NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LESLIE STUART, Plaintiff and Respondent, v. TORRANCE UNIFIED SCHOOL DISTRICT, Defendant and Appellant.	B203942 (Los Angeles County Super. Ct. No. BC365793)

APPEAL from a judgment of the Superior Court of Los Angeles County. Yvette Palazuelos, Judge. Affirmed.

Parker & Covert, Henry R. Kraft and Michael T. Travis for Defendant and Appellant.

Law Offices of Michael P. Ehline and Michael P. Ehline for Plaintiff and Respondent.

Leslie Stuart (Stuart), a public high school teacher who lives with Crohn's Disease, sued his employer Torrance Unified School District (the District) after the District placed him on administrative leave and terminated his employment. The District filed a special motion to strike Stuart's claims for disability discrimination and unlawful retaliation under the Fair Employment and Housing Act (FEHA), which the trial court denied. On appeal, the District limits its challenge to the trial court's denial of its motion to strike the retaliation claim. We affirm.

BACKGROUND

A. The First Amended Complaint.

In May 2007, Stuart filed a first amended complaint against the District and two of its administrators, Annette Alpern and John Schmitt.[1] The complaint alleged (1) disability discrimination, (2) failure to prevent discrimination, (3) failure to provide a reasonable accommodation, (4) unlawful retaliation, and (5) wrongful termination in violation of public policy. Specifically, Stuart alleged:

In 1999, the District hired Stuart to teach "independent studies" to students on a one-on-one basis. Two years later, Stuart learned that he had Crohn's Disease, an incurable condition that causes severe inflammation of the small and large intestines.

In early 2004, Stuart was hospitalized because of his condition. Joe Zeiler, the principal of Shery High School where Stuart's office was located, demanded that Stuart call his students to tell them that he was sick. When Stuart returned to work, Zeiler declared in a loud voice in front of others, "We didn't know you had Crohn's Disease!" On the same day, the high school's Dean of Students approached Stuart and said, "You look like shit! You really look like shit! You should take a medical leave right away."

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[1] Because the first amended complaint is the operative complaint, we will refer to it as "the complaint" for brevity.

Stuart reported the comments to the District's Director of Human Resources (H.R.), who promised to investigate the matter. A month later, Zeiler twice reprimanded Stuart for taking long lunch periods, which Stuart explained was directly related to his condition. Stuart again met with H.R., and "[a]ll present agreed that Stuart would need to be provided with a position that would have flexibility and parameters were negotiated pertaining to workday schedule and workload."

In June 2004, the District eliminated Stuart's position as an independent studies teacher, placed him on the "excess teacher list," and promised to find "a position for which he was qualified." During the following school year, Stuart worked half day as a "Reading Specialist" at one of the District's middle schools and half day as an independent studies teacher at Shery High School. During this time period, Stuart's evaluations were "excellent."

In 2005, the District eliminated Stuart's position at the middle school and assigned him a full teaching load at North High School, which consisted of five classes daily with approximately 170 students. Stuart informed the District that teaching a full load "would be an excessively stressful strain on his medical condition (Crohn's Disease), with its lack of flexible time to use the restroom and to take [] medication." One week after the school year began, Annette Alpern, the principal at North High School, informed Stuart that she had received complaints from students about his "teaching habits." During this meeting, Alpern asked Stuart about his medication and called him "mentally incompetent." Stuart informed the District that he felt "harassed, threatened, and professionally disrespected" and stated it was "unprofessional and unethical" for Alpern to imply that his medication affected his mental, emotional, or physical capabilities.

In September 2005, Stuart commenced a medical leave of absence. Two of his treating physicians wrote to the District and explained Stuart's need for a "flexible schedule," and "a change in schools and appropriate modification of his schedule." The District replied that it was "not able to make such adjustments without considerable costs to the District and [could not] accommodate Stuart's request." Over the next two months, Stuart continued to request a modification of his schedule. He proposed moving his

conference period to the lunch period and a lighter classroom teaching load supplemented by work with independent studies students. The District, through its assistant superintendent Schmitt, told Stuart "Suck it up," "Be a good boy," and "Don't cause any problems."

The District maintained that it had no position available for Stuart other than the position he currently had at North High School and permitted him to teach a lighter course load for two weeks, after which time it expected him to return to a full teaching load or extend his medical leave of absence.

In November 2005, Stuart returned to work. The District reduced Stuart's salary to 67% of his full-time pay, permitted him to teach four out of six periods a day through the fall 2005 semester, and informed him that it would renegotiate his status in the spring 2006 semester. Stuart informed the District that placing him on part-time status with part-time pay was not an adequate accommodation and that he was seeking an "accommodation on a full-time permanent basis . . . as required by the Fair Employment and Housing Act." The District did not offer an additional accommodation. In February 2006, Stuart filed a complaint for discrimination, failure to accommodate, and harassment with the Department of Fair Employment and Housing (DFEH) and received from DFEH a right-to-sue letter.

On April 24, 2006, while a female student was making a presentation in his psychology class, Stuart admonished the student for dressing inappropriately and declared that "the class could see her nipples." On the same day, Stuart informed Alpern of his comments, and she directed him to call the student's parents and apologize.

On April 28, 2006, the District placed Stuart on administrative leave pending a "full investigation" of the incident concerning the female student. On the same date, the District also contacted the Torrance Police Department about the matter.

On May 3, 2006, a detective with the police department called Stuart and accused him of inappropriately touching a male student, sexually gratifying himself in class, being sexually aroused in class, and telling a male student that the student was "pretty" and that

Stuart "loved" him. Later that month, the District placed Stuart on mandatory unpaid leave without conducting an investigation as to whether these allegations were true.

The District Attorney subsequently brought a criminal case against Stuart.[2] A jury found Stuart not guilty of all counts alleged against him. After the verdict, the District notified Stuart that it intended to move forward with his termination, citing additional allegations of misconduct not raised in the criminal trial.

B. Voluntary dismissal and special motion to strike.

After Stuart filed the complaint, the parties stipulated that Stuart would voluntarily dismiss with prejudice the individual defendants, Alpern and Schmitt.[3] The stipulation provided that "[a]s to the dismissed defendants only, any claims made by them or to be made for attorneys fees and costs, will be and are hereby waived."

The District, the remaining defendant, filed a special motion to strike the first (disability discrimination) and fourth (unlawful retaliation) causes of actions pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP statute.[4] The District did not submit evidence in support of its motion and instead argued that Stuart's disability and retaliation claims, as alleged, arose from actions the District took pursuant to "official proceedings authorized by law." The trial court denied the motion, ruling that the District failed to carry its initial burden of demonstrating that Stuart's claims arose from protected activity. It did not decide whether Stuart was likely to prevail on the claims,

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[2] The complaint and the record are silent as to what criminal charges were brought against Stuart.

[3] Stuart later moved to set aside the voluntary dismissal on the grounds of mistake and fraud. The trial court denied Stuart's motion, and Stuart has not appealed from that ruling.

[4] "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.) Unless otherwise specified, all section references are to the Code of Civil Procedure.

nor did it rule on objections lodged by the District to multiple portions of Stuart's complaint. The District timely appealed.

DISCUSSION

I. The Anti-SLAPP Statute and the Standard of Review.

The anti-SLAPP statute is aimed at curbing lawsuits brought primarily to "chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 738-739 (*Jarrow*).) It provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

In ruling on a motion under section 425.16, the trial court engages 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).) Protected activity includes "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body, or any other official proceeding authorized by law." (§ 425.16, subd. (e)(2).)[5] "In deciding whether the initial 'arising from' requirement is met, a court

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[5] Section 425.16, subdivision (e) provides that an "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in

considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b).)" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).)

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. To satisfy the latter prong, the plaintiff "'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) "'The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue.'" (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928 (*Kajima*).)

We review the trial court's rulings on an anti-SLAPP motion independently under a de novo standard of review.[6] (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055 (*Rusheen*).) "Thus, our review is conducted in the same manner as the trial court in considering an anti-SLAPP motion." (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 672.) "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

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connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or 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."

[6] Citing *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172 (*Simon*), Stuart argues that we should "view the factual findings . . . of the trial court with great deference." Simon concerns the standard of review used to determine whether an award of punitive damages is constitutionally excessive and not the standard for reviewing the denial of a special motion to strike under section 425.16.

minimal merit -- is a SLAPP, subject to being stricken under the statute." (*Navellier*, *supra*, 29 Cal.4th at p. 89.)

II. Stuart's retaliation claim does not arise from protected activity.

"As courts applying the anti-SLAPP statute have recognized, the arising from requirement is not always easily met." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66 (*Equilon*).) "[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity." (*Ibid.*) Likewise, "[t]hat a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*).) "Rather, 'the act underlying the plaintiff's cause or the act which forms the basis for the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech.' [Citations.]" (*Equilon*, *supra*, 29 Cal.4th at p. 66.)

"In short, the statutory phrase 'cause of action . . . arising from' means simply that 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. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati, supra,* 29 Cal.4th at p. 78; *Navellier*, *supra*, 29 Cal.4th at p. 92 [the "anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action, but, rather, the defendant's *activity* that gives rise to his or her asserted liability -- and whether that activity constitutes protected speech or petitioning"].) Accordingly, the 'arising from' prong encompasses any action *based on* protected speech or petitioning activity as defined in the statute [citation] regardless of whether the plaintiff's lawsuit was *intended* to chill [citation] or *actually* chilled [citation] the defendant's protected conduct." (*Martinez v. Metabolife Intern., Inc.* (2003) 113 Cal.App.4th 181, 187 (*Martinez*).)

As we turn to Stuart's complaint, we keep in mind that "a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of 'one cause of action.'" (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308.) "Conversely, a defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant." (*Martinez, supra,* 113 Cal.App.4th at p. 188.)

The present complaint alleges a long and protracted history between Stuart and District over his medical condition that predated his inappropriate comment about a student's body parts. Stuart repeatedly complained about alleged discriminatory comments by District personnel and the District's alleged refusal to provide a reasonable accommodation for his medical condition. His discrimination complaints culminated in a report to DFEH, almost two months before his classroom comment. Stuart alleges the District thereafter "retaliate[d] against Stuart by placing Stuart on administrative leave," and "further retaliate[d] against Stuart by failing to properly conduct an investigation." Under the cause of action for retaliation, the complaint alleges that Stuart "opposed practices forbidden under the FEHA and [he] complained . . . to the Department of Fair Employment and Housing." "As a result," the complaint alleges, "Defendants retaliated against Plaintiff."

A reasonable construction of the complaint reveals that the fundamental basis for Stuart's retaliation claim is that the District used his inappropriate comment about a student's body parts as a pretext for placing him on administrative leave and then terminating him without properly investigating the charges of inappropriate conduct made against him – all in retaliation for his multiple requests for an accommodation and complaint to the DFEH for discrimination, harassment, and unwillingness to accommodate his disability. While we agree that the District's report to the Torrance Police Department constituted protected activity because it was a "statement or writing made in connection with an . . . official proceeding authorized by law," the District's subsequent conduct of placing Stuart on administrative leave and allegedly failing to

investigate the charges made against him before his termination were not part of an official proceeding authorized by law. It is these subsequent acts, and not the initial mandated report to law enforcement itself, that Stuart alleges constituted retaliation. (*City of Cotati, supra,* 29 Cal.4th at p. 78 ["[t]hat a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such"].) The complaint expressly alleged that the District "contacted the Torrance Police Department" and that "Stuart is not alleging a claim for this contact."[7]

Putting the mandated reporting aside, the District contends that because the Education Code governs the process for demoting, suspending, or terminating a certificated employee, such as Stuart, his placement on administrative leave and termination are "official proceedings authorized by law," and thus within the scope of section 425.16. We disagree. Simply because various statutory provisions prescribe the grounds and procedures by which a public school district may terminate a teacher, that fact alone does not turn the actual suspension and termination into "official proceedings." If it did, no certificated employee of a public school could ever sue for retaliation (or wrongful termination for that matter) because the school district would simply assert that its adverse employment actions (however discriminatory or unlawful) are regulated by the Education Code and thus subject to the protections of section 425.16.

Finally, we reject the District's argument that its internal discussions about whether Stuart should be placed on administrative leave and terminated constitute

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[7] Had Stuart filed a cause of action for defamation based on the District's report that he had engaged in child abuse, we would agree that cause of action arose from protected speech and would be the proper subject of a special motion to strike. (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1569-1570 [reports of child abuse "designed to prompt action by law enforcement or child welfare agencies" are "[c]ommunications . . . preparatory to or in anticipation of commencing official proceedings," and thus "come within the protection of the anti-SLAPP statute"].) Stuart's claim, however, arises from retaliatory conduct that goes beyond reporting suspected child abuse to law enforcement officials.

constitutionally "protected speech." The District has failed to cite any authority for such a broad proposition, and our research has identified none.

For the foregoing reasons, we conclude the trial court properly denied the District's motion to strike Stuart's retaliation claim. Accordingly, we need not consider the likelihood of whether Stuart would have prevailed on that claim.

III. Additional arguments.

The District contends the trial court committed reversible error by considering Stuart's opposition, which exceeded the 15-page limit for trial court memoranda set forth in California Rules of Court, rule 3.1113(d).[8] The trial court exercised its discretion to consider the opposition, and we see no abuse. Although the District claims it would have submitted a lengthier brief had it known that the trial court would "allow any number of pages in briefing," the District fails to demonstrate what additional arguments it would have raised and how its inability to raise those arguments prejudiced its case.

The District also contends that the trial court should have considered the special motion to strike filed by the individual defendants, Alpern and Schmitt (the administrators), for the purpose of awarding attorney fees. According to the District, even though Stuart voluntarily dismissed the administrators with prejudice, their motion to strike was meritorious and thus the administrators are entitled to attorney fees pursuant to section 425.16, subdivision (c). The District's argument is patently at odds with the stipulation entered into by Stuart, the District, and the administrators. The stipulation clearly provides that Stuart would voluntarily dismiss the administrators with prejudice, and in exchange, the administrators would "waive" "any claims . . . for attorneys fees and costs." The District, which vigorously opposed Stuart's attempt to set aside this stipulation below, cannot now seek attorney fees on behalf of the administrators.

[8] Rule 3.1113(d) provides: "Except in a summary judgment or summary adjudication motion, no opening or responding memorandum may exceed 15 pages."

Further, we decline to review the trial court's overruling of the District's demurrer. The District concedes, as it must, that the trial court's order overruling its demurrer is not itself appealable. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 912-913 ["an order overruling a demurrer is not directly appealable but may be reviewed on an appeal from the final judgment"].) However, the District contends that the order overruling its demurrer may be reviewed as part of the appeal from the denial of the anti-SLAPP motions, under the authority of section 906.[9] According to the District, the overruling of a demurrer will always "substantially affect the rights" of defendants within the meaning of Code of Civil Procedure section 906, in that such a ruling will require further litigation of meritless causes of action, which is "expensive, time consuming, and distressing."

We disagree. Not every order overruling a demurrer substantially affects the defendant's rights. (See, e.g., *Johnson v. Holmes Tuttle Lincoln-Merc.* (1958) 160 Cal.App.2d 290, 301 [finding that "the error, if any, in overruling the special demurrer did not affect defendant's substantial rights in any way"].) Normally it cannot be determined until final judgment whether an order overruling a demurrer has substantially affected the rights of a party. Thus, an appeal following final judgment is generally considered to be an adequate remedy for an erroneous order overruling a demurrer. (*San Diego Gas & Electric Co. v. Superior Court*, *supra*, 13 Cal.4th at p. 912.)

Finally, both parties seek attorney fees incurred below and on appeal. We deny the District's request because it did not prevail in its anti-SLAPP motion, and we deny Stuart's request because the District's appeal was not frivolous.

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[9] Section 906 provides in relevant part: "Upon an appeal pursuant to Section 904.1 or 904.2, the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . . . "

DISPOSITION

The judgment is affirmed. Stuart shall recover his ordinary costs on appeal.

NOT TO BE PUBLISHED.

BAUER, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

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