Appellate Reports

Employment and anti-SLAPP: A decision to deny tenure rested on communications made in the course of that decision, an official proceeding, and was protected activity for purposes of anti-SLAPP

By Jeffrey I. Ehrlich

Park v. Board of Trustees of the California State University

(2017) __ Cal.4th __ (Cal. Supreme)

Park was an assistant professor at Cal. State Los Angeles. His application for tenure was denied in 2013. Park thereafter filed a lawsuit against the University under the FEHA for national origin discrimination. The University responded with an anti-SLAPP motion, arguing that Park's suit arose from its decision to deny him tenure and the numerous communications that led up to and followed that decision, these communications were protected activities, and that Park had not shown a sufficient probability of prevailing on the merits. The trial court denied the motion. The Court of Appeal reversed. The majority reasoned that, although the gravamen of Park's complaint was the University's decision to deny him tenure, that decision necessarily rested on communications the University made in the course of arriving at that decision. Such communications were in connection with an official proceeding, the tenure decisionmaking process, and so were protected activity for purposes of the anti-SLAPP statute. Reversed.

Anti-SLAPP motions may only target claims "arising from any act of [the defendant] in furtherance of the [defendant'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).) In turn, the Legislature has defined such protected acts in furtherance of speech and petition rights to include a specified range of statements, writings, and conduct in connection with official proceedings and matters of public interest. (*Id.*, subd. (e).) A claim arises from protected activity when that activity underlies or forms the basis for the claim. Critically, the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. The mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. Hence, the law draws a distinction between "a cause of action based squarely on a privileged communication, such as an action for defamation, and one based upon an underlying course of conduct evidenced by the communication."

Applying this rule in the anti-discrimination context, 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. Failing to distinguish between the challenged decisions and the speech that leads to them or thereafter expresses them would chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power.

Similar problems would arise for attempts to enforce the state's antidiscrimination public policy. Any employer who initiates an investigation of an employee, whether for lawful or unlawful motives, would be at liberty to claim that its conduct was protected and thereby shift the burden of proof to the employee who, without the benefit of discovery and with the threat of attorney fees looming, would be obligated to demonstrate the likelihood of prevailing on the merits.

Hence, 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."

Park has alleged that he is of Korean national origin, was qualified for tenure, and was denied tenure while other faculty of Caucasian origin with comparable or lesser records were granted tenure. The complaint also alleges a school dean "made comments to Park and behaved in a manner that reflected prejudice against him on the basis of his national origin" and that Park pursued an internal grievance, which was denied. The elements of Park's claim, however, depend 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. 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.

The trial court correctly observed that Park's complaint is based on the act of denying plaintiff tenure based on national origin. Plaintiff could have omitted allegations regarding communicative acts or filing a grievance and still state the same claims.

Ultimately, the Court held 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). Accordingly, the University has not carried its burden of showing "the defendant's conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e)."

Short(er) takes:

Enforcement of judgments; scope of debtor exams:
Yolanda's Inc. v. Kahl & Goveia Commercial Real Estate (2017) __ Cal.App.5th __ (Second Dist., Div. 6.)

Plaintiff obtained a judgment against KGCRE. Its owners shut down KGCRE, set up a new company, and transferred assets from KGCRE to the new company. Plaintiff obtained an order directing KGCRE to produce its person most knowledgeable ("PMK") to appear for a debtor's exam. During the exam the PMK acknowledged that certain of KGCRE's assets had been transferred to third parties, but counsel directed the PMK not to answer questions about where the transferred assets were currently located. He claimed that such questions were beyond the scope of a third-party debtor's exam. The trial court ordered the PMK to answer the questions, and KGCRE took a writ. Denied. "The policy of the law favors enforcement of judgments. . . . There is no policy favoring the concealment of the judgment debtor's assets from the judgment creditor."

The Second District takes on the question of trail immunity.

"Trail immunity," Gov. Code § 831.4; golf courses; errant golf balls causing injury; municipal liability:
Garcia v. American Golf Corp. (2017) __ Cal.App.5th __ (Second Dist., Div. 2.)

The City of Pasadena owns the Brookside Golf Course, which is managed by American Golf Corp. The Rose Bowl Loop is comprised of roadways that encircle the Rose Bowl Stadium and the two golf courses within the Brookside Golf Course. People use the Loop, which has a 13-foot wide pedestrian walkway for walking, jogging, skating and bicycling. In 2011, Jacobo Garcia was in a stroller that his mother was pushing on the walkway, when he was struck in the head by an errant golf ball. Jacobo sued, and the City moved for summary judgment, citing various immunities, including "trail immunity" under Gov't Code § 831.4. The trial court granted the motion. Reversed.

Under section 831.4, a public entity cannot be held liable for a condition of "(a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas and which is not a (1) city street or highway or (2) county, state or federal highway or (3) public street or highway of a joint highway district, boulevard district, bridge and highway district or similar district formed for the improvement or building of public streets or highways. [¶] (b) Any trail used for the above purposes."

Assuming that the walkway qualified as a trail, the issue in the appeal is whether the injury to Jacobo was caused by a dangerous condition of the walkway for purposes of trail immunity. The plain language of section 831.4 provides immunity for injuries caused by dangerous conditions of trails, but it does not provide immunity for injuries caused by dangerous conditions of adjacent public properties.

The Brookside Golf Course is a developed and commercially operated golf course that introduced the danger of people using the Loop getting hit by errant golf balls. In other words, there is a risk of harm posed by third parties, i.e., golfers. This danger is the result of a human creation in contrast to a naturally occurring danger that results from topography and gravity.

The danger of errant golf balls (and need for safety) exists for people outside the Brookside Golf Course regardless of whether they use the walkway. As a commercial enterprise that generates revenue, the

Brookside Golf Course can pay for safety features such as the safety nets that it erected in 2001 after a pedestrian was hit by an errant golf ball. It can obtain insurance, and it can pay lawyers and judgments.

It is fair to deny the City trail immunity for a dangerous condition of the Brookside Golf Course that increases the risk of harm by third party conduct. Rather than prompting the closure of trails that abut public streets and are adjacent to publicly owned golf courses, liability will prompt such golf courses to take corrective action in a manner consistent with the accepted and expected methods of managing golf courses.

"A bulwark to our conclusion is that recognizing immunity here would give City a disincentive to correct a dangerous condition of the Brookside Golf Course even if the course is revenue generating. And if the Brookside Golf Course has a dangerous condition, recognizing immunity would have the absurd consequence of requiring City to protect people using the Loop from getting hit by an errant golf ball except anyone who happens to be using the walkway."


Ehrlich

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm*, with offices in Encino and Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of* Advocate *magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.*