

# CALIFORNIA

## EMPLOYMENT LAW LETTER



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### EMPLOYER RETALIATION

## **Court not so SLAPP happy over hospitals' action against doctor**

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*Employers relying on the Strategic Lawsuit Against Public Participation (anti-SLAPP) procedure to strike retaliation claims must be sure that the anti-SLAPP action is based soundly on protected activity. There is an important distinction between protected statements or conduct leading to the act for which retaliation liability is asserted and the act itself. If the act isn't protected, the anti-SLAPP action will fail.*

### **Doctor denied privileges**

Aram Bonni, a surgeon at St. Joseph Hospital of Orange and Mission Hospital Regional Center, sued the hospitals, claiming, among other things, retaliation because he was subjected to a lengthy and humiliating peer review process, suspended, and ultimately denied medical staff privileges at the hospitals. Bonni alleged these actions were taken in retaliation for his complaints about unsafe and substandard conditions in the hospitals.

The hospitals filed an anti-SLAPP motion to strike Bonni's retaliation claim, insisting that all of the activities about which Bonni complained were protected hospital activities, and thus his claim couldn't proceed. The trial court agreed and granted the hospitals' anti-SLAPP motion. However, the California Court of Appeal reversed that ruling, holding that Bonni's claim didn't arise from protected statements or conduct.

As the court aptly noted, the purpose of the anti-SLAPP law is to "ferret out meritless lawsuits intended to quell First Amendment rights." Courts have routinely observed that retaliation and discrimination claims are "rarely, if ever, good candidates for the filing of an anti-SLAPP motion." And the court of appeal noted that this case was no exception.

### ***Is there a robot in the house?***

In analyzing the anti-SLAPP motion, the court looked at the hospitals' motive. Before his review, suspension, and loss of hospital privileges, Bonni had complained about unsafe and substandard conditions at the hospitals. Specifically, he complained about numerous safety issues involving the da Vinci Surgical System, which was the robotic surgery program used in 2009. Bonni claimed that during one surgery, the robot's

camera malfunctioned and that inadequate staffing and training contributed to extreme difficulties correcting the problem, causing a 42-minute delay in completing the surgery. Additionally, he complained that the robot's tissue-cutting and cauterizing instrument malfunctioned.

Bonni sent an e-mail to the vice president of medical affairs requesting that the safety issues be corrected at the hospitals. He also complained about the problems with the robotic surgery program to the chief of staff, the chief of quality review, and the chief of obstetrics/gynecology. His complaints were the subject of an outside review.

The hospitals claimed that Bonni had a consistent pattern of poor judgment and surgical techniques that caused "serious complications" and "near death" for his patients. According to the hospitals, their judicial review committees found that Bonni experienced complications in three of the first six robotic procedures he performed and that he perforated a patient's tissue five times, causing unnecessary suffering, complications, a second surgery, and a longer hospital stay. The hospitals also claimed that in light of imminent danger to future patients, they conducted peer review proceedings that resulted in Bonni's suspension. In defense of that action, the hospitals relied on their bylaws and California law requiring that they ensure patient safety.

### ***The anti-SLAPP motion***

Courts conduct a two-pronged analysis when considering anti-SLAPP motions. First, courts determine if the defendant has made a threshold showing that the plaintiff's claim arises from protected activity. If the defendant meets this first prong of the analysis, the court proceeds to the second prong, which requires the plaintiff to show a probability of prevailing on his claim.

In the first prong of the test, the alleged protected activity must fit into one of the categories expressly stated in the anti-SLAPP statute, which 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 proceeding authorized by law."

In this case, the hospitals claimed that Bonni's retaliation claim arose from the peer review processes, which constitute protected activity under the anti-SLAPP statute. Moreover, the hospitals argued that Bonni couldn't show a probability of success on his retaliation claim because he had no evidence showing that the hospitals acted in retaliation because he complained about the robotic surgery program. Again, the hospitals insisted that their actions were motivated by concerns for patient safety because of Bonni's poor surgical technique.

The trial court granted the hospitals' anti-SLAPP motion, holding they met their threshold burden because the "gravamen of [Bonni's] retaliation claim was

based on protected hospital peer review activities." The trial court also held that Bonni failed to show the probability that he would succeed on his retaliation claim.

In reversing the trial court, the appellate court ruled that Bonni's claim *arose* from the retaliatory acts of peer reviews, suspension, and the denial of his hospital privileges, *not* from any alleged protected statements made during the hospitals' peer review process. Indeed, the appellate court focused on whether the retaliatory conduct itself was protected under the anti-SLAPP statute. The appellate court ruled that the acts on which Bonni based his retaliation claim—peer reviews, suspension, and denial of hospital privileges—weren't protected under the statute.

Notably, although the appellate court reversed the order granting the anti-SLAPP motion, Bonni has not prevailed on his retaliation claim. Rather, the ruling merely permits him to proceed with the claim at the trial court level. *Bonni v. St. Joseph Health System* (CA4/3 G052367, 7/26/17).

### ***Bottom line***

Employers should carefully consider the protected conduct they rely on when filing an anti-SLAPP action in an effort to strike retaliation and discrimination claims.

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