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MICHAEL P. STONE, GENERAL COUNSEL

6215 River Crest Drive, Suite A, Riverside, CA 92507
Phone (909) 653-5152 Fax (909) 656-0854

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CALIFORNIA ANTI-SLAPP STATUTE APPLIES TO ROUTINE ADMINISTRATIVE MANDAMUS PETITIONS

An Analysis Of The Holding And Effect Of Vergos v. McNeal

By Michael P. Stone
and Marc J. Berger

A dramatic example of legislative intentions gone astray can be derived in a line of recent California appellate decisions culminating in the case of *Vergos v. McNeal* (2007) 146 Cal. App. 4th 1387. Based on *Vergos* and a few other recent cases, it now appears that nearly all petitions for administrative mandamus are subject to the anti-SLAPP motion procedure, with no limiting principle whatsoever. The case law developments that led to the *Vergos* holding stand as a monument to the futility of legislation as a remedy for power imbalances among the economic strata of society.

The anti-SLAPP statute was enacted in 1992 to deter the type of litigation for which its acronym stands: "Strategic lawsuits against public participation." This acronym referred to a growing tendency for powerful land development interests to bring defamation actions against environmental activists to deter the activists from exercising their legal rights to challenge large-scale development plans. It was widely perceived that these powerful real estate interests were using their financial resources to impose intolerable litigation costs on activists, so as to intimidate them from participating in the public proceedings where the developers' plans were under consideration.

To accomplish the purpose of the statute, the legislature authorized a "Special Motion to Strike" any complaint or cause of action that seeks to impose liability for statements made or

actions taken in an exercise of constitutionally-protected speech or the First Amendment right to petition the government for redress of grievances. The Special Motion to Strike is filed as the defendant's first responsive pleading. If the motion shows that the complaint seeks to impose liability for a statement made or action taken in an exercise of the right of free speech or petition, then the complaint or cause of action will be immediately stricken, with a mandatory award of attorney fees in favor of the defendant, unless in opposition the plaintiff demonstrates a probability of prevailing on the merits of the claim.

This statute was thought to be an effective deterrent against the lawsuits it targeted, because in those suits, developers were bringing claims against activists without a goal of prevailing on the merits, but for the collateral purpose of discouraging political opposition by forcing the opponent to incur intolerable litigation expenses. So, imposing a requirement of showing minimal merit acted as a precaution against suits that have financial intimidation as their only goal, while shifting responsibility for attorney fees would deprive the developers of the greatest single benefit they otherwise receive from the tactic of bringing litigation for the sole purpose of financial intimidation.

While the legislature primarily intended to attach consequences to the tactics of powerful developers and other corporate interests, the statute as drafted contained no limitation of the classes of plaintiffs who could be subject to an anti-SLAPP motion, and no limit on the size or power of the defendants who could bring the motion. Instead, the Special Motion to Strike could be filed by any defendant who could establish that the conduct on which the alleged liability is based is protected by the First Amendment rights of free speech and petition. And, there is no statutory requirement governing the size or power of the plaintiffs against whom the motion can be filed. Any defendant whose alleged liability arose from constitutionally protected speech or petitioning, no matter how powerful, could bring an anti-SLAPP motion against any plaintiff, no matter how weak and powerless the plaintiff might be.

The anti-SLAPP statute, originally designed as a tool to protect weak interests from being intimidated by powerful interests, has now itself become a tool by which powerful institutions and interests can in some cases intimidate economically weak and relatively powerless individuals. Combined with a

concurrent trend in federal law, which has eliminated constitutional protection for the work-related speech of public employees, while creating a doctrine of "free speech" protection for the government itself, the new interpretations of the anti-SLAPP statute have vastly eroded the ability of public employees to obtain hearing and evidentiary review of disciplinary sanctions imposed on them by their employers. The new interpretation rendered in the *Vergos* opinion will apparently make all actions for administrative mandamus subject to a Special Motion to Strike. This would vastly erode the ability of public employees to obtain hearing and evidentiary review of disciplinary sanctions imposed on them by their employers. It would seem to similarly affect administrative mandamus petitions seeking to challenge governmental decisions to revoke or suspend professional licenses. It may subject a private employee's action for wrongful termination to a Special Motion to Strike, if the private employer claims that the act of terminating the employee was an exercise of free speech.

In *Vergos,* counsel for the Regents of the University of California devised the idea of using the anti-SLAPP statute to protect employers from administrative mandamus. Exploiting a few recent precedents that treat the government as a "person" for First Amendment purposes, the Regents persuaded the Court of Appeal to recognize that the act of terminating or disciplining a public employee for cause is an exercise of free speech by the government, and consequently, an employee who cannot make a preliminary showing of a probability of prevailing on the merits of the claim can be required to pay the employer's attorney fees.

I. *VERGOS v. McNEAL* HOLDS THAT THE ANTI-SLAPP STATUTE PROTECTS A HEARING OFFICER SUED FOR DENYING A GRIEVANCE.

In *Vergos*, the plaintiff brought an action against Julie McNeal, the Director of Operations and Maintenance at University of California at Davis, for sex harassment and failure to prevent sex harassment. Defendants also included the harasser and the Regents, but the Court of Appeal only reviewed the denial of McNeal's anti-SLAPP motion.

Plaintiff Randy Vergos was an inspector, planner and estimator, working under Allen Tollefson, who worked under McNeal. Vergos filed an internal grievance, alleging sex harassment against Tollefson. McNeal, acting as hearing officer for Vergos' grievance, denied the grievance, and wrote to Tollefson that it was more likely that Vergos' allegations did not occur. McNeal refused to take any action

to protect McNeal from Tollefson. 146 Cal. App. 4th at 1390-1391.

McNeal was named as an individual defendant in Vergos' cause of action based on 42 USC § 1983. The pleading alleged that McNeal, acting as agent for the Regents and under color of state law, denied Vergos' grievance, thus violating Vergos' right to be free of discrimination and harassment, and that the Regents did not properly train McNeal in acting as a hearing officer to decide grievances. *Id.* at 1391-1392.

McNeal filed an anti-SLAPP motion challenging the § 1983 claim, alleging that the Complaint arose from her activities of hearing, processing and deciding plaintiff's grievances, in furtherance of her own First Amendment right of petition and free speech. *Id.* at 1392. McNeal's anti-SLAPP motion alleged that she permissibly delegated the investigation of Vergos' sex harassment claims, received a report that the claims were unsubstantiated, had no reason to believe the investigator was biased, was not biased herself, and communicated the results of the investigation to Vergos, who then failed to appeal the denial through available further steps of the grievance process. *Id.* at 1392-1393.

The trial court denied the anti-SLAPP motion on the grounds the claim was based on McNeal's hearing, processing and deciding of Vergos' grievance, and was "not based on the content of what Defendant stated in any proceeding or the exercise of the right to petition...." *Id.* at 1394.

The Court of Appeal reversed and remanded with instructions to grant the anti-SLAPP motion and award attorney fees to McNeal. The appellate court agreed with McNeal that her "statements and communicative conduct in handling plaintiff's grievances ... are protected" by the anti-SLAPP statute, "because they (1) were connected with an issue under review by an official proceeding authorized by law; and (2) furthered the right to petition of plaintiff and similarly situated employees." *Id.*

The court reasoned that *Code of Civil Procedure*, § 425.16(e)(2) authorized an anti-SLAPP motion where the action arises from "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." *Id.* at 1395, italics omitted. Also taking into account sub § (e)(1), authorizing an anti-SLAPP motion where the action arises from "any written or oral

statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," the appellate court held that neither § (e)(1) nor (e)(2) "require the defendant to show a public issue or issue of public interest." *Id.* at 1395, citing *Briggs v. Eden Council* (1999) 19 Cal. 4th 1106, 1116-1117, 1123. The court stated that for communications made in official proceedings, "it is the context or setting itself that makes the issue a public issue." *Id.*

The plaintiff argued that an action does not "arise" from petitioning or speech activity merely because it follows such activity, and that here, he was suing McNeal for aiding and abetting harassment. *Id.* at 1396. But the court observed that plaintiff's own pleading complained of McNeal's hearing, processing and deciding of plaintiff's grievances. *Id.* Noting that the trial court had denied the motion on the basis that the claim against McNeal was based on McNeal's conduct, not the content of her statements, the appellate court disagreed, since "hearing, processing and deciding of the grievances ... are meaningless without a communication of the adverse results." *Id.* at 1397.

II. *SAN RAMON v. CONTRA COSTA COUNTY:* GOVERNMENT ACTION IS NOT PROTECTED BY SLAPP IF IT DOES NOT IMPLICATE FREE SPEECH AND PETITION

The appellate court distinguished *San Ramon v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal. App. 4th 343, which held that an action seeking judicial review of the decision of a public entity is not subject to an anti-SLAPP motion merely because the decision is taken by a vote after discussion at a public meeting. The court in *San Ramon* observed that the public entity's action (of increasing required contributions to a pension fund) was not in itself an exercise of the right of free speech or petition.

The court in *Vergos* noted that plaintiffs relied on *San Ramon* because it "recognized that government bodies may invoke § 425.16 where appropriate, just like any private litigant, and its holding was based on the conclusion that the Board's act [i.e. the change in pension contributions] did not implicate free speech or the right to petition." *Id.* at 1063. The court in *Vergos* rejected plaintiff's argument because *San Ramon* disavowed deciding any issue concerning suits against individuals. *Id.*

The foregoing observation in *Vergos* means (1) the court appears to agree that government bodies may invoke the anti-SLAPP statute the

same as individuals; and (2) an individual acting on behalf of the government is entitled to invoke the anti-SLAPP statute. The court concluded, "We agree with McNeal that a narrow reading of the statute in plaintiff's favor could result in public employees' reluctance to assume the role of hearing officer in such cases, and thus thwart the petitioning activities of employees with grievances." *Id.*

Finally, the court also agreed with defendant "that she acted in furtherance of the right to petition within the meaning of § 425.16 even though it was not her own right to petition at stake." *Id.* The court elaborated that the anti-SLAPP statute "does not require that a defendant moving to strike ... demonstrate that its protected statements or writings were made on its own behalf (rather than, for example, on behalf of its clients or the general public)." *Id.*, citation omitted.

The court specifically declined to recognize an exception to the anti-SLAPP statute and reasoned that "Hearing officers in official proceedings deserve the protection of the anti-SLAPP statute." *Id.*

The *San Ramon* opinion dodges both of the broader propositions' implications of extending the anti-SLAPP statute to protect the government. The court noted that amicus briefs had argued that the government itself has no First Amendment free speech rights, but since the case before it required only a ruling that the particular act of increasing pension contributions did not implicate free speech, the court was not reaching the larger question posed, as to whether the First Amendment protects the government itself. The opinion also acknowledges that dicta in *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal. App. 4th 713, in finding the civil damages action before it to be a SLAPP suit, had noted that a petition for administrative mandamus would be the "proper" remedy, thus implying that such a petition would not be a SLAPP suit. But contrary to that court's view, the fact that administrative mandamus is the proper remedy does not exempt it from the anti-SLAPP statute, since it is well-established that an administrative mandamus petition can be found subject to the anti-SLAPP statute. See, e.g., *Moraga-Orinda Fire Protection Dist. v. Weir* (2004) 115 Cal. App. 4th 477.

III. THE GOVERNMENT IS NOW RECOGNIZED AS A "PERSON" FOR FIRST AMENDMENT PURPOSES.

The interpretation of the anti-SLAPP statute found in *Vergos* thus has its roots in *Mission Oaks*, *Moraga-Orinda*, and *Schroeder v. Irvine*

City Council (2002) 97 Cal. App. 4th 174. *Mission Oaks* recognizes in passing that administrative mandamus is the proper remedy to challenge a denial of a land development permit, 65 Cal. App. 4th at 730, but does not say that this exempts a petition from the reach of the anti-SLAPP statute. *Schroeder*, ironically, recognizes that "SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff." 97 Cal. App. 4th at 182. Yet the court resoundingly endorsed the government's right to invoke the anti-SLAPP statute, rejected an argument by amicus curiae that the government has no First Amendment rights, and held that a government official's act of voting is an act of free speech. *Id.* at 192, fn. 3.

Moraga-Orinda acknowledges that the anti-SLAPP statute was intended to apply to large corporations that can provoke prolonged litigation, not to an individual's relatively simple mandamus petition. But the court held that no such limitation appears on the face of the statute, and legislative history is irrelevant because the statute is unambiguous, and in any event, the history shows the statute is to be broadly applied. 115 Cal. App. 4th at 482 and fn. 4.

The newly-broadened judicial interpretation of the anti-SLAPP statute now imposes a major risk on any employee contemplating whether to seek judicial review of termination or other employment discipline. Can the employee avoid the anti-SLAPP statute by refraining from suing for damages, and limiting the remedy to reinstatement? No, because SLAPP has already been applied to petitions for civil harassment, which do not seek damages. *Thomas v. Quintero* (2005) 126 Cal. App. 4th 635, 642.

Can the employee avoid the anti-SLAPP statute by filing the mandamus petition against the governmental body only, without naming any officials? No, because the *San Ramon* and *Vergos* decisions hold that the government itself has a constitutional right of petition, which it would be exercising every time it takes disciplinary action against an employee.

The *Vergos* decision, by granting the government a constitutional freedom of speech and petition, has now extended the anti-SLAPP statute to the point where it applies to every petition for administrative mandamus, and probably to every suit that challenges a government decision. In that sense, *Vergos* takes another step in the readjustment of the balance of power between individuals and

government that was recently signaled by the United States Supreme Court in *Garcetti v. Ceballos* (2006) 126 S.Ct. 1951. The *Ceballos* decision took away an individual's constitutional protection for job-related speech, by recognizing it as speech of the government, in which the individual has no interest. *Ceballos* tells individual government employees they must say only what the employer wants them to say, or be terminated and replaced with someone who will. Decisions such as *Vergos* complete the transfer of power by recognizing that the constitutional freedom of speech, which previously protected the employee making the communication, now fully protects the government entity that dictates the content of what its employees may express in their job-related communications.

Thus the *Vergos* decision protects a hearing officer from liability for a decision against the employee, but *Ceballos* leaves the hearing officer with no protection against the employer for making a decision in favor of the employee. Under this scheme, it seems unlikely that any hearing officer would dare decide a case contrary to a governmental employer's interests. And of course, *San Ramon* protects not only the hearing officer, but also the governmental employer itself, in an administrative mandamus action.

IV. ROUTINE ADMINISTRATIVE MANDAMUS PETITIONS ARE NOW SUBJECT TO THE ANTI-SLAPP STATUTE.

It therefore seems that in view of the *San Ramon* and *Vergos* decisions, all employers served with petitions for administrative mandamus challenging employment decisions, are entitled to file an anti-SLAPP motion on the basis of § 425.16(e)(1), as a "written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;" and (2) as a "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." The employee must then make a preliminary showing of likelihood of prevailing on the merits, or the petition is summarily stricken with an award of attorney fees to the employer.

It is not entirely certain that *Vergos* will trigger a flood of anti-SLAPP motions to counter administrative mandamus petitions. The rule is a windfall that public employers do not really need, and as a practical matter, the government will not often be in a position to be able to execute a judgment for attorney fees against a terminated employee.

From the perspective of judicial economy, an anti-SLAPP motion to challenge a petition for administrative mandamus is quite wasteful, requiring the judge to rule on the same evidence twice: first under the probability of prevailing standard, then under the applicable substantive standard, be it independent judgment or substantial evidence. Where the matter is to be decided by the judge sitting without a jury (*Code of Civil Procedure*, § 1094.5), the preliminary showing of probability to prevail on the merits is equal to the final showing: the court merely predicts what the court will do, then does it.

There are actually at least two procedural advantages an employer would receive from filing an anti-SLAPP motion to strike a mandamus petition. First, if the governmental entity is able to drag its feet in preparing the hearing transcripts, so they are not available in time for the anti-SLAPP motion to be heard, the court can strike the petition on the basis that plaintiff failed to show a probability of prevailing, that the anti-SLAPP statute places the burden on plaintiff to immediately demonstrate the requisite probability of prevailing, and the court is not required to go beyond the pleadings and any declarations then available to make its ruling (CCP §§ 425.16(b)(2) and 425.16(g)). This may sound draconian, but no more so than the underlying rule of *Vergos* itself.

But even assuming the hearing transcript is available, an anti-SLAPP motion unilaterally gives the employer a free dress rehearsal for its defense, which the employee is incidentally forced to finance. If the employer prevails on the motion, the case is over and the employee owes attorney fees. But if the employee survives the motion under the "probability" standard, the ruling will educate the employer as to where it needs to improve its arguments. The anti-SLAPP motion thus gives the employer a second chance to present its legal arguments, a luxury the employee never receives.

It is difficult to predict how widespread the use of anti-SLAPP motions will be against mandamus petitions. Some governmental bodies will not want to bother chasing their fired employees for attorney fees. Others will want to use the tactic for its intimidating effect. When this happens, the anti-SLAPP regime will have come full circle, as a weapon for the government to intimidate individuals who seek to use the courts to question its decisions.

That the government itself has a right to freedom of speech is a perverse twist of

constitutional construction. It does not follow from treating the government as a fictitious "person" for some purposes, that the government itself has a right to claim the benefit of the constitutional freedom of speech. It is the government's raw power to silence an individual that makes it necessary, and even possible, to recognize a freedom of speech. The constitutional freedom of speech specifically means a protection against being silenced by the government. It means the government is restricted from prohibiting, punishing, or imposing burdens on, expressive communication of individuals. The only effect of recognizing a freedom of speech is to restrict the government from doing something it has the raw power to do. It is because of this raw governmental power to silence individuals that the body politic has deemed a constitutional protection necessary and appropriate. Governmental speech does not need this constitutional protection, which would amount to protection from itself. The anomaly of the outcome that flows from the recognition of a governmental right of free speech is compounded by treating the termination of an employee as an act of communication. It is true that the termination is communicated to the employee. But the termination is not effected by telling the employee about it, the termination is effected by no longer paying the employee or accepting a tender of work performance. Even if the First Amendment may protect an employer's statement that the employee is fired, it should not protect the official conduct involved in separating the employee from the position.

To put it simply: the employer has a constitutional right to tell the employee, "You're fired," but that statement does not fire the employee any more than a murderer can be executed by telling him, "You're dead."

Stay safe!

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 27 years, following 13 years as a police officer, supervisor and police attorney.

Marc J. Berger is the firm's senior law and motion and writs and appeals specialist. He has been associated with Michael P. Stone since 1986.