

California Appeals Court Opines on Interplay Between Employment Discrimination Claims and Anti-SLAPP Laws

A California appellate court last week issued a decision in *Wilson v. CNN*, applying and interpreting the scope of last year's Supreme Court ruling in the same case, which had itself resolved a circuit split in the state as to whether California's broad anti-SLAPP statute was categorically inapplicable to claims alleging discriminatory or retaliatory employment actions. The Supreme Court answered that question in the negative, holding that if such employment claims are based on actions by the defendant that qualify as protected speech or petitioning activity under the statute, they are subject to the statute's required preliminary screening, even if the plaintiff alleges that the *motive* for such actions was discriminatory or retaliatory.

Turning to the question of what types of actions by a news organization constitute protected speech activity under the statute, the Supreme Court held that plagiarism involves a "serious breach of journalistic ethics," the discipline of which "further[s] [the] organization's exercise of editorial control." Therefore, the Court reasoned, a news organization's decision to discipline an employee for plagiarism constitutes protected conduct "in furtherance of" the organization's speech rights. The Supreme Court held that CNN had made out a *prima facie* case that Wilson's termination was based on its decision to discipline him for plagiarism.

On remand, the Court of Appeal acknowledged that if an employer makes a *prima facie* showing of non-discriminatory motive for the adverse employment action which, if accepted, would render such action protected free speech conduct under the anti-SLAPP statute, that is enough to trigger review under the statute. The court observed, however, that this is not the end of the inquiry, because if the plaintiff makes a *prima facie* factual showing that the proffered motive is *pretextual*, then the case will survive preliminary screening under the anti-SLAPP law. The appellate court went on to note the Supreme Court's observation that plaintiff's burden on this second step of the anti-SLAPP analysis is a "limited one" requiring only a demonstration of "minimal merit." The question, in other words, is whether, accepting plaintiff's evidence as true, he or she has stated a legally sufficient claim and made a *prima facie* factual showing sufficient to sustain a favorable judgment. Only if evidence proffered by defendant defeats plaintiff's claim as a matter of law should the anti-SLAPP special motion

to strike be granted.

CNN attempted to impose a more stringent standard on plaintiff during this second stage of the analysis, arguing that the court could only rely on an inference if it was the *only* plausible inference that could be drawn from undisputed facts. The court rejected this argument, holding that the standard was the same as that applied on summary judgment, *i.e.*, if the court concludes that the plaintiff's evidence *or inferences that can be drawn from such evidence* raise a triable issue of material fact, it must conclude its consideration and deny the defendant's motion.

The Court of Appeal also rejected CNN's argument that Wilson would have to meet a clear and convincing evidence standard to demonstrate that the news agency's proffered reason for firing him was pretextual because such proffered reason was "rooted in the First Amendment." Instead, the court confirmed, the normal preponderance of the evidence standard applied. Ultimately, the Court of Appeal held that Wilson had made out a *prima facie* case that CNN's proffered reason for firing him – *i.e.*, plagiarism – was pretextual, and therefore reversed the trial court's order granting CNN's special motion to strike.