LAW360 Employment Authority

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Calif.'s Anti-SLAPP Still A Mixed Wage Case Defense Tool

By **Max Kutner**

Law360 (August 13, 2024, 6:36 PM EDT) -- Tesla's failed attempt to use California's anti-SLAPP law to escape personnel record claims shows the statute can be an unreliable defense strategy in wage and hour litigation, attorneys said.

Tesla's failed attempt to escape workers' race discrimination suit, that had a wage and hour component, using California's anti-SLAPP law shows that the statute can be an unreliable defense in wage and hour litigation, attorneys said. (AP Photo/Jeff Chiu)

California's law prohibiting strategic lawsuits against public participation from 1992 is meant to protect against plaintiffs using lawsuits to chill free speech and petition rights. There is no federal anti-SLAPP statute, but at least 34 states and the District of Columbia have enacted their own versions. California's was among the first.

In the recent case, in which Tesla brought an anti-SLAPP motion in workers' racial discrimination suit containing a wage and hour element, an appellate panel **held that** the company hadn't shown "speech or petitioning activity undertaken in connection with a public issue."

The judges also found that Tesla's refusal to respond to the workers' requests for personnel records was not a protected activity under the anti-SLAPP law "simply because of the pendency of hotly contested litigation on a public issue in a related case."

Ari Stiller of Stiller Law Firm, who represents workers, said employers facing wage and hour claims have misused the statute.

"The point of the anti-SLAPP statute was that you shouldn't be sued for protected free speech or petitioning activity," he said. "Employers have taken that initial purpose and run with it to try to apply the anti-SLAPP statute in contexts where it's totally inapplicable."

A Tough Burden

Attorneys on both sides said anti-SLAPP motions are infrequent in wage and hour litigation, because it can be hard for employers to meet the threshold question of showing that not complying with California wage law requirements implicates free speech.

Stiller said he couldn't recall a recent wage and hour case in which a court granted such a motion or in which an appeals court did not undo granting one.

"It shouldn't apply there because the conduct that the employee is alleging in a wage and hour claim is that the employer failed to comply with the labor code," Stiller said. "You don't have a free speech or petitioning right to avoid complying with the labor code."

Another worker-side attorney, Jeff Lewis of Jeff Lewis Law APC, said employers would struggle to meet the burden of showing they are being sued on the basis of an activity that is protected under the statute, generally related to free speech or the right to petition the government.

"Prong 1 of the anti-SLAPP law really acts as a gatekeeper to prevent misuse of the anti-SLAPP law in areas it was never meant to apply to," Lewis said. "It's really hard in a wage and hour case to satisfy Prong 1."

Under the second part of the anti-SLAPP analysis, plaintiffs have to show they have at least minimal merit to their claims, a step that **can sometimes be** a dealbreaker for workers.

Workers sometimes respond to anti-SLAPP motions with requests for sanctions, and the granting of such requests indicates that California "judges at the trial court level and justices at the appellate level are more and more hostile to misuses of the anti-SLAPP law," Lewis said.

Still, employers continue bringing such motions as a delay tactic, he said.

"When you file an anti-SLAPP motion, discovery is stayed and then the loser of the anti-SLAPP motion inevitably appeals, and the case is frozen for a year-and-a-half to two years while a court of appeal rules," Lewis said.

Such motions typically aren't a leading defense strategy, said Felix Shafir of management-side firm Horvitz & Levy LLP. Motions to compel arbitration typically come first so that a worker doesn't argue that the employer waived the right to compel arbitration by delaying, for example, he said.

"But after that, a defendant is really going to have to take a close look at a wage and hour claim and see if it's based whether in whole or in part on either an activity that's protected by the anti-SLAPP statute," he said. "If it's based even in part on an activity protected by the anti-SLAPP statute, then the defendant can bring this anti-SLAPP motion to strike that piece of it that's protected."

Because of fee-shifting, in which the prevailing party on a special motion to strike can recover attorney fees and costs, and the automatic right to appeal, "anti-SLAPP motions are attractive to employers," said Matthew Helland of Nichols Kaster, who represents the workers in the Tesla case.

"Anti-SLAPP is meant to protect free speech and petition rights by individuals, and it wasn't designed for corporations," he added. "I think it's been weaponized by the defense bar and by corporate America, and it would be just another step too far to utilize it in wage and hour cases."

Courts are "Careful"

There seems to have been an uptick in anti-SLAPP attempts in employment law cases since the California Supreme Court's 2019 ruling in Wilson v. Cable News Network Inc. that nothing in the statute made it inapplicable to employment law claims, said Shafir of Horvitz & Levy.

Before that ruling, "there was a lot of debate about when the anti-SLAPP statute could apply," Shafir said. "It explained that what courts need to do is look very carefully at whether an element of the plaintiff's claims is based on activities that are protected by the anti-SLAPP statute."

Since then, courts have "been working on assessing, claim by claim, allegation by allegation, whether a specific element of an employment claim, whatever that employment claim may be, is a protected activity," he said. "But California courts have been very careful. They really have done their best to carefully pick through the allegations and a claim to try to figure out if their elements are based on protected activities."

That has played out in cases in recent years that have gone to California appellate courts. In Callanan v. Grizzly Designs LLC et al., a California appellate panel said in its 2022 opinion that "failing to pay minimum wage is not an act in furtherance of the right of petition or free speech."

And in May 2023, a panel in Nirschl v. Schiller et al. ruled in favor of a nanny suing a former employer for wage and defamation claims, finding that alleged defamatory statements were part of negotiations for severance pay and not within the protected context of litigation.

Now, in the Tesla ruling, in which the company argued that its decision not to disclose personnel information was a protected activity, the panel **held that** a refusal to speak or disclose has to be inherently expressive to fall under the anti-SLAPP statute and that Tesla hadn't argued that it was.

"We saw it in Callanan, we saw it in my case, Nirschl, and now we're seeing it again in this Tesla case, that the courts of appeal are not persuaded by employer arguments that wage and hour claims fall within the anti-SLAPP statute," said Stiller, who represented the nanny.

However, Shafir said the Tesla ruling seemed to depart from state high court decisions.

"It may be in tension with California Supreme Court case law and other cases, which have not suggested that there needs to be some kind of evidence or some kind of showing on the part of the defendant company that its failure to speak was inherently expressive," he said.

Federal Anti-SLAPP Push

Much of the national anti-SLAPP conversation has focused on California, which has one of the earliest and strongest such laws. The disparity between states' laws has led to judge and forum shopping, said Lewis, who represented the worker in Callanan.

There has been a recent attempt to enact a federal version. The SLAPP Protection Act of 2022, which Rep. Jamie Raskin, D-Md., introduced, intended to deter fossil fuel companies from suing environmental activists, the congressman said at the time.

"The rights to free speech, peaceful assembly and a free press are fundamental to what it means to be an American, but this gap in federal law has allowed corporations and bad actors to chill speech and dissent," Raskin said in a 2022 statement.

The bill died in committee, and Raskin does not appear to have reintroduced a version in the current Congress.

Representatives for Tesla did not respond to an interview request.

The case is Taylor et al. v. Tesla Inc. et al., case number A168333, in the Court of Appeal of the State of California, First Appellate District.

--Additional reporting by Hailey Konnath. Editing by Emma Brauer.
