

92 Cal.App.5th 1256 (2023)

WANDA M. BROWN, Plaintiff and Respondent,
v.
CITY OF INGLEWOOD et al., Defendants and Appellants.

No. B320658.

Court of Appeals of California, Second District, Division One.

May 31, 2023.

As modified June 30, 2023.

1259 *1259 APPEAL from an order of the Superior Court of Los Angeles County, Super. Ct. No. 21STCV30604, Deirdre H. Hill, Judge. Affirmed in part and reversed in part.

Engstrom, Lipscomb & Lack, Walter J. Lack, Richard P. Kinnan and Christopher A. Kanne for Defendants and Appellants.

Miller Barondess, Mira Hashmall and Colin H. Rolfs for Plaintiff and Respondent.

[CERTIFIED FOR PARTIAL PUBLICATION^[*]]

OPINION

ROTHSCHILD, P. J.—

Respondent Wanda M. Brown has served as the elected treasurer for appellant, the City of Inglewood (the City), since 1987. Brown sued the City and several members of the Inglewood City Council^[1] (the council), alleging that after she reported concerns about financial improprieties, the City and the individual defendants defamed and retaliated against her. She alleged causes of action for (1) defamation; (2) violation of Labor Code section 1102.5, subdivisions (b) and (c),^[2] which prohibit retaliation against an employee based on the employee reporting or refusing to participate in what the employee reasonably believes to be illegal activity by the employer (the section 1102.5 retaliation claim); and (3) intentional infliction of emotional distress (IIED), based both on the alleged retaliation and the alleged defamation. The City and the individual defendants filed a joint special motion to strike the complaint as a strategic lawsuit against public participation, or SLAPP, under the anti-SLAPP statute (Code Civ. Proc., § 425.16). The court granted the motion in part, but denied it as to the section 1102.5 retaliation claim and the retaliation-based IIED claim against all defendants. For reasons we discuss below, in the unpublished portion of the opinion, we hold that the retaliation-based claims against the individual defendants arise from protected activity under the anti-SLAPP statute, and that the court should have stricken the retaliation-based IIED claim based on the second step of the anti-SLAPP analysis. In the published portion of the opinion, we conclude the court should have stricken the section 1102.5 retaliation claim as well, because an elected official is not an "employee" for the purposes of that statute. In all other respects, we affirm the court's ruling on the anti-SLAPP motion.

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1260 FACTS AND PROCEEDINGS BELOW*A. Brown's Lawsuit Against Defendants**

In her first amended complaint (the FAC), Brown alleged she had "reported to [individual defendants] that she had discovered facts indicating that [individual defendants] were mishandling the City's finances, including an improper payment of nearly [\$100,000] to a City [c]ontractor," and "improperly fail[ing] to accurately report to the public the true financial health of the City." She alleged that, as a result of her reporting these concerns, defendants took various adverse actions against her, including reducing her duties and authority as treasurer, reducing her salary by 83 percent, taking away her seat on the dais at council meetings, and temporarily locking her and her staff out of their offices. Brown further alleged that, at a council meeting, one of the individual defendants, Mayor Butts, offered a "defamatory pretextual reason for taking away [Brown's] duties and reducing her salary," namely that she "[did] not know the procedure for handling bad debts, [and that] he had no choice but to reduce her duties and her salary."

B. Defendants' Anti-SLAPP Motion and Related Evidence

Defendants filed a motion to strike all causes of action in the FAC under the anti-SLAPP statute. The anti-SLAPP statute is "designed to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern. [Citations.] To that end, the statute authorizes a special motion to strike a claim ` 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).)" (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 883-884 [249 Cal.Rptr.3d 569, 444 P.3d 706].) Such acts are referred to in anti-SLAPP parlance as "protected activity." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 [217 Cal.Rptr.3d 130, 393 P.3d 905].) (*Park*.)

"Litigation of an anti-SLAPP motion involves a two-step process. First, `the moving defendant bears the burden of establishing that the challenged allegations or claims "aris[e] from" protected activity in which the defendant has engaged.' [Citation.] Second, for each claim that does arise from protected activity, the plaintiff must show the claim has `at least "minimal merit."' [Citation.] If the plaintiff cannot make this showing, the court will strike the claim." (*Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1009 [281 Cal.Rptr.3d 678, 491 P.3d 1058].) (*Bonni*.)

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Defendants' motion argued the FAC alleged claims arising from conduct that falls into two of the statutorily enumerated categories of protected *1261 activity: "any written or oral statement[s] 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" (Code Civ. Proc., § 425.16, subd. (e)(2)), and "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." (Code Civ. Proc., § 425.16, subd. (e) (4).) Specifically, the motion argued that each of Brown's claims arose from voting and other legislative actions of the individual defendants and statements they made at the council meetings in connection therewith. Defendants' motion further argued that, for various reasons, Brown could not demonstrate that her claims had minimal merit, including that the claims were barred by government discretionary act immunity, that section 1102.5 does not permit individual liability, and that Brown was neither an "employee"

for purposes of section 1102.5, nor had she reported conduct that she reasonably suspected to be illegal, both of which are required under section 1102.5.

1. Evidence in support of and opposition to the anti-SLAPP motion

Defendants primarily supported their anti-SLAPP motion with the following evidence: (1) excerpts from the City charter and municipal code; (2) City ordinances and a City policy adopted by a vote of the individual defendants that, collectively, reduced Brown's salary, investment authority, and duties, as alleged in the FAC; (3) excerpts of transcripts from various council meetings, including excerpts reflecting council votes passing the relevant ordinances and policy;^[3] and (4) declarations.

Under the City charter, the council is the City's legislative body, and all powers of the City are vested in and exercised by the council, which consists of the mayor and four council members. The City treasurer is not a member of the council. Council meetings are open to the public. The council has the authority to "establish rules and regulations for the conduct of its proceedings" and the mayor is "responsible for maintaining the order and decorum of meetings." The mayor, council members, clerk, and treasurer are all publicly elected. The council has the authority to fix the compensation of any City officer except the mayor and council members.

1262 *1262 In fall 2022, the council passed two ordinances included in the documents supporting the anti-SLAPP motion. First, in September 2022, it passed ordinance No. 20-16 regarding "Assignment of City Duties" that, inter alia, transferred general auditor responsibilities once held by the treasurer to the City clerk, reduced the maximum amount of funds the treasurer was permitted to manage to \$50,000, and adopted a revised investment policy.^[4] In October 2022, it passed a second ordinance, "Salary Ordinance for Fiscal Year 2020-2021," which adjusted the salaries of a number of positions, including the treasurer's salary, which it reduced by over 80 percent as compared to the previous year.

Declarations from defendant Mayor Butts and the City's manager, Artie Fields, addressed allegations in the FAC that Butts had denied Brown a seat on the dais during council meetings and that the individual defendants had blocked Brown's access to her office. Butts's declaration stated that the City treasurer "is not a member of the ... council and so has no standing to sit on the dais during meetings of the ... council," but that "a previous mayor had decided to let the treasurer have a seat on the dais during meetings, and [Butts] [had initially] continued that practice." (Capitalization omitted.) Butts continued that, in early 2020, Brown "began to disrupt meetings of the ... council" and in July 2020 Butts "exercised [his] discretion as chair of the council and revoked the privilege of the treasurer to be seated at the dais during meetings of the ... council." (Capitalization omitted.)

The Fields declaration stated that, in October 2020, "Brown's proximity badge was deactivated because she had failed to present a negative COVID-19 test confirmation to the [C]ity, as required" and, as a result, Brown was locked out of her office at City Hall. Fields declared "[t]his same action was taken as to all personnel that did not provide a negative test confirmation.... Brown's proximity badge was reactivated once she provided a negative test confirmation."

The transcripts from council meetings reflect the votes by the individual defendants adopting the ordinances and policy noted above, Butts's allegedly defamatory statements, and Brown's statements criticizing the council and Butts.

1263 In opposing defendants' anti-SLAPP motion, Brown submitted, inter alia, a declaration and supporting exhibits in an effort to establish her status as an "employee" for purposes of section 1102.5. Specifically, Brown offered W-2 federal tax forms she had received from the City, which identify her as an "[e]mployee[]" and her biweekly pay stub, which identifies various employee *1263 benefits such as health benefits and reflects a deduction from her regular earnings for "workers[]" comp[ensation]." (Boldface & capitalization omitted.)

2. Court's ruling on anti-SLAPP motion

The court granted defendants' anti-SLAPP motion with respect to the defamation claim and the defamation-based portion of the IIED claim. The court denied the motion as to the section 1102.5 retaliation claim and retaliation-based portion of the IIED claim, finding these claims did not arise from "protected activity." The trial court explained, "[T]he individual defendants' conduct in their decision making or voting is not the gravamen of the [retaliation] claim." The trial court concluded that, instead, "the activities upon which the claim rests, which are adverse actions, are the reduction in her salary and duties and being locked out of her office and computer."

Defendants timely appealed the court's partial denial of their anti-SLAPP motion.

C. Additional Procedural History^[*]

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DISCUSSION

Defendants argue that the trial court reversibly erred in denying their anti-SLAPP motion as to the retaliation-based causes of action against the individual defendants. Our review is de novo. (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1056 [18 Cal.Rptr.3d 882].) We agree.

A. Anti-SLAPP Analytical Framework

1264 In the first step in the anti-SLAPP analysis, the moving defendant bears the burden of "identify[ing] what acts each challenged claim rests on and to show how those acts are protected under a statutorily defined category of protected activity." (*Bonni, supra*, 11 Cal.5th at p. 1009.) If the court determines that relief is sought "based on allegations arising from activity protected by the statute, the second step is reached" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396 [205 Cal.Rptr.3d 475, 376 P.3d 604]), and "the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Ibid.*) This step *1264 involves a "summary-judgment-like procedure." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192 [25 Cal.Rptr.3d 298, 106 P.3d 958].) If the plaintiff fails to make the requisite showing to support the claim, "the claim is stricken." (*Baral, supra*, at p. 396.)

B. The Retaliation-based Claims Against the Individual Defendants Arise from Protected Activity (Anti-SLAPP Analysis Step One)^[*]

C. Legal Sufficiency of Retaliation-based Claims Against Individual Defendants (Anti-SLAPP Analysis Step Two)

Because we conclude above that Brown's retaliation-based claims against the individual defendants arise from protected activity, we proceed to analyze these claims under the second step of the anti-SLAPP analysis. In this step, we consider whether Brown has "" demonstrate[d] that [the retaliation-based claims against the individual defendants] [are] 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."" (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 791 [249 Cal.Rptr.3d 295, 444 P.3d 97].)

1. Section 1102.5 retaliation claim against individual defendants

Defendants argue that the section 1102.5 retaliation claim is not legally sufficient, because Brown is not an "employee" for the purposes of that statute. We agree.

Brown alleges the individual defendants violated subdivisions (b) and (c) of section 1102.5. By their own terms, these sections protect only "employee[s]" from certain types of retaliation by "[a]n employer, or any person acting on behalf of the employer." (§ 1102.5, subds. (b) & (c).) Section 1106 addresses the definition of the term "employee" in this context: "For purposes of Section[] 1102.5 [and other enumerated sections] 'employee' includes, but is not limited to, any individual employed by ... any ... city." (§ 1106.) Notably, the Legislature did not reference elected officials as falling within the scope of the term "employee" for the purposes of section 1102.5. Yet when the Legislature intended to include elected officials within the scope of the term "employee" elsewhere in the code—namely, in defining the term for purposes of workers' compensation—the Legislature expressly defined the term "'[e]mployee' ... [to] include[] ... [¶] ... [¶] ... [a]ll elected ... paid *1265 public officers." (§ 3351, subd. (b) [section of Workers' Compensation Act providing: "'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes ... [¶] ... [¶] ... [a]ll elected and appointed paid public officers".]) The plain language of these statutes thus unambiguously includes "elected officials" in the definition of "employee" for purposes of workers' compensation, but not within the definition of "employee" for purposes of section 1102.5. Because the plain language of a statute is the best indication of the Legislature's intent (see *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977 [90 Cal.Rptr.2d 260, 987 P.2d 727] (*Wilcox*)), this language reflects the Legislature's decision to provide elected officials the benefits of the Workers' Compensation Act, but to deny them the protections of section 1102.5.

Brown argues that "[i]t is reasonable and sensible for California courts to ... classify elected officials as employees [under section 1102.5]," just as the California Legislature did in the context of workers' compensation and the Internal Revenue Service does for purposes of federal tax law. (See 26 U.S.C. § 3401(c) [defining "employee" under the Int.Rev. Code to include "an officer, employee, or elected official"].)

This argument flies in the face of basic maxims of statutory interpretation, because it asks us to interlineate section 1106 with words that the Legislature chose *not* to include—words which, based on section 3351, the Legislature is clearly capable of employing. (See *Blankenship v. Allstate Ins. Co.* (2010) 186 Cal.App.4th 87, 94 [111 Cal.Rptr.3d 528] ["the Legislature's omission of a term in a list of terms indicates the Legislature did not intend to include the omitted term"].)

Brown also urges us to look to case law defining "employee" for the purposes of section 1102.5, specifically cases incorporating the "common law definition of employee" for this purpose. (*Bennett v. Rancho California Water Dist.* (2019) 35 Cal.App.5th 908, 927 [248 Cal.Rptr.3d 21].) We need not resort to judicial interpretations of the definition the Legislature provided when that definition is clear and unambiguous. (See *Wilcox, supra*, 21 Cal.4th at p. 977 [plain, unambiguous language of a statute is the best indicator of legislative intent in statutory interpretation].) Accordingly, Brown's section 1102.5 retaliation claim against the individual defendants fails the second prong of the anti-SLAPP analysis, and the court erred in denying the anti-SLAPP motion as to that claim.

2. Retaliation-based IIED claim against the individual defendants^[*]

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*1266 DISPOSITION

The court's order on defendants' anti-SLAPP motion is reversed to the extent it denies the motion as to Brown's section 1102.5 retaliation claim against the individual defendants and Brown's retaliation-based IIED claim against the individual defendants. In all other respects, the order regarding the anti-SLAPP motion is affirmed.

The parties shall bear their own costs on appeal.

Bendix, J., and Weingart, J., concurred.

[*] Pursuant to California Rules of Court, rule 8.110, the opinion is certified for publication with the exception of the Facts and Proceedings Below, part C., and the Discussion, parts B. and C.2.

[1] Specifically, respondents Mayor James T. Butts, Jr., Alex Padilla, George Dotson, Eloy Morales, and Ralph Franklin (collectively, the individual defendants).

[2] Unless otherwise indicated, all unspecified statutory references are to the Labor Code.

[3] At Brown's request, the court took judicial notice of the first two categories of documents listed above, but declined to take judicial notice of the council meeting transcripts. On appeal, defendants contend this ruling was in error, and Brown raises no argument to the contrary. We need not resolve this issue, however, because regardless of whether the court erred in partially denying the request for judicial notice, the transcripts were attached to a declaration in support of the motion, and the anti-SLAPP statute expressly requires that, in its anti-SLAPP analysis, the court "shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2).)

[4] Defendants also submitted the policy itself in support of the anti-SLAPP motion.

[*] See footnote, *ante*, page 1256.

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