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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

RAFE ESQUITH, Plaintiff and Respondent, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Appellant.	B276432 (Los Angeles County Super. Ct. No. BC591067)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

Ballard Rosenberg Golper & Savitt, Linda Miller Savitt, David Fishman and Zareh A. Jaltorossian for Defendant and Appellant.

Geragos and Geragos, Mark J. Geragos, Zack V. Muljat and Ben J. Meiselas for Plaintiff and Respondent.

INTRODUCTION

Plaintiff Rafe Esquith, a teacher, sued his employer, Los Angeles Unified School District (LAUSD), LAUSD superintendent Ramon C. Cortines, and LAUSD employee David R. Holmquist, alleging retaliation and discrimination. Esquith alleged that he was an outspoken critic of certain LAUSD policies and he was nearing retirement, and as a result defendant retaliated and discriminated against him by removing him from his teaching position and conducting a baseless, meandering investigation designed to damage Esquith's career and reputation. Defendants filed a special motion to strike under Code of Civil Procedure section 425.16 (section 425.16), arguing that Esquith's causes of action arose from the employment investigation, which is a protected activity. The trial court denied the motion, and defendants appealed.

We affirm. When a plaintiff has alleged that certain employment actions form the basis for retaliation and discrimination claims, the defendant employer may not successfully move to strike the plaintiff's complaint under section 425.16 by asserting that those very actions were protected activity under section 425.16, subdivision (e). Because Esquith alleged that the investigation itself was retaliatory and discriminatory, the investigation was not protected activity under section 425.16, and the trial court did not err in denying the motion.

FACTUAL AND PROCEDURAL BACKGROUND

A. Complaint

Esquith filed a complaint on August 13, 2015, alleging eight causes of action: (1) defamation per se, (2) defamation per quod, (3) intentional infliction of emotional distress, (4)

conversion, (5) retaliation, (6) age discrimination, (7) unfair business practices, and (8) declaratory relief/reinstatement. The following facts are alleged in the complaint.

Esquith alleged that he was an "internationally-renowned and award-winning teacher" at Hobart Boulevard Elementary School (Hobart) in LAUSD. He has written books about teaching and he runs a nonprofit organization, the "Hobart Shakespeareans," "which provides extracurricular music and arts education to local students." Esquith said he was also an "outspoken critic of LAUSD's collusion with big business and its wasteful spending on ill-advised programs." As a result, Esquith asserted, "LAUSD and its agents embarked on a campaign to silence Mr. Esquith."

On March 19, 2015, the Hobart principal told Esquith that he was being counseled to "be careful about what you say in front of students." The principal later explained that the basis for this discussion was a joke about nudity Esquith told in front of students. Esquith asserted this was a misunderstanding about a quote from *The Adventures of Huckleberry Finn* by Mark Twain. About a month after the initial meeting, the principal told Esquith that a complaint about him had been forwarded to the California Commission on Teacher Credentialing. On May 27, 2015, the California Commission on Teacher Credentialing closed the investigation on Esquith "having found no evidence of misconduct." A copy of a letter from the California Commission on Teacher Credentialing was attached to the complaint.

Esquith received notice around April 10, 2015 that he was being stripped of his classroom duties due to allegations of serious misconduct. He was required to report to "teacher jail": an industrial building in which teachers "are forced to spend

their days staring at cubicle walls and not accessing electronics." A gag order was imposed, barring Esquith from communicating with students or their parents. Esquith asserted that he was not informed of the allegations against him or the basis of LAUSD's investigation.

Esquith alleged that LAUSD continued a baseless investigation "designed to cook up negative facts and smear Mr. Esquith's reputation in the community." Students from Esquith's class were "grilled" using "heavy-handed interrogation tactics" about Esquith's actions. Concerned parents were not told what the investigation was about, and Esquith was not allowed to respond to parent inquiries due to the gag order. On May 27, 2015, LAUSD investigators met with Esquith and questioned him. Esquith alleged that the questions "followed no conventional interviewing protocol or any appropriate or logical line of questioning."

LAUSD also investigated the Hobart Shakespeareans, which according to the complaint is "a completely nonprofit organization with an independent board of directors." The Hobart Shakespeareans "sponsor numerous trips and an annual performance of a Shakespeare play each year." Board members were questioned about these student trips, and Esquith was told that an upcoming trip to a Shakespeare festival had to be cancelled because the "trip is not authorized or sponsored by the District." LAUSD's letter requesting that the trip be cancelled was attached to the complaint. The trip and the students' planned performance of the annual Shakespeare play were cancelled.

Esquith filed a government tort claim on June 22, 2015, which Esquith alleges gained media attention. LAUSD then "set

a plan in motion to orchestrate bizarre abuse allegations designed to retaliate against Mr. Esquith for bringing a notice of intent to sue." "LAUSD's mouthpiece, [defendant] David R. Holmquist, arranged for an elderly woman to call a major media outlet to claim that her son was now accusing Mr. Esquith of abuse dating [back] forty years, when Mr. Esquith was a teenager." Thereafter, "Mr. Holmquist proceeded to inform the media that the investigation would now be looking into this new allegation." Esquith alleged that defendants' actions caused him to suffer a stress-induced thrombosis, for which he was hospitalized.

On July 8, 2015, counsel for the Hobart Shakespeareans received a letter from a law firm retained by LAUSD requesting 15 years' worth of financial data. After Esquith's counsel responded with a letter, LAUSD's firm "wrote directly to the Hobart Shakespeareans on or about July 20, 2015 to point out that the investigation is now *actually* directed at Mr. Esquith for potential 'government ethics' breaches pertaining to the Shakespeareans." Esquith alleged that he had never been accused of violating government ethics laws with respect to the Hobart Shakespeareans, and this letter was "specifically orchestrated to assassinate Mr. Esquith's character."

On July 19, Superintendent Cortines issued a press release regarding the Esquith investigation that was "disseminated to major media outlets." The press release stated, "This is a very complex issue. While I respect that this teacher is extremely popular—and has been for some time—in the briefings that have been given to me, there are serious issues that go beyond the initial investigation. The Los Angeles Unified School District will not be rushed to make a decision and will complete our

investigation with the highest level of integrity. The safety and security of every District student will remain our number one priority." Esquith alleged that the press release "was designed to retaliate against Mr. Esquith for consistently and publicly opposing many of LAUSD's wasteful policies and practices." He also alleged that the continuing investigation revolved around "nothing more than baseless allegations manufactured by LAUSD after the initial complaint against Mr. Esquith was disproven and LAUSD realized it faced catastrophic liability based on the manner and methods it used to remove the world's most well-known teacher from his classroom because of a Mark Twain quote."

Esquith also alleged that LAUSD "conducted a raid of Room 56" (Esquith's classroom) and "stole property totaling approximately $100,000.00 in musical instruments and educational materials, thirty laptop computers, hundreds of copies of classical literature, and other items belonging to students and paid for by donated funds." Esquith alleged that LAUSD also "stole Mr. Esquith's National Medal of Arts, presented to him personally by the President of the United States of America."

In the first cause of action for defamation per se, Esquith contended that defendants harmed him by broadcasting "the false notion that Plaintiff had engaged in serious misconduct towards his students and in his relationship with the Hobart Shakespeareans." The statements at issue include LAUSD statements to students, statements to the press, and Holmquist's "fabrications." The statements "charge [Esquith] with criminal conduct, directly injure him with respect to his profession, and impute upon him a want of chastity."

The second cause of action for defamation per quod alleged defamation for the same statements to students and the media. The second cause of action also alleged that Esquith suffered special damages.

The third cause of action for intentional infliction of emotional distress incorporated the general allegations discussed above. It alleged that defendants' conduct was outrageous, and that defendants intended to cause Esquith emotional distress or acted with a reckless disregard for the probability that Esquith would suffer severe emotional distress as a result of defendants' conduct.

The fourth cause of action for conversion is asserted on behalf of Esquith, "his Students, and the Hobart Shakespeareans." It alleges that Esquith, his students, and the Hobart Shakespeareans had a right to possess the property taken from Room 56, and defendants substantially interfered with their rights when they "took possession of said property while Plaintiff was held in LAUSD's teacher jail." Esquith alleged that he and the students were harmed by the taking of the property.

The fifth cause of action for retaliation alleged that the Fair Employment and Housing Act (FEHA) prohibits retaliation against employees for exercising their rights. Esquith alleged that defendants retaliated against him "by removing him from his teaching position, burdening [him] with a gag order, placing him in teacher jail, and levying allegations of abuse against him in part because he opposed LAUSD's relationship with big business, criticized many of LAUSD's policies and initiatives, and because he filed a claim for damages."

The sixth cause of action for age discrimination alleged that LAUSD has a pattern of retaliating against teachers nearing

retirement age "to usurp their benefits and wages and to funnel them to its other misguided practices. . . ." Esquith alleged this practice violated Government Code section 12940, subdivision (a), that he was over 40 years old at the time defendants acted, and that his age was a substantial motivating factor in his constructive discharge.

In the seventh cause of action for unfair business practices, Esquith alleged that defendants violated Business and Professions Code section 17200, et seq. He alleged defendants improperly removed him from his teaching position, failed to inform him of the charges against him, placed him in teacher jail, failed to allow him to defend himself, conducted interviews with students intended to defame his character, and released defamatory statements to the press.

In the eighth cause of action for declaratory relief, Esquith sought a declaration that he could return to his teaching duties.

B. Defendants' anti-SLAPP motion[1]

Defendants filed a special motion to strike Esquith's complaint under section 425.16. Defendants asserted the following facts, and filed several declarations in support of their factual assertions. Esquith was initially investigated for "using sexually inappropriate language" in the presence of fifth-grade students. Esquith was placed on administrative leave, and he "was not required to report to the Educational Service Center on a daily basis; he was required to remain at home during working hours." The LAUSD investigation "revealed serious allegations of highly inappropriate conduct" by Esquith. Defendants also

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[1] "SLAPP" is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57 (*Equilon*).)

contended that their press releases were responses to press statements by Esquith.[2]

Defendants argued that Esquith's "entire complaint arises from LAUSD's investigations of child molestation by Plaintiff Rafe Esquith, which is protected activity under [section 425.16]." Defendants asserted that "each cause of action relies on the same set of facts: actions taken by District personnel as a part of the process of investigating allegations that Plaintiff engaged in sexual misconduct." Defendants contended that these actions were in furtherance of their rights to free speech and petition.

Defendants also asserted that Esquith could not show a probability of prevailing on the merits. For the defamation causes of action, defendants argued that no defamatory statements were made, and defendants' conduct was privileged under Civil Code section 47. Defendants included with their motion LAUSD news statements dated June 19, 2015 and June 26, 2015. Defendants contended that Esquith's causes of action for intentional infliction of emotional distress and conversion had no merit because defendants cannot be liable for common law torts under the Government Claims Act, Government Code section 810, *et seq*. Defendants argued that the fifth cause of action for retaliation and the sixth cause of action for age discrimination failed because Esquith had not engaged in

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[2] Defendants' motion also included descriptions of events and evidence that post-date Esquith's complaint. Defendants include in their brief on appeal a host of accusations against Esquith that purportedly were discovered during LAUSD's investigation. Events occurring after the complaint were filed have no relevance to whether Esquith's claims arose from protected activity. Accordingly, we do not address those accusations here.

protected activity under FEHA, and Esquith's claims lacked a causal nexus. Defendants also asserted that as a public entity and public entity employees, they could not be liable under Esquith's seventh cause of action for unfair business practices. Finally, defendants argued that Esquith's cause of action for declaratory relief was an "equitable, derivative remedy" that must be dismissed because the other causes of action lacked merit.

C. Esquith's opposition and defendants' reply

Esquith opposed defendants' motion. Esquith argued that the complaint "is based on conduct that precedes August 13, 2015," the date the complaint was filed, and defendants' arguments and evidence regarding later events were inappropriate. Esquith asserted that his claims were not based on conduct arising from protected activity, because Esquith alleged that defendants' actions were "without a legitimate, lawful connection to any official proceeding." He argued that retaliation, age discrimination, conversion, and intentional infliction of emotional distress do not constitute protected activity. Esquith acknowledged that the press statements were speech, but said they did not involve a public issue: "Mr. Holmquist was not speaking on a public issue, he was creating a false issue and injecting [it] into a public forum."

Esquith also argued that he had a probability of prevailing on the merits. He asserted that defendants' statements about him were false and defamatory, and they were not privileged because there were outside the scope of any reasonable investigation. Esquith contended that defendants were not immune from liability for intentional infliction of emotional distress or conversion because the employee defendants were not

immune, and public entities may be liable for their employees' actions. Esquith argued that defendants were incorrect that his FEHA claims were not based on protected activity, because Esquith's criticism of LAUSD's programs was protected, and defendants' actions were retaliatory in nature. He also asserted that the eighth cause of action for declaratory relief would prevail along with the other causes of action.

In reply, defendants reasserted that their investigation of Esquith was an official proceeding authorized by law, and therefore it was protected activity under section 425.16. Defendants also argued that Esquith failed to demonstrate a probability of prevailing on the merits for any of his causes of action.

D. Court ruling

At the hearing on the motion, the court said the defamation causes of action and the intentional infliction of emotional distress cause of action likely involved protected activity because they focused on statements by defendants. The court asked defense counsel how the retaliation and age discrimination causes of action involved protected activity, and defense counsel responded that all causes of action "arose out of the investigation and the official proceeding." The court said that the fifth cause of action for retaliation did not say anything about the investigation. Defense counsel argued that it was all tied together, because the alleged retaliation was part of the investigation. The court disagreed, saying, "To the extent that there was this investigation ongoing, that's not part of the retaliation claim or the age discrimination claim. If it is at all, it is, at most, incidental to the gravamen of the complaint." The court also pointed out that Esquith alleged the retaliation was in

response to his criticism of LAUSD, and the investigation was only pretextual. Esquith's counsel agreed, stating that FEHA claims would be meaningless if an employer could escape liability by simply arguing that an investigation was pending.

The court also asked defense counsel how Esquith's conversion cause of action was based on protected activity. Defense counsel argued that the seizures were also part of the investigation. Defense counsel also asserted that Esquith failed to present evidence to show a probability of prevailing. The court said, "Oh, yeah. The burden is to come forward with evidence after we have met the first prong, and . . . I don't see how we get past the first prong on the – the conversion, retaliation, age discrimination."

The court said to defense counsel, "Now, I think you probably [passed] the first prong on [causes of action] one, two, and three and so that shifts the burden except . . . [your] Anti-SLAPP motion is to the entire complaint, which you can do. You can seek to strike an entire complaint, but you know, if anything survives, then I can't strike the entire complaint." Defense counsel argued that the entire complaint should be stricken, but if it were not then at least it should be stricken as it related to the individual defendants. The court stated that defendants did not move to strike any portions of the complaint as to individual defendants or causes of action in their motion, stating that "[i]t wasn't spelled out either in the points and authorities or the notice or the reply."

The court concluded, "The gravamen of the action in terms of the essential [*sic*] the fifth and sixth causes of action, they were his employment claims that were not related to First Amendment activity. So I am going to deny the special motion to strike."

Defendants timely appealed. (Code Civ. Proc. § 904.1, subd. (a)(13).)

STANDARD OF REVIEW

"'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.]' [Citation.]" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

DISCUSSION

"Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Equilon*, *supra,* 29 Cal.4th at p. 67.)

A. Prong One: Arising from protected activity

"A claim arises from protected activity when that activity underlies or forms the basis for the claim." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062 (*Park*).) "[I]n ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability." (*Park, supra*, at p. 1063.)

Defendants argue that each of Esquith's causes of action meet the first prong of the anti-SLAPP test because they "arise from protected activity—LAUSD's official investigation." Under section 425.16, subdivision (e)(2), an "'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 . . . 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." (§ 425.16, subd. (e)(2).) In general, an investigation into an employee's conduct in connection with public employment is considered to be protected activity. (*Miller v. City of Los Angeles* (2008) 169 Cal.App.4th 1373, 1383 (*Miller*).)

B. Prong one in employment discrimination and retaliation cases

Discriminatory, harassing, and retaliatory employment actions, however, do not arise from protected activity. Here, Esquith alleged that LAUSD's investigation was improper and baseless, and was designed to "cook up negative facts and smear Mr. Esquith's reputation." He alleged that the investigation was undertaken because LAUSD feared "catastrophic liability based

on the manner and methods it used to remove" Esquith from his classroom duties. Esquith also alleged that LAUSD's press release "was designed to retaliate against Mr. Esquith for consistently and publicly opposing many of LAUSD's wasteful policies and practices." Esquith asserted that defendants publicly accused him of sexual misconduct in retaliation for Esquith's filing a claim for damages. He asserted that the "ever-evolving 'investigation' was specifically orchestrated to assassinate Mr. Esquith's character."

In a case in which a plaintiff has alleged discrimination, harassment, or retaliation by an employer, an investigation or communication alleged to have furthered that intent is not considered protected activity. Even if the defendants' actions fall within a category typically considered to be protected activity, it "does not mean that defendants' alleged discrimination and retaliation against plaintiff . . . was also an act in furtherance of its speech rights." (*Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822, 834.) To the contrary, in employment discrimination and retaliation cases, "[d]iscrimination and retaliation are not simply motivations for defendants' conduct, they *are* the defendants' conduct." (*Id.* at p. 835.)

The Supreme Court recently addressed this issue in *Park, supra,* 2 Cal.5th 1057. In *Park*, the plaintiff, a professor, alleged that his employer university discriminated against him based on his national origin when it denied him tenure. The plaintiff sued under FEHA, and the university filed an anti-SLAPP motion arguing that the lawsuit "arose from its decision to deny [Park] tenure and the numerous communications that led up to and followed that decision, these communications were protected activities." (*Park, supra*, 2 Cal.5th at p. 1061.)

The Supreme Court disagreed. Park's complaint centered around allegations that he had been improperly denied tenure. Although a number of communications suggested that the motivation for the university's decision related to Park's national origin, those communications did not make up the gravamen of Park's complaint. "The elements of Park's claim . . . 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." (*Park, supra*, 2 Cal.5th at p. 1068.)

The Court noted that several "[c]ourts presented with suits alleging discriminatory actions have taken . . . care not to treat such claims as arising from protected activity simply because the discriminatory animus might have been evidenced by one or more communications by a defendant." (*Park, supra*, 2 Cal.5th at p. 1065.) These cases are distinguishable from typical anti-SLAPP actions because "[w]hat 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.) "[T]o read the 'arising from' requirement . . . 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." (*Id*. at p. 1067.)

Thus, in an action in which the plaintiff has alleged employment discrimination, harassment, or retaliation, "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.)

Park cited with approval *Nam v. Regents of the University of California* (2016) 1 Cal.App.5th 1176 (*Nam*). In that case, an anesthesiology resident alleged that her employer, a university medical center, took a variety of inappropriate employment actions against her in retaliation for plaintiff's actions. The plaintiff sued for retaliation, discrimination, sexual harassment, wrongful termination, breach of contract, and violations of the Business and Professions Code. (*Nam*, *supra*, 1 Cal.App.5th at p. 1184.) The medical center moved to strike under section 425.16, arguing that the plaintiff's causes of action arose from written complaints made in connection with an official proceeding. (*Ibid*.)

The Court of Appeal held that the trial court correctly denied the motion. The court said, "Defendant . . . insists that all of its conduct involving plaintiff was protected and plaintiff's lawsuit was designed to chill the exercise of its right to petition, that is, its right to handle the complaints" relating to the plaintiff's employment performance. (*Nam, supra*, 1 Cal.App.5th at p. 1187.) The plaintiff argued that the defendant's actions constituted harassment and retaliation, and the defendant argued that "motive is irrelevant in assessing the merits of an anti-SLAPP motion to strike." (*Ibid*.)

The court disagreed, saying that to adopt the defendant's argument would be to allow the anti-SLAPP law to undermine all

harassment and retaliation claims. "Any employer that 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. Such a result is at odds with the purpose of the anti-SLAPP law, which was designed to ferret out meritless lawsuits intended to quell the free exercise of First Amendment rights, not to burden victims of discrimination and retaliation with an earlier and heavier burden of proof than other civil litigants and dissuade the exercise of their right to petition for fear of an onerous attorney fee award." (*Nam, supra,* 1 Cal.App.5th at p. 1189.) The court concluded, "[T]he 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. In that case, the conduct giving rise to the claim is discrimination and does not arise from the exercise of free speech or petition." (*Id*. at p. 1190-1191.)

Similarly, in *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, the plaintiff alleged that his employer, a municipal water district, took adverse employment actions against him due to race and age discrimination, and in retaliation for the plaintiff's actions. The defendants filed an anti-SLAPP motion, arguing that "all plaintiff's causes of action were barred as privileged communications made in the proper discharge of their official duties." (*Martin*, supra, 198 Cal.App.4th at p. 618.) The trial court denied the motion, and the Court of Appeal affirmed. The court said, "[T]he pleadings

establish that the gravamen of plaintiff's action against defendants was one of racial and retaliatory discrimination, not an attack on [a supervisor] or the board for their evaluations of plaintiff's performance as an employee." (*Id*. at p. 625.) The court added, "it is clear that his action does not arise from any purported exercise of defendants' privileged governmental acts, which would be covered by the statute." (*Ibid*.)

In *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273 (*Alta Loma*), a landlord wanted to take its rental units off the market, and the landlord served a notice of its intentions to the tenants. A disabled tenant sought an extension of time to vacate the apartment. The landlord challenged the tenant's disability diagnosis, and ultimately filed an unlawful detainer proceeding. The Department of Fair Employment and Housing (DFEH) sued the landlord for discrimination and other violations relating to the disabled tenant. (*Alta Loma*, *supra*, 154 Cal.App.4th at p. 1280.) The landlord defendant moved to strike the complaint under section 425.16, arguing that the lawsuit arose from protected activity "in connection with official proceedings in removing its residential units from the rental market and thereafter in filing unlawful detainer actions." (*Ibid*.) The trial court denied the motion, and the Court of Appeal affirmed.

The court assumed that the defendant's communication with the tenant and subsequent filing of the unlawful detainer action constituted protected petitioning or free speech activity. (*Alta Loma, supra*, 154 Cal.App.4th at p. 1283.) But such a finding was not sufficient to meet the first prong of the anti-SLAPP test. "[T]he pleadings and the affidavits submitted by the parties establish the gravamen of DFEH's action against Alta

Loma was one for disability discrimination, and was not an attack on any act Alta Loma committed during the rental property removal process or during the eviction process itself." (*Id*. at p. 1284.) The court added, "[I]f this kind of suit could be considered a SLAPP, then landlords and owners, if not Alta Loma, could discriminate during the removal process with impunity knowing any subsequent suit for disability discrimination would be subject to a motion to strike and dismissal. We are confident the Legislature did not intend for section 425.16 to be applied in this manner." (*Id*. at p. 1288.)

C. Application to this case

Esquith alleged that he was a vocal critic of LAUSD practices, and defendants retaliated against him as a result by opening a baseless investigation intended to harm him. Esquith alleged that even after the California Commission on Teacher Credentialing found no evidence of misconduct and closed its investigation, defendants "continued on a baseless and meandering investigation designed to cook up negative facts and smear Mr. Esquith's reputation in the community." He alleged that the press release about the investigation "was designed to retaliate against Mr. Esquith for consistently and publicly opposing many of LAUSD's wasteful policies and practices." He alleged that allegations of sexual abuse were created by defendants, disseminated to the media by defendants, and then "investigated"—all in retaliation after Esquith filed a government claim for damages. Specific to his age discrimination cause of action, Esquith alleged that defendants engage in a pattern and practice of retaliating against teachers who are nearing retirement age.

The gravamen of Esquith's complaint, therefore, is discrimination, harassment, and retaliation. The investigation, the press releases, and certain adverse employment actions are, according to the complaint, *evidence* of the alleged discrimination, harassment, and retaliation. (See *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214-1215 ["In deciding whether an action is a SLAPP, the trial court should distinguish between (1) speech or petitioning activity that is mere evidence related to liability and (2) liability that is based on speech or petitioning activity."]) Discrimination, harassment, and retaliation are not protected activities, and as *Park*, *Nam*, and the other cases discussed above make clear, an employer who has allegedly engaged in discrimination, harassment, and retaliation may not use the anti-SLAPP law to strike a complaint when the plaintiff's causes of action are based on such allegations.

Defendants argue that *Park* does not support Esquith's position, because an investigation into employee wrongdoing is protected activity.[3] They argue that "according to the complaint, the injury or wrong Plaintiff is complaining of *is* the investigation. Putting it in terms of the elements for discrimination and retaliation, *the investigation is the 'adverse employment action' upon which those claims rest*." (Italics in original.) Because an investigation is protected activity,

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[3] *Park* was decided after the parties completed briefing in this case, and we requested additional briefing to allow the parties to address how the holding of *Park* affects the issues in this case.

defendants conclude, the first prong of the anti-SLAPP test is met.[4]

In support of their position, defendants cite several cases holding that an employment-related investigation constitutes an official proceeding under section 425.16, subdivision (e)(2), and is therefore protected activity. Some of these cases clearly do not involve anti-SLAPP motions relating to claims of discrimination, harassment, or retaliation. Defendants cite *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, for example, in which the plaintiffs challenged a city's actions relating to a local ballot measure. Defendants also rely on *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192 (*Kibler*), which arose from a lawsuit by a hospital staff physician relating to a disciplinary recommendation by the hospital's peer review committee; the Court opinion makes no mention of any allegations of

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[4] It is possible that certain communications alleged in the complaint could be considered sufficiently separate from the allegedly discriminatory and retaliatory conduct that they constitute protected activity, and are therefore subject to a motion to strike. (See, e.g., *Baral v. Schnitt* (2016) 1 Cal.5th 376, 393 [where a challenged cause of action includes allegations relating to both protected and unprotected activity, the protected activity may be subject to anti-SLAPP protections].) Here, however, defendants have not asserted such an argument, instead asking the trial court only to strike the complaint in its entirety, and asserting on appeal that each cause of action constitutes protected activity because it arises from LAUSD's investigation. We therefore do not consider the alleged instances of communication separately to determine whether they individually constitute protected activity.

discrimination, harassment, or retaliation.[5] In *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, the Court of Appeal found that an employment investigation was protected activity. (*Id*. at p. 610-611.) However, that investigation was conducted in response to a discovery request while litigation was already pending, and it was intended to generate information for the pending lawsuit. (*Id*. at pp. 611-612.) The court found that because the investigation was done "in the course of preparing responses to [the plaintiff's] discovery requests," it constituted protected activity. (*Id*. at p. 612.) Because these cases arose from circumstances different than those in the instant case, they have limited applicability in determining whether the first prong of the anti-SLAPP test has been met here.

Two other cases defendants cite include defamation and retaliation claims, but both were decided before *Park* and neither case makes clear whether the courts granted anti-SLAPP motions on causes of action arising from allegedly discriminatory or retaliatory actions. In the first case, *Hansen v. California Dept. of Corrections and Rehabilitation* (2008) 171 Cal.App.4th 1537 (*Hansen*), the plaintiff/employee alleged that his employer engaged in retaliation by continuing to pursue an investigation into potential job-related wrongdoing after he retired. He alleged that certain employees conspired to defame him, and that

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[5] In *Park*, the Supreme Court emphasized that the issue decided in *Kibler* was very narrow: "The trial court in *Kibler* found, and we accepted for purposes of review, that these tort claims arose from statements made in connection with a hospital peer review proceeding. The only issue before us was whether, assuming this to be so, the peer review proceeding was an "'official proceeding'" within the meaning of the anti-SLAPP statute." (*Park, supra*, 2 Cal.5th at p. 1069.)

employees lied to get a warrant to search his house. The plaintiff filed a complaint alleging "causes of action for intentional infliction of emotional distress and violation of his constitutional rights." (*Hansen*, *supra*, 171 Cal.App.4th at p. 1541.) The Court of Appeal noted that "Hansen's complaint is based on statements and writings CDCR personnel made *during the internal investigation and in securing the search warrant*." (*Id.* at p. 1544 [italics added].) Because the investigation was an official proceeding, the court held, "the objected-to statements and writings, i.e., the allegedly false reports of criminal activity, were made in connection with an issue under consideration by an authorized official proceeding and thus constitute protected activity under . . . subdivision (e)(2)." (*Id.* at p. 1544.) It is not clear whether the plaintiff in *Hansen* alleged, as Esquith does here, that the investigation *itself* constituted retaliation, or whether his causes of action arose from certain statements made in the scope of the investigation, which led to the issuance and service of a search warrant on his house. Moreover, unlike in *Park*, the *Hansen* plaintiff did not appear to allege that his employer engaged in any discriminatory or retaliatory employment action, because the alleged conspiracy to defame him arose only after he retired.

The second case is *Miller, supra,* 169 Cal.App.4th 1373, which included allegations of discrimination, harassment, and retaliation. However, those causes of action were not addressed by the defendant's anti-SLAPP motion. Instead, the Court of Appeal held that due to previous proceedings, "Miller was collaterally estopped from arguing in his complaint that his termination was wrongful." (*Miller*, *supra*, 169 Cal.App.4th at p. 1383.) Only the plaintiff's causes of action for defamation and

intentional infliction of emotional distress were subject to the motion to strike. The court said, "Here, the thrust of Miller's defamation and intentional infliction of emotional distress claims is the City's investigation into Miller's conduct in connection with his public employment and its determination and report that he had engaged in misconduct on the job constituting a conflict of interest as well as theft of City property. On this record, the first prong of section 425.16 is satisfied." (*Id*. at p. 1383.) The case does not make clear whether the plaintiff alleged that the investigation itself was discriminatory, harassing, or retaliatory, thus limiting any applicability to this case.

Esquith argues that the reasoning of *Park* applies here because "*Park* makes clear that Appellants cannot attempt to shield themselves from liability by using a bogus 'investigation' into [Esquith] as a pretext for retaliatory and discriminatory conduct." Esquith also argues that the analysis in *Park* supports the trial court's ruling because the conduct at issue—conversion of Esquith's property, age discrimination, and false statements about Esquith's character—was not "purported 'speech activity' tenuously connected to the LAUSD's bogus investigation."

We agree that Esquith's claims do not arise from a protected employment investigation. Rather, Esquith has alleged that defendants harassed him, discriminated against him, and retaliated against him, and to accomplish these ends they engaged in a baseless investigation and took adverse employment actions against Esquith. Because Esquith has alleged that the investigation and related actions were a pretext for defendants' retaliation and discrimination, the investigation is not protected activity and it cannot provide a basis for defendants' anti-SLAPP motion.

Defendants therefore failed to meet their burden to show that the first prong of the anti-SLAPP test had been met. As a result of this finding, we do not address whether Esquith satisfied the second prong of the anti-SLAPP test by demonstrating a probability of prevailing on his claims. (See *Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 582.) The trial court correctly denied defendants' motion.

DISPOSITION

The court's denial of defendants' special motion to strike is affirmed. Esquith is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.