUSD. Appellant agreed to resign from employment with LAUSD.

PROCEDURAL HISTORY

Appellant filed his complaint against LAUSD on August 19, 2015. Appellant asserted seven claims under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.): (1) sexual harassment and discrimination; (2) disability discrimination; (3) failure to accommodate disability; (4) failure to engage in a good faith interactive process; (5) retaliation; (6) failure to prevent harassment and discrimination; and (7) harassment and discrimination based on sexual orientation. Appellant alleged three tort causes of action against LAUSD: (1) defamation; (2) invasion of privacy – false light; and (3) intentional infliction of emotional distress (IIED).

In September 2015, LAUSD filed a demurrer as to the three tort causes of action on the ground that under Government Code section 815, public entities are not liable for non-statutory tort claims. The demurrer was sustained with leave to amend.

Appellant filed his first amended complaint (FAC) on April 22, 2016. Appellant restated the defamation, invasion of privacy - false light and IIED claims pursuant to Government Code section 815.2.

LAUSD filed its anti-SLAPP motion on May 18, 2016. The motion sought to strike all 10 of appellant's causes of action. LAUSD argued that the entire complaint arose from LAUSD's investigation of student allegations of misconduct, which is protected activity pursuant to section 425.16. LAUSD further argued that appellant was unable to show a probability of prevailing on the claims.

Appellant timely opposed the motion on September 21, 2016. LAUSD filed its reply on September 27, 2016.

The trial court heard oral argument on October 4 and 14, 2016. In a written order filed October 14, 2016, the trial court denied in part, and granted in part, LAUSD's motion. Specifically, the court denied the motion as to appellant's second through fourth causes of action for disability discrimination, failure to accommodate, and failure to engage in a good faith interactive process. The court noted that "[Appellant's] allegations that [he] was discriminated and harassed because of a service pet that he was originally allowed to keep does not concern [LAUSD's] investigation into alleged improper conduct."

However, as to "the remaining allegations and causes of action concerning [respondent's] investigation, and subsequent communications, surrounding allegations of inappropriate behavior by [appellant] and the vulgar Facebook account," the court found that those allegations did concern protected activity. The court noted that "failure by [LAUSD] to investigate and remediate potential cases of child abuse and endangerment is the impetus for numerous tort-based lawsuits." The court thus found that LAUSD's "investigation and corresponding letter constitute both an official proceeding authorized by law and communications in anticipation of a lawsuit." The court struck the eighth and ninth causes of action for defamation and invasion of privacy--false light and found that these allegations could not form the basis of the IIED cause of action. The court further found that LAUSD's actions were privileged pursuant to Civil Code section 47, subdivision (c).[4]

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[4] Section 47, subdivision (c) provides that: "A privileged publication or broadcast is one made: [¶] . . . In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing

The remaining FEHA causes of action -- the first, fifth, sixth and seventh causes of action for sexual harassment and discrimination; retaliation; failure to prevent harassment, discrimination and retaliation; and sexual orientation harassment and discrimination, were mixed causes of action arising out of both protected and nonprotected activity. The court held:

> "[Appellant] may not use [LAUSD's] actions taken in connection with the reports of inappropriate conduct that [LAUSD] investigated. [Appellant], however, also bases his FEHA-claims on other allegations, such as harassment by students and a failure to accommodate his service animal on the basis of his alleged disability. Therefore, to the extent that these claims do not implicate the protected activity previously discussed, the court DENIES the motion."

On December 13, 2016, appellant filed his notice of appeal.

DISCUSSION

I. Applicable law and standard of review

A special motion to strike under section 425.16, also known as the anti-SLAPP statute, allows a defendant to seek early dismissal of a lawsuit involving 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." (§ 425.16, subd. (b)(1).)

Actions subject to dismissal under section 425.16 include those based on any of the following acts: "(1) any written or oral statement or writing made before a legislative, executive, or

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the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. . . ."

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." (§ 425.16, subd. (e).)

"A SLAPP is 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.' (§ 425.16, subd. (b)(1).) Thus, evaluation of an anti-SLAPP motion requires a two-step process in the trial court. 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citations.]" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1035 (*Nygard*).) "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.)

"'Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) However, we neither "weigh credibility [nor] compare the weight

of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' [Citations.]" (*Nygard, supra*, 159 Cal.App.4th at p. 1036.)

II. The anti-SLAPP motion was properly granted

A. Timeliness

We first address the timeliness of LAUSD's motion. Generally, "[a] party may not file an anti-SLAPP motion more than 60 days after the filing of the complaint, unless the trial court affirmatively exercises its discretion to allow a late filing. [Citation.]" (*Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal.App.4th 772, 775; § 425.16, subd. (f).) Here, the parties agree that LAUSD filed its motion outside of the 60-day period as to the original complaint, but within 60 days after the filing of the FAC. Thus, we must determine whether the trial court in this matter abused its discretion to permit the motion. (*Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, 1187.) A claim that the trial court abused its discretion "requires the appellant to demonstrate that the trial court applied the statute in a manner that is incompatible either with the statute's actual mandate, or with its 'purposes and policy.' [Citation.]" (*Id.* at p. 1188.)

We find that the trial court did not abuse its discretion in hearing LAUSD's motion on the merits. First, courts that have considered this issue have determined that an anti-SLAPP motion filed within 60 days of the filing of an amended complaint is timely. (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 314 [finding anti-SLAPP motion timely where it was filed within 60 days of service of the third amended complaint]; *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 840 [finding anti-SLAPP motion

timely where it was filed 64 days after filing of the first amended complaint].)[5]

In support of his argument that LAUSD's motion was untimely, appellant cites two cases. As to the first case, review has been granted by the Supreme Court. (See *Newport Harbor Ventures LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, review granted Mar. 22, 2017, S239777.) Thus, the case has no binding or precedential effect. (Cal. Rules Court, rule 8.1115(e).)[6] In *Newport*, the anti-SLAPP motion was filed "within 60 days of service of a third amended complaint." (*Newport*, at p. 1218.) We find that the case is not persuasive as the analysis was specific to the procedural history of that case, where numerous demurrers, motions to strike, and a summary judgment motion had previously been ruled upon, "[t]he parties had engaged in extensive discovery and the trial court had ruled on several discovery motions." (*Id.* at p. 1219.)

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[5] In fact, appellant's opposition to the anti-SLAPP motion states that LAUSD "filed the present Anti-SLAPP motion on May 18, 2016, thirty days before the deadline for such a motion." As LAUSD points out, appellant argued in his opposition that the motion was improper because it exceeded the page limit for such motions, not because it was not timely filed. Appellant merely pointed out that "'A memorandum that exceeds the page limits of these rules must be filed and considered in the same manner as a late-filed paper.' (CRC Rule 3.113(g).)" Thus, it appears that appellant did not make this timeliness argument to the trial court. However, the trial court made an explicit finding that the motion was timely. We exercise our discretion to consider the timeliness argument on appeal.

[6] California Rules of Court, rule 8.1115(e), provides that any citation to a Court of Appeal opinion of which review has been granted "must note the grant of review." Appellant failed to do so in his opening brief which was filed after the grant of review.

The second case, *Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, is also distinguishable. In *Hewlett-Packard*, the defendant brought an anti-SLAPP motion after the trial court had found in a bifurcated trial that the defendant was liable for certain obligations, on the eve of trial on the issues of breach and remedy. Under the circumstances, the motion was denied as untimely because it was "late under any reasonable construction of the facts." (*Id.* at p. 1178.)

Such is not the case here. Appellant had filed one prior complaint, and LAUSD successfully demurred to the three tort causes of action which were ultimately stricken, in whole or in part, under the anti-SLAPP. Upon the filing of appellant's FAC, those tort causes of action were, for the first time, properly stated against LAUSD. LAUSD filed its anti-SLAPP within 60 days. Under the circumstances, even if it had been untimely filed, the trial court had discretion to hear the motion at the time it was filed.

In sum, pursuant to the authorities discussed above, appellant's motion was timely filed. Even if it was not timely filed, the trial court acted within its discretion in hearing and determining the motion on its merits.

B. Section 425.16 analysis

1. Protected activity

a. Acts related to the investigation were protected

The threshold question in evaluating the section 425.16 motion is whether the stricken portions of the FAC arise from protected activity. We find that they do. (*Nygard, supra,* 159 Cal.App.4th at p. 1035.)

LAUSD had the initial burden of showing that the causes of action against it arose from protected activity. (§ 425.16, subd. (e).) LAUSD argued that the initial investigation was an official

proceeding authorized by law and that activities related to investigations performed in connection with litigation are protected activity.

Statements and writings made during an initial investigation into allegations of wrongdoing are protected under section 425.16, subd. (e)(2). (*Hansen v. Department of Corrections and Rehabilitation* (2008) 171 Cal.App.4th 1537, 1544 (*Hansen*). An internal investigation is an official proceeding authorized by law. (*Ibid.*) "The entire disciplinary process, commencing with the receipt of complaints about an employee and proceeding through the investigation and disposition, constitutes an 'official proceeding authorized by law.'" (*Nam v. Regents of University of California* (2016) 1 Cal.App.5th 1176, 1186 (*Nam*).) Even in situations where an individual is never charged with misconduct or a crime, "communications preparatory to or in anticipation of the bringing of an official proceeding are within the protection of section 425.16. [Citation.]" (*Hansen*, at p. 1544.) LAUSD thus met its initial burden.

Appellant argues that the LAUSD internal investigation was not an official proceeding, and the 72-hour letter was not part of an official proceeding. These questions were recently considered by this District in *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574 (*Okorie*). *Okorie* involved a similar situation. A student made an allegation against a teacher, and the teacher was immediately removed from his classroom and sent home. During the investigation into the allegations, the principal of the school "advised the school's parents that Okorie had been 'walked off campus for misconduct and the . . . safety of staff and students.'" (*Id.* at p. 582.) When Okorie later sued LAUSD for discrimination under FEHA, as well as intentional infliction of emotional distress and defamation, the internal investigation and communications to

parents were protected conduct under section 425.16. The court concluded, "[i]t is well established that internal investigations constitute an 'official proceeding authorized by law.'" (*Id.* at p. 594.) As to the parent communications, the court found that "investigation-related speech allegations -- e.g., statements to parents and others about Okorie's removal from the classroom . . . -- were protected by the anti-SLAPP statute." (*Ibid.*) Thus, we reject appellant's argument that these actions were not protected.

b. Protected activity forms the basis of the stricken portions of the FAC

Appellant argues that even if some of LAUSD's actions are protected under section 425.16, not *all* of LAUSD's actions in connection with the investigation are protected. Specifically, appellant argues that the trial court did not consider the interplay between an employer's obligations under FEHA to protect an employee who is facing harassment at work with anti-SLAPP's protections for internal investigations at the workplace. Appellant distinguishes *Hansen* on the ground that in *Hansen* the employee alleged that the employer had made up the internal investigation to punish the employee for whistleblowing. Here, in contrast, appellant argues, appellant does not challenge the appropriateness of the internal investigation, but the limits of that protected conduct when the investigation conflicts with an employer's simultaneous obligations under FEHA.

Appellant cites several cases in support of this argument. These cases, appellant explains, have tackled the interplay between FEHA and the anti-SLAPP statute. We find these cases distinguishable because, unlike the stricken claims in this matter, the claims at issue did not arise from protected action.

In *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273 (*Alta*

Loma), a landlord appealed from the denial of his anti-SLAPP motion, arguing that an unlawful detainer action and related communications to a disabled tenant were protected activity. The denial of the anti-SLAPP motion was affirmed on appeal because the acts that formed the basis of DFEH's complaint were not acts that the landlord undertook in furtherance of the eviction itself. (*Id.* at p. 1284.) Instead, the complaint alleged the landlord refused to provide reasonable accommodations to the disabled tenant. (*Ibid.*) The lawsuit did not, in fact, challenge the landlord's act of filing the unlawful detainer action. That action, and the letters between the parties, were merely evidence of the landlord's failure to accommodate the disabled tenant. (*Id.* at p. 1285.)

Similarly, in *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 624-625 (*Martin*), a former employee alleged retaliation, racial discrimination, defamation and wrongful termination after the employee refused to take action against a subordinate who had filed a discrimination claim against the employer. The employer filed an anti-SLAPP, which was denied. In its motion, the employer mischaracterized the complaint as based on statements made at a board meeting. In fact, the board meeting was only briefly mentioned in the complaint. (*Id.* at p. 625.) The action did "not arise from any purported exercise of the defendants' privileged governmental acts," thus the anti-SLAPP was properly denied. (*Ibid.*)

Appellant points to *Nam, supra,* 1 Cal.App.5th 1176 as the decision most directly on point. In *Nam,* a former anesthesiology resident filed a complaint against a university for retaliation, discrimination, sexual harassment, and wrongful termination, among other things. (*Id.* at p. 1184.) In considering the university's anti-SLAPP motion, the Court of Appeal noted that it must look to the allegations of wrongdoing to determine whether

the gravamen of the complaint was discrimination. "The mere fact that the discrimination or retaliation triggered protected activity does not mean that it arose from the protected activity. [Citations.]" (*Id.* at p. 1190.) If the protected conduct is "incidental" to the cause of action, anti-SLAPP dismissal is inappropriate. (*Ibid.*) In short, the court concluded 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." (*Ibid.*)

The *Nam* court also emphasized the timeline of events, as pled, was significant: "Plaintiff's complaint and declaration make perfectly clear that the basis of her claim, as in *Alta Loma* and *Martin*, was defendant's retaliation -- punishing her for rebuffing [a superior] and calling attention to problems with the department's policies and procedures." (*Nam, supra*, 1 Cal.5th at p. 1193.) This portrayal of the facts conflicted with the university's, which insisted that "plaintiff exhibited unprofessional conduct shortly after she started the program in July 2009, thus triggering its constitutional right, indeed its duty, to investigate the complaints and discipline her accordingly." (*Id.* at p. 1192.) Despite the factual "murkiness," the court was required to accept as true the plaintiff's pleaded facts. (*Id.* at pp. 1192-1193).[7]

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[7] Recently, in *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, the Supreme Court noted that the timing of the initiation of the protected action can play a role in determination of whether that action forms the basis of the plaintiff's claims. In discussing a prior opinion, the high court justified the denial of an anti-SLAPP where a city had filed a declaratory judgment seeking a ruling that its rent control ordinance was constitutional. The court noted that the anti-

Here, accepting as true the appellant's facts as pled, LAUSD's allegedly wrongful acts began with a student allegation and the immediate initiation of an investigation. This case does not present the same factual murkiness that was present in *Nam*, where the parties presented sharply contrasting versions of the complex, drawn-out facts leading to the discipline and ultimate termination of the resident. Instead, the first mention of an act carried out by LAUSD is the initiation of the investigation after LAUSD employees were informed of the lewd Facebook post. There is no indication that appellant ever felt that he had suffered discrimination or harassment prior to that time. In other words, it was the initiation of the investigation that gave rise to appellant's claims.[8]

SLAPP was properly denied because the city's potential entitlement to a declaratory judgment "arose from the parties' underlying dispute over whether the ordinance was constitutional, a dispute that existed prior to and independent of any declaratory relief action." (*Id.* at p. 1063.)

[8] We decline to address *Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822, review granted March 1, 2017, S239686, at length despite appellant's reliance on the case. Like *Newport,* review of the case has been granted by the California Supreme Court. Again, in violation of California Rules of Court, rule 8.1115(e), appellant failed to notify this court of that fact. Further, in *Wilson*, the Court of Appeal determined that "the gravamen of plaintiff's employment-related causes of action was defendants' allegedly discriminatory and retaliatory conduct against him, not the particular manifestations of the discrimination and retaliation, such as denying promotions, assigning him menial tasks, and firing him." (*Wilson*, at p. 836.) Here, as discussed, the stricken portions of appellant's complaint arise from LAUSD's decision to initiate an investigation and inform the school community of that investigation. Thus, *Wilson* is not persuasive.

The causes of action that were stricken in their entirety from the complaint were the eighth cause of action for defamation and the ninth cause of action for invasion of privacy - false light. These causes of action arose from LAUSD's acts of initiating the investigation and sending out the 72-hour letter in connection with the investigation. These acts were protected activity, thus the anti-SLAPP was properly granted. Further, as the trial court properly held, these acts cannot form the basis of appellant's IIED claim or his FEHA claims.

In sum, LAUSD has carried its burden of showing that, as to the stricken portions of the FAC, the conduct by which plaintiff claims to have been injured falls within section 425.16, subd. (e).

2. Probability of prevailing on tort claims

The trial court struck appellant's eighth cause of action for defamation; ninth cause of action for invasion of privacy - false light; and tenth cause of action for IIED, in part. We agree that appellant was unlikely to prevail on these stricken claims.

a. Defamation

Defamation requires "a publication that is false, defamatory, unprivileged, and has a tendency to injure or cause special damage. [Citations.]" (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 277.)

The statements alleged in appellant's complaint are the letter and telephone messages that went out to the students and their parents at the commencement of the investigation. These statements were both true and privileged, and therefore cannot form the basis of a defamation claim.

The letter sent to parents stated:

> "The purpose of this letter is to inform you of an investigation involving alleged misconduct by a school employee who has been removed from campus pending the results of the District's administrative investigation."

The letter further informed the recipients that at the direction of the Los Angeles Police Department, the case was to be handled administratively by LAUSD. The letter assured the recipients that LAUSD would take every precaution to ensure the safety of the students and staff at the school. Appellant was not mentioned by name in either the letter or the phone calls, nor was there any false statement regarding appellant contained therein. Under the circumstances, appellant is not likely to prevail on his defamation claim.

Further, the communications resulting from the investigation were privileged under Civil Code section 47, subdivision (c). (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 472 [holding that individuals' disclosures of concerns regarding an after school coach were privileged].) The communications were made "without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." (Civ. Code, § 47, subd.(c).)[9] Contrary to appellant's protests, all parents of the school would be interested and concerned about

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[9] Malice, in the context of protected speech, means that the defendants published the statement with "'recklessness or . . . knowledge of falsity.'" (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 257.) There is no evidence that the LAUSD employees believed that their communications regarding the commencement of an internal investigation regarding an unnamed teacher were false. We reject appellant's suggestion that the letter "clearly implied that [appellant] had engaged in child abuse." The letter informed the school community that alleged misconduct by an unnamed school employee was under investigation -- nothing more.

potential misconduct by a teacher. Under the circumstances, the communications were privileged and could not form the basis for appellant's defamation cause of action.

b. Invasion of privacy – false light

To establish a claim for invasion of privacy, false light, a plaintiff must show the same elements as required to establish a defamation claim. (*Hawran v. Hixson, supra,* 209 Cal.App.4th at p. 277.) As set forth above, appellant cannot meet those requirements, thus he is not likely to prevail on this claim.

c. IIED

"A cause of action for intentional infliction of emotional distress exists where there is """(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct."""" [Citations.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050.) A defendant's conduct is "'outrageous'" when it is so """extreme as to exceed all bounds of that usually tolerated in a civilized community."""" (*Id.* at p. 1051.) Further, the defendant's conduct must be """intended to inflict injury or engaged in with the realization that injury will result."""" (*Id.* at p. 1051.)

LAUSD's actions in initiating the investigation and sending out the 72-hour letter and phone calls were not so extreme as to exceed all bounds of what is usually tolerated in a civilized community. In fact, the actions were dictated through LAUSD's written policies and procedures, which were designed to "ensure[] that allegations of employee misconduct are dealt with promptly, thoroughly, and effectively," and to assist administrators and supervisors "in handling such allegations, and in managing the investigation and notification process." Further, as set forth

above, the acts were privileged, thus cannot form the basis of a tort claim. (See *Hansen, supra,* 171 Cal.App.4th at pp. 1546-1547.)

In sum, appellant is not likely to prevail on the tort claims arising from the investigation and related acts. Thus, those claims were properly stricken under section 425.16.

3. Probability of prevailing on FEHA claims

Appellant next argues that even if they arise in part from protected activity, appellant's FEHA claims arising from LAUSD's investigation are causes of action that have a likelihood of success on the merits. Citing *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*), appellant urges that the anti-SLAPP statute "does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." Thus, appellant argues, even if appellant's FEHA claims did arise in part out of protected activity, LAUSD's anti-SLAPP motion should fail as to these claims because appellant presented sufficient evidence to demonstrate a likelihood of success on the merits.

We disagree. The *Baral* court made clear that "an anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded. [Citations.]" (*Baral, supra*, 1 Cal.5th at p. 393.) As set forth above, those portions of the FEHA claims that are based on appellant's initiation of an investigation, and any acts undertaken in connection with the investigation, are protected. Appellant is unlikely to prevail on a claim that those acts amounted to discrimination or harassment. There is simply no evidence that LAUSD initiated or carried out those acts with discriminatory intent. Instead, the allegations show that those acts were undertaken in direct response to the complaints of students.

In fact, appellant does not argue that the acts undertaken in connection with the investigation arose from discriminatory intent. Instead, appellant points to LAUSD's alleged failures to act -- its failure to investigate the students who made the claim; its failure to shut down the Facebook profile; its failure to consider whether sending out the 72-hour letter would create a hostile work environment; its failure to send out a subsequent letter exonerating appellant; and its failure to discipline students who were making homophobic remarks. The anti-SLAPP was not based on such failures, but was based on "actions taken by [LAUSD] personnel as part of the process of investigating allegations of misconduct by [appellant]."

Appellant's FEHA claims have survived to the extent they are based on harassment by students and LAUSD's failure to accommodate appellant's service animal. To the extent that those claims are based on the internal investigation of student allegations and communications in connection therewith, they were properly stricken.

DISPOSITION

The order is affirmed. Respondent is awarded its costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT