**Appendix A.**

Opinion of the Court of Appeal for the First District, Division Four, December 20, 2010 (unpublished) in Appeal No. A155165, A155187, A155899.

Filed 12/20/19

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| TATYANA E. DREVALEVA,<br>Plaintiff and Appellant,<br>v.<br>DEPARTMENT OF INDUSTRIAL RELATIONS,<br>Defendant and Respondent. | A155165, A155187, A155899<br><br>(Alameda County<br>Super. Ct. No. RG17881790) |

These consolidated appeals arise from an order partially granting the Department of Industrial Relations' (DIR) special motion to strike under Code of Civil Procedure section 425.16[1], a judgment of dismissal following an order sustaining a demurrer without leave to amend, and orders after judgment denying attorney's fees and costs. Plaintiff contends the court erred by: (1) partially granting the DIR's special motion to strike (the anti-SLAPP motion) and awarding it prevailing party attorney's fees; ( 2) denying her motion to take discovery under section 425.16, subdivision (g); (3) sustaining the DIR's demurrer without leave to amend; (4) denying her motion requesting the issuance of a writ of mandate compelling the DIR to release records under the Public Records Act (Gov. Code, § 6250 et seq.) (PRA) and denying her motion for attorney's fees and costs thereunder; and (5) denying her motion for prevailing plaintiff attorney's fees and costs under section 425.16, subdivision (c). We affirm.

[1] All statutory references are to the Code of Civil Procedure unless otherwise specified.

## I. FACTUAL BACKGROUND

Plaintiff worked as a cardiac monitor technician for Alameda Health System (AHS).[2] On or around August 25, 2013, she had a conversation with a supervisor, Mr. Harding, wherein she asked why she was classified as a part time employee when she worked full time, and why she did not receive shift differentials, overtime payments, or the required number of paid breaks during shifts. Harding told her he would think about her questions, but nothing changed. On September 5, 2013, plaintiff sent Harding a letter (the September 5th letter) with the same questions. Two days later, she was fired due to alleged "discrepancies between acceptable employment standards and those [plaintiff] exhibited during [her] employment with AHS."

Plaintiff filed a retaliation claim with the DIR's Division of Labor Standards Enforcement (DLSE), which was assigned to Deputy Labor Commissioner Daly. Plaintiff also filed a wage claim with the DIR seeking overtime wages, rest period premiums, differential pay, and waiting time penalties.

Daly investigated plaintiff's retaliation claim. Her supervisor, Ms. Healy, also corresponded with plaintiff. Daly informed plaintiff that AHS stated that plaintiff had failed to meet acceptable employment standards because her negligence allegedly seriously harmed a patient. In July 2013, a patient died while plaintiff was working, but plaintiff alleged that she was not negligent because the doctor on duty at the time verified her reading of the patient's electrocardiogram. AHS produced an email dated September 4, 2013 (the September 4th email) that supported its assertion that it decided to terminate plaintiff before she authored the September 5th letter. The DIR concluded that plaintiff could not prove the reason for her termination was a pretext. Consequently, the DIR found that AHS terminated plaintiff for a legitimate, non-retaliatory reason. Healy informed plaintiff by email in December 2016 that her retaliation claim would be denied. A formal letter, dated December 29, 2016, set forth the DIR's full determination and

[2] The factual allegations are taken from plaintiff's complaint.

denial of plaintiff's claim, although plaintiff alleges she did not get this letter until after she filed a lawsuit against the DIR in federal court.

Deputy Labor Commissioner Santos considered plaintiff's wage claim and determined that the DIR lacked jurisdiction because AHS was a county hospital. He advised plaintiff of this determination and that the DIR would not take any further action. He also explained that plaintiff could pursue her wage claim "through any other appropriate forum."

Plaintiff sued the DIR, alleging that it committed libel in communications with her by stating that: (1) plaintiff committed negligence towards a patient; (2) plaintiff missed an appointment with the DIR; (3) the DIR sent plaintiff a final determination letter; (4) plaintiff knew she was going to be fired prior to sending her September 5th letter; and (5) the DIR did not have jurisdiction over wage claims from county employees. She also alleged that the DIR committed negligence by: (1) failing to contact all of the witnesses she listed; (2) recklessly disregarding as a witness the doctor who worked with plaintiff when a patient passed away in July 2013; (3) processing her retaliation claim for the extraordinary amount of time of over three years; (4) attempting to force her to withdraw her retaliation claim; (5) failing to send her a determination letter, thus depriving her of an opportunity to appeal; and (6) intentionally failing to recognize fraud and negligence committed by AHS.

## II. PROCEDURAL HISTORY

In response to plaintiff's complaint, the DIR filed a demurrer, a motion to strike, and an anti-SLAPP motion. After the DIR filed its anti-SLAPP motion, the court denied plaintiff's motion for leave to conduct discovery.

The court issued a tentative ruling stating that it intended to grant the DIR's anti-SLAPP motion, and it took the demurrer, motion to strike, and anti-SLAPP motion under submission after hearing. The court then continued each motion and requested supplemental briefing for the anti-SLAPP motion on: (1) whether the DIR's negligent failure to send her a determination letter was a protected activity; (2) whether the court could strike an entire cause of action where some allegations are based on protected

activity and others are not; (3) whether plaintiff claimed that the DIR's failure to send her a determination letter violated a mandatory statutory duty, and if so, what duty; and (4) how the hourly rate in DIR's attorney's fees request was calculated.

Meanwhile, before the court held its final hearing on the demurrer, motion to strike, and anti-SLAPP motion, plaintiff filed a "Notice of Petition: Petition for a Writ of Mandate and a Declaratory Relief to Compel DIR to Issue Public Records" seeking to compel the DIR to release public records under the PRA (PRA motion), and a separate motion for prevailing party attorney's fees and costs thereunder.

On August 17, 2018, the court granted the DIR's anti-SLAPP motion with respect to plaintiff's libel claim and certain allegations in her negligence claim, finding those claims arose from protected activity and plaintiff had not established a probability of success on the merits because the DIR was immune from suit under Government Code sections 815.2, subdivision (b), 818.8, 821.6, and 820.2, and the DIR's acts were privileged under Civil Code section 47, subdivision (b). The court awarded the DIR prevailing party attorney's fees. The court then sustained the DIR's demurrer to what remained of plaintiff's negligence claim without leave to amend based on the same privilege and government immunities, and it dismissed the motion to strike as moot. The court denied plaintiff's PRA motion. The court's order on the demurrer dismissed the entire action.

On August 21, 2018, plaintiff filed a notice of appeal, indicating appeal from an order or judgment under section 904.1, subdivision (a)(3)–(13). In an attachment, she specified that she was appealing the court's orders: (1) sustaining the demurrer; (2) partially granting the anti-SLAPP motion and sustaining the DIR's written objections to plaintiff's evidence; (3) awarding the DIR attorney's fees under section 425.16; (4) dismissing the motion to strike; (5) denying the PRA motion; (6) ruling on two of plaintiff's requests for judicial notice; and (7) overruling plaintiff's objections to the DIR's method of service of the anti-SLAPP motion.

On August 29, 2018, plaintiff filed another notice of appeal indicating appeals from a judgment of dismissal after an order sustaining a demurrer, an order or judgment

under section 904.1, subdivision (a)(3)–(13), and, under the "other" box, plaintiff wrote that she was appealing from the court's rulings on her motion to take discovery and the demurrer. In an accompanying attachment, plaintiff explained that she filed another notice of appeal because she was unsure whether her prior notice was sufficient to appeal the demurrer ruling.

On September 10, 2018, plaintiff filed a motion for prevailing plaintiff's attorney's fees under section 425.16. On October 4, 2018, the trial court denied this motion and plaintiff's motion for prevailing party attorney's fees under the PRA. Plaintiff filed a third notice of appeal from these orders. This court consolidated the three appeals.[3]

## III. DISCUSSION

Plaintiff is a pro se litigant with a deeply-held perception that she has been the victim of injustice, but she demonstrates a limited understanding of the role (or rules) of this court in considering such claims.

To begin, we reiterate the following well-established rules: (1) an appealed judgment is presumed correct, and appellant bears the burden of overcoming the presumption of correctness (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 865); (2) when an appellant fails to support an issue with reasoned argument and citations to authority, we treat the point as waived (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979); (3) if a party fails to support an argument with the necessary citations to the record, the argument will be deemed forfeited (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; Cal. Rules of Court, rule 8.204(a)(1)(C)); and (4) a party who chooses to represent himself on appeal " 'is to be treated like any other party and is

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[3] With her reply brief in two of the consolidated appeals, plaintiff filed a motion to augment the record to include a March 2013 employee welcome letter from AHS. This motion to augment is denied because plaintiff did not establish good cause excusing the motion's untimeliness and because the letter was not part of the record below (see former Local Rule 7(b)–(c)). (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.)

entitled to the same, but no greater consideration than other litigants and attorneys' " (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247).

Plaintiff improperly demands that we apply less stringent standards to her as a pro se litigant, and her briefing fails to include even a single citation to the record. We give plaintiff no greater consideration than any other party before this court. (*Nwosu v. Uba, supra*, 122 Cal.App.4th at pp. 1246–1247.) Rather than strike her improper briefing in its entirety, however, we affirm the lower court's judgment based on the absence of reversible error. (Cal. Rules of Court, rule 8.204(e).)

***A. The Anti-SLAPP Motion***

The Legislature enacted section 425.16 to prevent the chilling effect of meritless lawsuits that force an individual into litigation for exercising his or her right of petition or free speech. "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 Constitution or the 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).) The purpose is to "weed[] out, at an early stage, meritless claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).)

"At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the

plaintiff has shown a probability of prevailing." (*Baral, supra*, 1 Cal.5th at p. 396.) We review the trial court's ruling on an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325–326.)

**1. Prong One: Claims Arising from Protected Activity**

Actions subject to dismissal under section 425.16 include those based on: "(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, or (4) 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." (§ 425.16, subd. (e).)

To ascertain whether a claim arises from protected conduct, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) "A claim arises from protected activity when that activity underlies or forms the basis for the claim." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062.) The only means by which a moving defendant can satisfy "the ['arising from'] requirement is to demonstrate that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e)." (*Id.* at p. 1063.)

In this case, plaintiff's claims arise from actions taken during DIR proceedings on her retaliation and wage claims. The DIR, including the DLSE (which is a division thereof headed by the Labor Commissioner), is an executive body, and DIR investigations of retaliation and wage claims are proceedings recognized by law. (Labor Code, §§ 50, 79, 98.7, 98.) Statements made in such proceedings fall under the anti-SLAPP statute because these are proceedings of a governmental administrative body. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [the

constitutional right to petition includes seeking administrative action].) The DIR argues that plaintiff's libel claim arises from protected statements made by the DIR while investigating and determining her wage and retaliation claims, and we agree.[4]

In contrast, the DIR does not argue that all of its allegedly negligent acts constitute protected activity. The trial court found that the following acts of the DIR were not protected as they do not constitute statements or writings made before or in connection with an issue under review in an official proceeding: (1) failing to contact all of the witnesses that plaintiff listed; (2) recklessly disregarding the doctor who worked with plaintiff when a patient passed away in July 2013 as a witness; (3) processing plaintiff's retaliation claim for the extraordinary amount of time of over three years; (4) failing to send plaintiff a determination letter, thus depriving her of an opportunity to appeal; and (5) intentionally failing to recognize fraud and negligence committed by AHS towards plaintiff. On appeal, the DIR argues that only statements and writings made in the course of its investigations, or in connection with issues under its consideration or review, are protected. We thus accept for purposes of this appeal that five of the six negligent acts plaintiff alleged do not arise from protected activity.

We reach a different conclusion regarding plaintiff's allegation that the DIR negligently attempted to get her to withdraw her retaliation claim. The uncontradicted declaration of DIR investigator Daly established that Daly informed plaintiff in writing in August 2014 that the DIR would not render a favorable determination on plaintiff's claim, Daly wrote that plaintiff could withdraw her claim if she preferred that the DIR not file a public report, and Daly sent plaintiff the claim withdrawal form. As such, this allegedly negligent act arose from protected activity—written statements made before or

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[4] In its anti-SLAPP order, the trial court summarized the libelous statements and acts that it culled from plaintiff's introductory allegations and then summarized the five libelous statements and the six negligent acts that plaintiff listed in the "summary" section of her complaint. Plaintiff argues that in creating the summary of her introductory allegations, the trial court unlawfully amended her complaint to include additional injurious acts and statements. As plaintiff confirms that she challenges only the five statements and six acts in the "summary" section of her complaint, we limit our discussion to these allegations.

in connection with an issue under review in an official proceeding. (§ 425.16, subd. (e)(1)–(2).)

**2. Prong Two: Probability of Success on the Merits**

The trial court found that plaintiff could not show a probability of success on the merits because the DIR is immune from tort liability under Government Code sections 815.2, subdivision (b), 818.8, 821.6, and 820.2, as well as Civil Code section 47, subdivision (b). We agree that statutory immunities and privileges bar plaintiff's suit.

Under the California Tort Claims Act (Gov. Code, § 810 et seq.), public entities are immune from tort liability except as provided by statute (*id.*, § 815, subd. (a)); public employees are liable for their torts except as otherwise provided by statute (*id.*, § 820, subd. (a)); public entities are vicariously liable for the torts of their employees acting within the scope of their employment (*id.*, § 815.2, subd. (a)); and public entities are immune where their employees are immune, except as otherwise provided by statute (*id.*, § 815.2, subd. (b)).

Plaintiff alleged direct statutory liability against the DIR only with respect to her negligence claim under Civil Code section 1714, but this general statute cannot be used to impose direct tort liability against a public entity. (*All Angels Preschool/Daycare v. County of Merced* (2011) 197 Cal.App.4th 394, 400 (*All Angels*).) Plaintiff also alludes in her briefing to direct liability for the DIR's negligent acts under Government Code section 815.6. She did not allege this liability, nor did she demonstrate that she sought to amend her complaint below, but even if she had, she could not prevail.

Government Code section 815.6 provides a basis to sue a public entity for direct liability only in certain circumstances. (*All Angels*, *supra*, 197 Cal.App.4th at p. 400.) "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (Gov. Code, § 815.6.) Three elements are necessary to establish liability. First, an enactment must impose a mandatory duty that is obligatory in its directions to the public

entity rather than merely discretionary or permissive. (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498.) Next, the enactment must be designed to protect against the particular kind of injury the plaintiff suffered, and, finally, the plaintiff's injury must have been proximately caused by the public entity's failure to discharge its mandatory duty. (*Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 898 (*Guzman*).)

Plaintiff contends that Labor Code section 98.7 created the operative mandatory duties. Under this statute, the DIR was required to investigate retaliation claims, but the manner of performing the investigation is left to the DIR's discretion. (Labor Code, § 98.7, subd. (b)[5].) The DIR similarly retained discretion to determine whether a claim has merit. (*Id.*, § 98.7, subd. (c)–(d)(1)[6].) The DIR's statement that plaintiff could withdraw her claim if she did not want a negative determination to be public record did not violate any identifiable mandatory duty under Labor Code section 98.7.

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[5] At the time plaintiff submitted her retaliation claim, this subdivision of Labor Code section 98.7 provided: "Each complaint of unlawful discharge or discrimination shall be assigned to a discrimination complaint investigator who shall prepare and submit a report to the Labor Commissioner based on an investigation of the complaint. . . . The investigation shall include, *where appropriate*, interviews with the complainant, respondent, and any witnesses who may have information concerning the alleged violation, and a review of any documents that may be relevant to the disposition of the complaint. . . . The investigation report submitted to the Labor Commissioner or designee shall include the statements and documents obtained in the investigation, and the findings of the investigator concerning whether a violation occurred. The Labor Commissioner *may hold* an investigative hearing whenever the Labor Commissioner determines, after review of the investigation report, that a hearing is necessary to fully establish the facts . . . ." (Labor Code, § 98.7, former subd. (b), italics added.)

[6] At the time plaintiff submitted her retaliation claim, Labor Code section 98.7, former subdivision (c) provided, "If the Labor Commissioner determines a violation has occurred, he or she shall notify the complainant and respondent and direct the respondent to cease and desist from the violation and take any action deemed necessary to remedy the violation, including, where appropriate, rehiring or reinstatement, reimbursement of lost wages and interest thereon, payment of reasonable attorney's fees associated with any hearing held by the Labor Commissioner in investigating the complaint, and the posting of notices to employees. . . ." Labor Code section 98.7 subdivision (d)(1) stated, "If the Labor Commissioner determines no violation has occurred, he or she shall notify the complainant and respondent and shall dismiss the complaint."

Lacking a basis to impose direct liability against the DIR, plaintiff's claim depends on the imposition of vicarious liability. (Gov. Code, § 815.2, subd. (a).) But DIR employees, and hence the DIR, are immune for the acts over which plaintiff sues.

Pursuant to Government Code section 821.6, "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." This statute has been primarily applied to immunize prosecuting attorneys and similar individuals, but it is not restricted to such personnel and applies to all employees of a public entity, including those who prosecute administrative disciplinary proceedings. (*Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744, 756–757; *Javor v. Taggart* (2002) 98 Cal.App.4th 795, 808–811 [acts of employee of the Uninsured Employers Fund in seeking reimbursement from an uninsured employer fell within Government Code section 821.6's immunity].) This immunity has also been extended to numerous torts other than false imprisonment or false arrest. (*Cappuccio, Inc. v. Harmon* (1989) 208 Cal.App.3d 1496 (*Cappuccio*) [defamation]; *Javor*, at pp. 808–811 [slander and clouding of title, intentional infliction of emotional distress, and negligence].)

"California courts construe section 821.6 broadly in furtherance of its purpose to protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil suits." (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1048.) Thus, Government Code section 821.6 has been found to cover the act of filing or prosecuting a judicial or administrative complaint and acts and statements made in investigations preliminary to such proceedings, even if formal action is not ultimately pursued. (*Richardson-Tunnell v. Schools Ins. Program for Employees* (*SIPE*) (2007) 157 Cal.App.4th 1056, 1062, overruled on another ground in *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 815, fn. 8; *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1291–1293 [statements in a press release concerning an investigation were part of the prosecution process and immune]; *Amylou R. v. County of Riverside*, (1994) 28 Cal.App.4th 1205, 1210–1211 [statements made by police officers to the plaintiff in the course of an investigation were incidental to the investigation and

immune]; *Cappuccio, supra*, 208 Cal.App.3d at pp. 1498, 1500–1502 [immunity applied to a statement that the plaintiffs were guilty of underweighing fish by an investigator for the Department of Fish and Game]; *Richards v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 304, 317–318 [immunity applied to statements made by defendant's employees during investigation of liquor license violations and preparation for formal proceedings to remedy these violations]; *Kayfetz v. State of California* (1984) 156 Cal.App.3d 491 [immunity applied to publication of charges and disciplinary action by the Division of Medical Quality of the Board of Medical Quality Assurance].)

In the administrative proceedings at issue, the DIR investigated plaintiff's claims to determine whether they warranted further administrative or judicial action. (Labor Code, §§ 98.7, subd. (b)–(d)(1), 98.) The written statements over which plaintiff sues were made by DIR employees as part of the prosecution process. Further, the statements were made during investigations within the scope of employment. An employee acts in the course and scope of his employment when he is engaged in work he was employed to perform, or when the act is incident to his duty and is performed for the benefit of his employer, not to serve his own purposes or convenience. (*Mazzola v. Feinstein* (1984) 154 Cal.App.3d 305, 311.) Plaintiff's complaint and the DIR's uncontradicted evidence establish that the statements at issue were made during wage and retaliation claim investigations by employees responsible for conducting these investigations with the ultimate purpose of providing a basis for the Labor Commissioner to determine whether to take action against the employer. (Labor Code, §§ 98, 98.3, 98.7, subds. (b)–(d).). Plaintiff does not plead, or even argue, that the employees' statements served their own purposes. Under Government Code section 821.6, the DIR is immune.

The statements at issue are also privileged under Civil Code section 47, subdivision (b) as broadcasts made "in any other official proceeding authorized by law." This "privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation [or official proceeding]; and (4) that have some connection or logical relation to the action." (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955.)

Courts recognize that statements made in connection with administrative proceedings and government investigations are privileged. (*Lemke v. Sutter Roseville Medical Center* (2017) 8 Cal.App.5th 1292 [Civil Code section 47, subdivision (b)'s privilege applied to allegedly disparaging statements a hospital made about a nurse to the California Board of Registered Nursing in connection with the hospital's internal investigation and in an official proceeding before the Board]; *Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1547 [same privilege applied to statements communicated by personnel to officials of the California Department of Corrections and Rehabilitation as part of an internal investigation concerning the plaintiff's alleged wrongdoing].) The trial court correctly granted in part the DIR's anti-SLAPP motion.[7]

**3. Procedural Challenges to the anti-SLAPP motion**

Having determined that DIR's anti-SLAPP motion was properly granted in part, we briefly address the procedural issues plaintiff raises.

First, plaintiff asks us to decide whether a represented party can be sanctioned for using the wrong method of service for reply papers under section 1005, subdivision (c). The DIR served plaintiff with its reply by regular, rather than overnight mail, and the trial court denied plaintiff's objection thereto for lack of prejudice. But plaintiff does not appeal this ruling, instead requesting that we answer this question for future litigants. This court does not issue advisory opinions. (*Nisei Farmers League v. Labor & Workforce Development Agency* (2019) 30 Cal.App.5th 997, 1022–1023 (*Nisei Farmers League*).)

Next, although conceding that section 425.16 does not contain a deadline for the trial court to decide an anti-SLAPP motion, plaintiff requests that we create one. This court has no power to impose a procedural deadline not present in the statute. (*Western/California, Ltd. v. Dry Creek Joint Elementary School Dist.* (1996) 50 Cal.App.4th 1461, 1488.)

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[7] Because the statements at issue are immune under Government Code sections 815.2, subdivision (b) and 821.6 and privileged under Civil Code section 47, subdivision (b), we need not address Government Code section 820.2's discretionary act immunity.

Finally, plaintiff asks us to confirm that section 425.16 is silent with respect to when the party opposing the anti-SLAPP motion must receive the motion after a complaint is filed. But plaintiff does not argue that section 425.16 requires the opposing party to receive the motion within a certain time or that any such timeframe was breached here. Again, this court does not give advisory opinions. (*Nisei Farmers League*, *supra*, 30 Cal.App.5th at pp. 1022–1023.)[8]

**4. The Discovery Ruling**

Before the DIR filed an anti-SLAPP motion, plaintiff served special interrogatories, a request for production of documents, and requests for admission. She challenges the trial court's denial of her motion to take this discovery after the anti-SLAPP motion triggered a discovery stay.

Generally, discovery is closed once a motion to strike under section 425.16 has been filed. (§ 425.16, subd. (g).) However, the trial court may allow discovery limited to the issues raised by the motion to strike upon "a timely and proper showing in response to the motion to strike." (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 868.) The "proper showing" includes "good cause" for the requested discovery. (§ 425.16, subd. (g).) "Good cause" means only discovery relevant to the plaintiff's burden of establishing a reasonable probability of prevailing on the claim. (§ 425.16 subd. (b)(3).) Discovery that is not relevant to a defense asserted in the anti-SLAPP motion is not permitted. (Burke, Anti-SLAPP Litigation (The Rutter Group 2018) 2:55; *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 922.) A trial court's decision to disallow discovery will not be disturbed unless it is "arbitrary,

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[8] We summarily reject plaintiff's assertions that objections to evidence can only accompany a motion for summary judgment or adjudication; that the trial court erred in treating assertions of fact in her opposing brief as argument, not evidence, where the assertions were not accompanied by a sworn declaration under penalty of perjury (§ 2015.5; *Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 941–942 [declarations that meet the requirements of § 2015.5 are admissible in an anti-SLAPP motion]); and that the court discounted her requests for judicial notice when the record shows that the trial court granted these requests.

capricious, or a patently absurd determination." (*Tutor-Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604, 617.)

No abuse of discretion occurred here. Plaintiff's special interrogatories targeted information about statements AHS made to the DIR explaining the reason for plaintiff's termination (who communicated the reason, the dates and persons involved in the communications, what AHS said about plaintiff's alleged negligence, what AHS said it did to investigate the alleged negligence, and who communicated with plaintiff regarding her termination before her September 5th letter). She sought AHS correspondence to the DIR regarding her termination, AHS's September 4th email, and all internal DIR documents regarding her case investigation. Finally, she asked the DIR to confirm that the following facts were true: the DIR communicated with AHS regarding the termination; AHS stated plaintiff had committed medical negligence that harmed a patient; AHS stated there was a September 4th email from plaintiff's supervisor to human resources asking advice about how to terminate plaintiff; and plaintiff knew that her employment would be terminated before her September 5th letter.

Plaintiff sued the DIR for libel and negligence. The DIR did not argue in its anti-SLAPP motion that plaintiff could not prevail because the statements were true or because she could not establish that the acts she alleged occurred. Instead, the DIR argued that its acts were immune and privileged under Government Code sections 815.2, subdivision (b), 821.6, 820.2, and 818.8, and Civil Code section 47, subdivision (b). It also argued that plaintiff could not state a claim for direct liability under Government Code section 815.6 because Labor Code section 98.7 imposed permissible rather than mandatory duties. Plaintiff argued that good cause existed for the discovery because she had a constitutional right of access to information concerning the conduct of the people's business and a right to access public records under the PRA. Because she did not establish that the discovery she sought was targeted to defeating the DIR's legal defenses, the trial court properly denied her motion.

**5. The Attorney's Fees Award to the DIR**

The trial court awarded the DIR attorney's fees as the prevailing party on its anti-SLAPP motion. A prevailing defendant on an anti-SLAPP motion is entitled to mandatory attorney's fees. (§ 425.16, subd. (c).) The amount of attorney's fees awarded is often computed in accordance with the familiar "lodestar" method. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135–1136 (*Ketchum*).) Under this method, "[t]he court tabulates the attorney fee touchstone, or lodestar, by multiplying the number of hours reasonably expended by the reasonable hourly rate prevailing in the community for similar work." (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1321.) We review the grant of attorney's fees to a prevailing defendant under section 425.16 for abuse of discretion. (*Id.* at p. 1322.)

Plaintiff makes the following challenges to the trial court's attorney's fees award: (1) the DIR unreasonably inflated its fees through miscalculation; (2) the government cannot recover attorney's fees when it is represented by an attorney who is a government employee; and (3) the trial court erred in allowing recovery for 21 hours of attorney work at $250 an hour. We reject each challenge.

First, by merely referring us to her briefing in the trial court and by failing to cite to the record, plaintiff does not properly raise the argument that the DIR unreasonably inflated its fees through miscalculation. (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived"].)[9]

Next, plaintiff does not establish that the trial court abused its discretion in rendering the attorney's fee award to the DIR. Her citations to *Trope v. Katz* (1995) 11 Cal.4th 274 (*Trope*) and *Ellis Law Group, LLP v. Nevada City Sugar Loaf Prop., LLC*

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[9] The DIR sought recovery for 27 hours of work at $400 an hour, for a total of $10,800, although it mistakenly stated the total as $12,800 in its briefing below. Plaintiff's miscalculation argument is in any event irrelevant because the trial court awarded only $250 an hour for 21 hours of work for a total of $5,250. As plaintiff is appearing in pro per, we appreciate the DIR's representation at oral argument that it does not intend to collect the attorney's fee award from plaintiff.

(2014) 230 Cal.App.4th 244 (*Ellis Law Group*) do not convince us that the government cannot receive attorney's fees when represented by an attorney whom it employs. In *Trope*, the Supreme Court held that an attorney acting in propria persona could not recover attorney's fees under Civil Code section 1717. The statute's use of the terms "incurred" and "attorney's fees" implies the existence of an attorney-client relationship (i.e., a party receiving and paying for professional services from a lawyer). (*Trope*, at pp. 280–281.) A self-represented litigant does not pay attorney's fees or become liable to pay them in exchange for legal representation, and thus cannot recover these fees. (*Ibid.*) In *Ellis Law Group*, the court similarly found that a law firm could not recover attorney's fees for its contract attorney's work because the attorney was essentially a member of the firm, and an attorney's representation of the law firm defendant to which he or she belongs is analogous to an attorney acting in propria persona as each represents his own interests. (*Ellis Law Group*, at pp. 252–260.)

In contrast, in *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1093 (*PLCM Group*), the Supreme Court held that attorney's fees could be recovered for in-house counsel's work under Civil Code section 1717. Unlike self-represented litigants, in-house attorneys, like private counsel, do not represent their own personal interests and are not seeking remuneration simply for lost opportunity costs that could not be recouped by a nonlawyer. (*Ibid.*) Further, "[a] corporation represented by in-house counsel is in an agency relationship, i.e., it has hired an attorney to provide professional legal services on its behalf." (*Ibid.*) We agree with the DIR that an attorney working in-house with the government is akin to an attorney working in-house with a private company, and he or she does not represent his or her own interests in suits against the government. (*Ibid.* ["The payment of a salary to in-house attorneys is analogous to hiring a private firm on a retainer"].)

Finally, the $5,250 award of attorney's fees was reasonable and supported by the record. Plaintiff does not argue that $250 was an unreasonable hourly rate, but instead contends that the trial court should have determined counsel's actual hourly salary. In *PLCM Group*, the Supreme Court rejected a similar argument under Civil Code section

1717, noting "nothing in [the statute] compels such an approach." (*PLCM Group*, *supra*, 22 Cal.4th at p. 1097.) Similarly, nothing in section 425.16 compels such an approach, and the trial court did not abuse its discretion by using the approved lodestar method. (See *Ketchum*, *supra*, 24 Cal.4th at p. 1131.)

The trial court's award for 21 hours of work was also reasonable. The DIR submitted a declaration from counsel stating that he spent 10 hours on the moving papers, six hours on the reply, and five hours on the supplemental briefing and hearing.[10] The parties do not cite authority addressing how a trial court should approach an attorney's fees award where a defendant succeeds in striking some allegations in a cause of action but not others after the Supreme Court clarified in *Baral* that an anti-SLAPP motion could be used in this manner. But, before *Baral*, where counsel's work on successful and unsuccessful causes of action overlapped, the court looked to the defendant's relative success on the motion in achieving his or her objective, and the court could reduce the amount of attorney's fees awarded for partial success *if appropriate*. (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 344–345.)

Here, counsel's work on the successful libel claim and the successful and unsuccessful negligence allegations largely overlapped. In its initial briefing, the DIR argued that all of the acts that plaintiff sued over were subject to section 425.16, and the DIR did not break down its briefing allegation by allegation. Even after the trial court requested supplemental briefing on the mixed cause of action issues raised by plaintiff's negligence claim, the DIR's supplemental brief contained only minimal paragraphs specific to one of plaintiff's six negligence allegations. As the trial court noted, the DIR prevailed in large part on its motion. On this record, and in the absence of some indication that the time spent attempting to defeat the five negligence allegations specifically was segregable or distinctly identifiable, we cannot say that the court erred in failing to discount the fee request to account for them.[11]

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[10] The DIR sought recovery for six additional hours of work related to plaintiff's motion to take discovery and continue hearings on the demurrer and anti-SLAPP motions, but the court did not allow recovery for these hours.

### *B. The Demurrer*

After the trial court granted the DIR's anti-SLAPP motion, plaintiff's remaining negligence allegations were that the DIR failed to contact witnesses; it disregarded a key witness; it processed her claim for an excessive duration; it did not send a determination letter to her mailing address; and it intentionally failed to recognize the fraud and negligence AHS committed against her. The trial court sustained the DIR's demurrer to plaintiff's negligence cause of action without leave to amend, finding that plaintiff failed to state a claim for direct liability and various statutory immunities barred the imposition of vicarious liability. The trial court then dismissed the action in its entirety.[12] We affirm this ruling.

#### 1. Standard of Review

When a trial court sustains a demurrer, we review the complaint independently to determine whether it states a valid cause of action, accepting all factual allegations as true. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We construe the allegations liberally and draw all reasonable inferences in the plaintiff's favor. (*Coleman v. Medtronic, Inc.* (2014) 223 Cal.App.4th 413, 422.) When a court sustains a demurrer

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[11] We reject plaintiff's request that we rule for "all future SLAPP litigants" that the filing of an anti-SLAPP motion cannot bar discovery where the documents sought are also public records under the PRA as plaintiff provides no convincing argument or authority to support this request.

[12] Plaintiff argues that section 581, subdivision (f)(1) prevented the trial court from dismissing the action without a party motion, but this argument is not convincing. Section 581 sets forth nonexclusive means for dismissing a complaint. (§ 581, subd. (f)(1) [allowing dismissal "[e]xcept where Section 597 applies, after a demurrer to the complaint is sustained without leave to amend and either party moves for dismissal"], subd. (m) [section 581 does not contain an exclusive enumeration of the court's power to dismiss]; *Sousa v. Capital Co.* (1963) 220 Cal.App.2d 744, 755 [section 581's provisions are not exclusive; the trial court had inherent power to enter a judgment of dismissal after plaintiffs failed to amend their complaint within the time allotted].) Further, an appellate court may treat an order sustaining a demurrer without leave to amend and dismissing the action as a final judgment of dismissal (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699), plaintiff treated the trial court's order as such, and plaintiff cannot show prejudice from dismissal given our review of her appeals and affirmance of the trial court's orders after dismissal on the merits.

without leave to amend, we review for abuse of discretion any determination that amendment could not cure the defects and reverse only if the plaintiff bears his or her burden of establishing a reasonable possibility that amendment could cure the defects. (*Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 279.)

**2. Analysis**

When addressing claims of government immunity, generally, a court first determines whether the defendant owes a duty to the plaintiff before determining whether the defendant is immune. (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 978, fn. 3 [describing the " 'duty before immunity' " doctrine].) Plaintiff pled a negligence claim against the DIR under Civil Code section 1714, but, again, this statute cannot impose direct tort liability on the DIR. (*All Angels, supra*, 197 Cal.App.4th at p. 400.) The trial court thus correctly recognized that plaintiff cannot sue the DIR for negligence.

On appeal, plaintiff argues that she has stated or can state a claim under Government Code section 815.6. To invoke Government Code section 815.6, plaintiff must specifically plead the particular enactment that creates a mandatory duty. (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1349.) Her complaint contains only two references to Government Code section 815.6 and fails to properly identity an enactment creating a mandatory duty. Nonetheless, because plaintiff argues that she can amend and that Labor Code section 98.7 imposed mandatory duties that the DIR violated, we consider whether she establishes a reasonable probability of curing the defects in her pleading.

As previously explained, three elements are necessary to invoke Government Code section 815.6. An enactment must impose a mandatory duty that is obligatory in its directions to the public entity rather than merely discretionary; the enactment must be designed to protect against the particular kind of injury that the plaintiff suffered; and the plaintiff's injury must have been proximately caused by the public entity's failure to discharge its mandatory duty. (*Guzman, supra*, 46 Cal.4th at p. 898.)

Here, Labor Code section 98.7 imposed a mandatory duty on the DIR to investigate retaliation complaints, but the manner of conducting the investigation and the

ultimate determination of whether a violation occurred fell within the DIR's discretion. (Labor Code, § 98.7, subds. (b)–(d).) Allegations that the DIR failed to interview all relevant witnesses and failed to recognize AHS's negligence and fraud (i.e., found no violation occurred) thus cannot establish a claim under Government Code section 815.6.

Similarly, plaintiff cannot show that the DIR had a mandatory duty to notify her of its determination by mail. The DIR was required to notify a claimant if it rejected his or her retaliation claim, but the statute contains no requirement that notification occur by mail. (Labor Code, § 98.7, subd. (d).) The DIR notified plaintiff that her claim would be rejected by email in December 2016, and, having received this notice, plaintiff sued the DIR in federal court on December 29, 2016.

Plaintiff also asserts that the DIR violated a mandatory duty to timely determine whether her claim had merit. The language of Labor Code section 98.7 supports this argument. "The Labor Commissioner shall notify the complainant and respondent of his or her determination under subdivision (c) or paragraph (1) of subdivision (d), not later than 60 days after the filing of the complaint." (Labor Code, § 98.7, former subd. (e).) However, to establish a claim, plaintiff must also prove her injury was the type the statute intended to prevent and proximate cause. (*Guzman, supra*, 46 Cal.4th at p. 898.) Here, we need not address the second prong of this test because plaintiff cannot establish proximate cause.

To establish proximate cause, the plaintiff must first show that a public entity's violation of a mandatory duty was a cause in fact of the plaintiff's injury. (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 352.) Because a cause in fact analysis often results in a broad liability (*id.* at p. 353 ["the purported [factual] causes of an event may be traced back to the dawn of humanity"]), the court must also engage in an analysis of various considerations of policy that limit an actor's responsibility for the consequences of his conduct. (*Id.* at p. 353.) Ordinarily proximate cause is a question of fact, but where the only reasonable conclusion that can be drawn from the facts is an absence of causation, the question is one of law. (*Ibid.*)

The only reasonable conclusion to be drawn from the facts alleged is that plaintiff cannot establish proximate cause. Plaintiff's alleged injuries were caused by AHS's termination. Because she lost her position at AHS, she lost wages and health and life insurance. She moved to Russia because of the lost health insurance, and, as a result, she suffered a lost opportunity for study and career advancement in the U.S., a lost opportunity to purchase a home and vehicle in the U.S., she incurred medical expenses and other debt, and she endured pain and suffering from these losses. But the DIR determined that plaintiff's retaliation claim lacked merit, and when she filed it and during the ensuing proceeding, she did not have to exhaust administrative remedies under Labor Code section 98.7 to sue for Labor Code violations. (*Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320, 331–332; *Satyadi v. West Contra Costa Healthcare Dist.* (2014) 232 Cal.App.4th 1022, 1032–1033 [2013 amendments to the Labor Code expressly stating that exhaustion of administrative remedies under Labor Code section 98.7 is not required clarified rather than changed existing law]; Labor Code § 98.7, subd. (g), added by Stats. 2013, ch. 732, § 3, effective January 1, 2014 [exhaustion of administrative remedies is not required].) The DIR's failure to render its denial of plaintiff's retaliation claim in 60 days thus was not a cause in fact of her alleged injuries, and therefore not a proximate cause.

Finally, plaintiff argues that the DIR violated a mandatory duty to create an investigation report of her retaliation claim. (Labor Code, § 98.7, subd. (b) [the investigator shall "prepare and submit a report to the Labor Commissioner" that includes "statements and documents obtained in the investigation, and the findings of the investigator concerning whether a violation occurred"].) However, plaintiff attaches an email to her complaint wherein DIR employee Healy informed plaintiff that she had reviewed the investigation report for plaintiff's claim and sent the report to the Assistant Chief Commissioner, and Healy pasted the report's conclusion in the email to plaintiff. We accept as true the contents of exhibits attached to a complaint. (See *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 504–505; *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83.) As such, plaintiff cannot establish a

reasonable probability that amendment would allow her to state a claim under Government Code section 815.6.

Nor can plaintiff pursue her claim against the DIR on a theory of vicarious liability. The DIR's allegedly negligent, injurious acts all arose from its investigation and determination of plaintiff's retaliation and wage claims. For the reasons previously set forth in our affirmance of the trial court's anti-SLAPP ruling, these acts are privileged under Government Code sections 821.6 and 815.2, subdivision (b).[13]

### *C. Denial of Plaintiff's "Petition" for the Disclosure of Public Records and Request for Attorney's Fees and Costs*

Plaintiff made her first PRA request on March 22, 2018, and the DIR replied on April 18, 2018. She made an additional PRA request on April 19, 2018, and the DIR informed her that it needed a two-week extension to respond. On May 24, 2018, plaintiff filed her PRA motion. In this motion, plaintiff also stated that she was looking for costs and attorney's fees under the PRA.

On June 13, 2018, the DIR responded to plaintiff's supplemental request. On July 19, 2018, plaintiff filed a motion for prevailing party attorney's fees and costs wherein she conceded that her friend had picked up the public records. The trial court denied the PRA motion on August 17, 2018 because the PRA requires that a party seeking to compel the release of improperly withheld public records file a complaint or verified petition in the superior court and plaintiff filed no such petition or complaint; plaintiff did not establish the required manner of service for a petition on the DIR; she did not establish that the disclosure of documents she sought was substantively warranted; and she was not a prevailing party entitled to attorney's fees under the PRA. The trial court denied plaintiff's additional motion for attorney's fees and costs on October 4, 2018.

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[13] Plaintiff challenges the trial court's ruling that the DIR's motion to strike under section 435 was moot in light of its ruling on the anti-SLAPP motion and demurrer. We summarily reject this challenge because this ruling did not harm plaintiff (*Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 431 [appellants are entitled to challenge only injurious trial court errors]), and because the motion was moot in light of the trial court's other rulings.

Plaintiff provides a laundry list of requests for relief with respect to the PRA motion, but, in essence, she requests that we find that the trial court should have treated her motion as a verified petition for writ of mandate under the PRA and declared her the prevailing party on this petition.[14] With respect to her first request, plaintiff's opening brief is not supported by reasoned argument, authority, or citations to the record. Plaintiff accordingly forfeited this issue on appeal. (*Jones v. Superior Court*, *supra*, 26 Cal.App.4th at p. 99 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived"].)

With respect to plaintiff's request for prevailing party attorney's fees and costs, under Government Code section 6259, former subdivision (d), "The court shall award court costs and reasonable attorney's fees to the requester should the requester prevail in litigation filed pursuant to this section." We review the trial court's determination that a litigant is a prevailing party under the PRA for abuse of discretion, and we defer to any factual findings made by the trial court in connection with the ruling if they are supported by substantial evidence. (*Garcia v. Bellflower Unified School Dist. Governing Bd.* (2013) 220 Cal.App.4th 1058, 1064 (*Garcia*).)

In determining whether a plaintiff in a PRA action has prevailed, courts have found that a plaintiff "prevails" when a public record is disclosed only because the plaintiff filed an enforcement action. (*Los Angeles Times v. Alameda Corridor Transportation Auth*ority (2001) 88 Cal.App.4th 1381, 1391.) Some courts have also determined that a PRA plaintiff may be a prevailing party entitled to attorney's fees, despite the lack of a favorable judgment or other court action, if the lawsuit was a catalyst in motivating the defendant to provide the primary relief sought. (*Garcia*, *supra*, 220 Cal.App.4th at p. 1066; *Rogers v Superior Court* (1993) 19 Cal.App.4th 469, 482; *Belth v Garamendi* (1991) 232 Cal.App.3d 896, 901.) The DIR urges us to apply the former test and plaintiff the latter. The distinction between these tests does not matter here, however, because plaintiff's argument fails even under a catalyst theory.

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[14] Plaintiff concedes that she has the public records requested, and she does not ask this court to remand this matter for the trial court to decide her PRA motion on the merits.

The DIR produced some documents in response to plaintiff's first public records request, and, although it was late in providing a response to her supplemental request, it never refused to provide the public records. In addition, although plaintiff filed her PRA motion before the DIR's supplemental production, as the trial court recognized, her motion was subject to a number of procedural challenges, and the court ultimately denied it. Under these circumstances, the trial court could have properly found that plaintiff's PRA motion was not a catalyst in motivating the DIR to disclose public records. The court accordingly did not abuse its discretion in denying plaintiff's request for attorney's fees.[15]

### *D. The Motion for Prevailing Plaintiff Costs and Attorney's Fees under section 425.16*

Plaintiff's final challenge in these consolidated appeals is to the trial court's order denying her request for costs and attorney's fees under section 425.16. She argues that she is entitled to these fees and costs because she partially prevailed on the DIR's anti-SLAPP motion. We disagree.

Section 425.16, subdivision (c) provides that "[i]f the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." "Frivolous in this context means that any reasonable attorney would agree the motion was totally devoid of merit." (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 450.) We review an order awarding or denying attorney's fees pursuant to section 425.16, subdivision (c) for abuse of discretion. (*Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 469–472.)

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[15] On October 4, 2018, the trial court denied plaintiff's additional motion for attorney's fees and costs under the PRA because it was repetitive of the request made in the PRA motion; plaintiff, a self-represented litigant, was not entitled to attorney's fees; plaintiff was not the prevailing party under the PRA; and the court lacked jurisdiction over the motion because of plaintiff's appeal. Because the trial court did not abuse its discretion in determining that plaintiff was not a prevailing party under the PRA, we need not address the remainder of the parties' arguments with respect to this order.

No abuse of discretion occurred. The DIR succeeded in large part on its anti-SLAPP motion. Some of plaintiff's negligence allegations survived, but the trial court's initial inclination to grant the entire motion and its request for supplemental briefing suggests that the resolution of the motion was not predetermined or obvious. Under these circumstances, the trial court did not abuse its discretion in finding that the DIR's motion was not frivolous or solely intended to delay. Furthermore, because plaintiff represented herself, she cannot recover attorney's fees (see *Trope*, *supra*, 11 Cal.4th at p. 280; *Musaelian v. Adams* (2009) 45 Cal.4th 512, 514–515 [citing *Trope* and holding that, like Civil Code section 1717, section 128.7 does not authorize the award of attorney's fees to self-represented litigants as sanctions]), and her costs were subject to fee waiver.[16]

## IV. DISPOSITION

The judgment is affirmed. The DIR is to recover its costs on appeal.

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[16] The DIR argues that the trial court did not have jurisdiction to decide this motion because of plaintiff's notice of appeal. However, a trial court generally retains jurisdiction to award attorney's fees after the entry of a judgment or order, notwithstanding an appeal from the judgment or order. (*Carpenter*, *supra*, 151 Cal.App.4th at p. 463 ["The perfecting of defendants' appeal . . . did not automatically stay proceedings in the trial court to award fees and costs under [the anti-SLAPP statute]."]; *Hoover Community Hotel Development Corp. v. Thomson* (1985) 168 Cal.App.3d 485, 487 [appeal from grant of summary judgment did not deprive trial court of jurisdiction to consider request for attorney's fees and costs].)

BROWN, J.

WE CONCUR:

STREETER, ACTING P. J.

TUCHER, J.

**Appendix B.**

Order of the Superior Court of Alameda County that partially granted DIR's anti-SLAPP Motion in case No. RG17881790, August 17, 2018.

Tatyana E. Drevaleva
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Division of Labor Standards
Enforcement
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San Francisco, CA 94102

# Superior Court of California, County of Alameda
# Rene C. Davidson Alameda County Courthouse

| | |
|---|---|
| Drevaleva<br>Plaintiff/Petitioner(s)<br>VS.<br>Department of Industrial Relations<br>Defendant/Respondent(s)<br>(Abbreviated Title) | No. RG17881790<br>Order<br>Motion to Strike Complaint<br>Partial Grant |

The Special Motion to Strike Plaintiff's Complaint Pursuant to Code of Civil Procedure Section 425.16, filed on March 9, 2018, by State of California, Department of Industrial Relations ("DIR"), Division of Labor Standards Enforcement (sued as "Department of Industrial Relations"), was set for hearing on June 26, 2018, at 3:00 p.m. in Department 22 of the court before the Honorable Harry Jacobs. A tentative ruling was published and was contested. DIR appeared through counsel Nicholas Seitz. Plaintiff Tatyana E. Drevaleva ("Plaintiff") appeared on her own behalf. The matter was argued and submitted.

Prior to that hearing, the court held an initial hearing on April 10, 2018, at which Plaintiff appeared in person as did counsel for DIR. After hearing argument and taking the matter under submission, the court issued an order on May 18, 2018, continuing the hearing to June 12, 2018, for supplemental briefing to be filed by May 30, 2018, and supplemental responses to such papers by June 5, 2018. The hearing was thereafter continued to June 26, 2018 because of the court's unavailability on June 12, 2018. After considering such supplemental papers and responses, along with the papers filed before the initial hearing on April 10, 2018, and the arguments of the parties at both hearings, the court ORDERS that the motion is GRANTED IN PART and DENIED IN PART.

A. General Standards

"Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16.... If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (Baral v. Schnitt (2016) 1 Cal.5th 376, 384.)

"At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (Id., p. 396.)

B. The Alleged Activity on Which the Claims Are Based

The complaint, filed on November 8, 2017, alleges two causes of action: a First cause of action for "Libel (Code of Civil Procedure, 340(c))" and a Second cause of action for "Negligence (California Civil Code Section 1714(a))." (Complaint, unnumbered pp. 22-23 of 26.) Both causes of action arise out of DIR's investigation and handling of retaliation and wage claims Plaintiff filed with the DIR against her former employer, Alameda Health System ("AHS"), in September 2013 and October 2013. (Complaint, unnumbered pp. 4 and 16; Decl. of Catherine Daly, ¶ 6 and Exh. A; Decl. of Bobit Santos, ¶¶ 6-9.)

1. Libel

In the preliminary factual allegations, Plaintiff alleges the Deputy Labor Commissioners assigned to investigate the retaliation claim, Catherine Daly and her supervisor and manager Joan Healy and Eric Rood, incorrectly determined that no retaliation violation occurred and made statements to that effect that constituted libel. (Complaint, unnumbered pp. 4-12.) More specifically, Plaintiff alleges that DIR defamed her by: (1) Deputy Daly's statement in the June 16, 2014 letter about the legitimate, non-retaliatory reason offered by AHS for the termination of Plaintiff's employment (Complaint, p. 4:12-15, Attachment 8); (2) Deputy Daly's and Deputy Healy's statements that Plaintiff's evidence of retaliation was insufficient (id., p. 6:20-24); (3) Deputy Daly's statement in the June 16, 2014 letter about Plaintiff's knowledge of the impending termination of her employment (id., p. 7:3-8; Attachment 8); (4) Deputy Healy's statement in the December 19, 2016 email about Plaintiff's failure to keep a scheduled appointment with Deputy Daly on December 13, 2016 (id., at p. 7:10-12; Attachment 15); (5) Assistant Labor Commissioner Rood's statement in the December 29, 2016 letter that AHS's decision to terminate Plaintiff's employment predated Plaintiff's alleged protected activity (id., p. 8:1-17; Attachment 17); (6) Assistant Labor Commissioner Rood's statement in the December 29, 2016 letter about the legitimate, non-retaliatory reason offered by AHS for the termination of Plaintiff's employment (id., p. 8:24-28; Attachment 17); and (7) Deputy Bobit Santos's statement in the January 7, 2014 letter that the Labor Commissioner did not have jurisdiction to adjudicate Plaintiff's wage claim (id., p. 16:15-20, 23:10-11).

In the portion of the complaint designated "Summary," Plaintiff summarizes the "First cause of action: Libel (Code of Civil Procedure, 340(c)," as follows: "1) DIR said that I had committed negligence towards the patient even though my former employer AHS never said it. Despite my numerous requests, DIR never explained what my specific actions were that constituted negligence, 2) DIR said that I had missed my appointment on September 13th, 2016" though "DIR never provided me with evidence that the appointment really existed, 3) DIR lied that it had sent me the Determination Letter so I could file an appeal with Director of DIR Ms. Baker.... 4) DIR lied that I knew that I was going to be fired from AHS prior to sending my letter to Mr. Harding.... [and] 5) DIR lied that it didn't have jurisdiction over 'county employees' and denied my wage claim." (Complaint, unnumbered pp. 22-23.)

2. Negligence

Plaintiff also includes preliminary factual allegations as to negligence by DIR, including by: (1) Assistant Labor Commissioner Rood's and Deputy Healy's alleged failure to mail the December 29, 2016 determination letter to Plaintiff (Complaint, unnumbered p. 7:15-21); (2) Assistant Labor Commissioner Rood's statement in the December 29, 2016 determination letter that the question of whether Plaintiff performed negligently during her employment for AHS was beyond the Labor Commissioner's jurisdiction (id., p. 10:15-20); (3) Deputy Daly's alleged failure to ask AHS for a detailed explanation of Plaintiff's actions that AHS considered negligent (id., p. 10:20-27); (4) Deputy Daly's alleged failure to accept Plaintiff's explanation of why the termination of her employment was retaliatory (id., p. 10:27-28); (5) Deputy Daly's alleged failure to interview all the witnesses identified in Plaintiff's June 18, 2014 letter (id., p. 11:1-14); (6) Deputy Daly's alleged failure to investigate Plaintiff's claim and suspect that AHS was lying (id., p. 11:15-21); (7) Assistant Labor Commissioner Rood's statement in the December 29, 2016 determination letter that AHS explained to Plaintiff why her complaints about alleged wage violations were invalid (id., p. 11:22-12:2); (8) Deputy Santos's statement in the January 7, 2014 letter that "the Division does not have jurisdiction over claims for overtime, rest period premiums, differential pay, or waiting time penalties for county employees" (id., p. 16:15-21); (9) Deputy Santos's alleged failure to advise in the January 7, 2014 letter how Plaintiff could pursue her wage claim (id., p. 16:22-27); (10) DIR's investigation of Plaintiff's retaliation claim spanning more than three years (id., p. 16:14-15); (11) DIR's alleged attempt to force Plaintiff to withdraw her retaliation claim (id., p. 22:17-18); and (12) DIR's alleged failure to recognize fraud and

negligence by AHS (id., p. 22:20-21.)

In the portion of the complaint designated "Summary," Plaintiff summarizes the "Second cause of action: Negligence (California Civil Code Section 1714(a)," as follows: "1) DIR failed to contact with all witnesses whom I listed in my letter to Ms. Daly dated June 18th, 2014 and August 6th, 2016, 2) DIR recklessly disregarded the main witness Dr. Sina Rachmani who can confirm that my EKG reading was correct, 3) DIR processed my claim for a huge amount of time - over three years causing me a lot of suffering, pain, and pushing me into a huge financial debt, 4) DIR attempted to force me to withdraw my claim thus depriving me the opportunity to get reinstated back to work and to get all not received wages, benefits, and other compensation, 5) DIR never sent me the Determination letter thus depriving me an opportunity to file an appeal with Ms. Baker, 6) intentionally failing to recognize fraud and negligence committed by AHS towards me. DIR knew that I didn't perform negligence toward the patient but continued to support my retaliator AHS." (Complaint, unnumbered p. 23.)

C. DIR Met Its Burden of Showing that Some of the Alleged Conduct is Protected.

The court determines that DIR met its initial burden of showing that some of the acts and omissions on which Plaintiff bases her claims for relief, as described above, are acts of DIR "in furtherance of [its] right of petition or free speech under the United States or California Constitution in connection with a public issue" as defined in C.C.P. section 425.16. More specifically, as defined in section 425.16(e), the quoted phrase "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, [and] (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...." (C.C.P. § 425.16(e)(1) and (2).)

First, the court determines that each of the statements on which Plaintiff bases her first cause of action for libel - as identified in detail in section B.1 above - constitutes a "written or oral statement or writing made before ... [an] official proceeding authorized by law" or "in connection with an issue under consideration" in such an official proceeding. All of such communications and determinations occurred in the course of an investigation into the retaliation and wage claims Plaintiff filed with the DIR pursuant to Labor Code sections 98 et seq. The DIR, and the Division of Labor Standards Enforcement which is a division thereof, headed by the Labor Commissioner, is an "executive body." (See, e.g., Gov. Code §§ 11000, 15550; Lab. Code §§ 50 and 79.)

Plaintiff's filing of wage and retaliation claims with that body, pursuant to Labor Code sections 98 et seq., including 98.7, initiated an "executive" proceeding or "official proceeding authorized by law." (C.C.P. § 425.16(e)(1) and (2); see Lab. Code §§ 98.2 and 98.7 [authorizing the filing of a complaint with the DIR by "[a]ny person who believes that he or she has been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner," which is to be "investigated by a discrimination complaint investigator in accordance with this section"]; Dickens v. Provident Life And Acc. Ins. Co. (2004) 117 Cal.App.4th 705, 714 [contact between insurer and federal authorities about a potential violation of law was "preparatory to commencing an official proceeding authorized by law" and thus "within the ambit" of section 425.16]; Kibler v. Northern Inyo County Local Hosp. Dist. (2006) 39 Cal.4th 192, 199 [hospital's peer review procedure qualifies as an "official proceeding authorized by law," including because it is based on a "comprehensive scheme" for licensure of physicians under California statute]; Hansen v. California Dept. of Corrections and Rehabilitation (2008) 171 Cal.App.4th 1537, 1544 [internal investigation by Office of Internal Affairs of California Department of Corrections and Rehabilitation into allegations that employee engaged in misconduct and criminal activity was "an official proceeding authorized by law"]; Green v. Cortez (1984) 151 Cal.App.3d 1068, 1073 [police investigation was "official proceeding authorized by law" for purposes of section 47(b).])

As detailed in section B.1 above, all of the challenged statements and determinations by Deputy Labor Commissioners or Assistant Labor Commissioner Rood occurred in the course of the DIR's investigation and determinations of Plaintiff's wage and retaliation complaints. For example, Plaintiff alleges Deputy Daly and Deputy Healy defamed her by making statements about the reason offered by her former employer, AHS, for termination of her employment, by stating that they found Plaintiff's evidence of retaliation to be insufficient, by stating that Plaintiff knew of the impending termination of her employment at the time she engaged in protected activity, and by stating that Plaintiff had failed to keep a scheduled appointment with Deputy Daly. (See section B.1, ¶ 1, items (1) through (4) above,

and ¶ 2, items (1), (2) and (4).) All of these statements were made in the course of their investigation into Plaintiff's retaliation claim against her former employer, which was an "official proceeding." The same is true of the alleged statements by Assistant Labor Commissioner Rood that AHS's decision to terminate Plaintiff's employment predated Plaintiff's alleged protected activity and that AHS had offered a legitimate, non-retaliatory reason for termination of Plaintiff's employment, as well as Deputy Santos's statement that the Labor Commissioner did not have jurisdiction to adjudicate Plaintiff's wage claim. (See section B.1, ¶ 1, items (5) through (7), and ¶ 2, items (4) and (5) above.) The same is true of the allegation that "DIR lied that it had sent me the Determination Letter...." (Section B.1, ¶ 2, item (3).)

All of these statements were made in an "executive ... or any other official proceeding authorized by law" and "in connection with an issue under consideration or review by a[n] ... executive ... or any other official proceeding authorized by law...." (C.C.P. § 425.16(e)(1) and (2); cf. Dickens, supra, 117 Cal.App.4th at p. 714 [statements and writings during executive branch investigation were protected under section 425.16]; Seltzer v. Barnes (2010) 182 Cal.App.4th 953, 962 [a statement is "in connection with" a proceeding if "it relates to the substantive issues in the [proceeding] and is directed to persons having some interest" in it]; Hansen, supra, 171 Cal.App.4th at p. 1544 [allegedly false reports of criminal activity in agency investigation were made "in connection with an issue under consideration by an authorized official proceeding and thus constitute protected activity under subdivision (e)(2)."])

Second, the court determines that some (but not most) portions of the Second cause of action for negligence constitute protected activity. This cause of action, like the libel cause of action, arises out of DIR's investigation and handling of Plaintiff's retaliation and wage claims filed with the DIR in September 2013 and October 2013. (Complaint, unnumbered pp. 4 and 16; Decl. of Catherine Daly, ¶ 6 and Exh. A; Decl. of Bobit Santos, ¶¶ 6-9.)

Plaintiff argues that a "negligence" cause of action, in general, does not fall within C.C.P. § 425.16 because negligence "has nothing common with the definition of "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." (See Opp., p. 9, citing C.C.P. § 425.16(b)(1); see also Robles v. Chalilpoyil (2010) 181 Cal.App.4th 566, 575-576 [cited in Plaintiff's Response filed 5/24/18, p. 14]; Jespersen v. Zubiate-Beauchamp (2003) 114 Cal.App.4th 624, 631-632 [cited in Plaintiff's 5/24/18 Response, p. 15.) This is an overstatement. "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." (Navellier v. Sletten (2002) 29 Cal.4th 82, 92.) "To determine whether a cause of action arises from protected activity, we disregard its label and instead examine its gravamen by identifying [t]he allegedly wrongful and injury-producing conduct ... that provides the foundation for the claim." (Wilson v. Cable News Network, Inc. (2016) 6 Cal.App.5th 822, 831-832 [internal quotes and citations omitted.])

In Robles, supra, 181 Cal.App.4th at pp. 575-576, for example, the court determined that allegations that a retained expert breached his duty of care by "failing to continue to act as an independent expert and/or disrupting the prosecution of ... case by entering into a business relationship, agreement, and/or proposal with ... defendants ... while said [experts] were still obligated to act as the plaintiffs' expert" did not fall into any of the four categories of section 425.16(e) because it was not a written or oral statement or "conduct ... in connection with a public issue or an issue of public interest."

As to the matters specified in the preliminary allegations, identified in section B.2, first paragraph, items (1), (3), (4), (5), (6), (9), (10) and (12), and as to items (1), (2), (3) and (5) identified in the second paragraph of section B.2 above, the court determines that DIR has not met its burden of showing that such conduct falls within any of the subdivisions of section 425.16(e). Section 425.16(e)(1) and (e)(2), for example, encompass "any written or oral statement or writing" made in an official proceeding authorized by law. (C.C.P. § 425.16(e)(1) and (2).) The alleged conduct identified above is in the nature of delays, omissions and negligent handling of the claim rather than making a "written or oral statement or writing" in the investigation. Though DIR's investigation into Plaintiff's retaliation and wage claims constitutes an "official proceeding" as discussed above, the protection under those subdivisions nevertheless applies only to a "written or oral statement or writing" made therein. (See, e.g., Robles, supra, 181 Cal.App.4th at p. 576.) DIR has not cited sufficient authority that the alleged negligent handling described in the portions of the negligence cause of action identified above qualify for such protection.

The court is not persuaded by DIR's argument that an alleged omission - such as the alleged failure to

send a determination letter to Plaintiff at a particular address - falls within the protection because the right of free speech "comprises both a right to speak freely and also a right to refrain from doing so at all." (DIR Supp. Brief, p. 2, quoting Beeman v. Anthem Prescription Management, LLC (2013) 58 Cal.4th 329, 342.) The Beeman case did not address the extent to which an alleged "failure to speak" constitutes a "statement or writing" under section 425.16, and did not address that statute at all. Instead, it addressed the extent to which a law requiring drug companies to conduct and furnish studies to third-party payors could constitute a violation of the constitutional right to free speech. The court does not find such authority sufficiently analogous to the issue before it to satisfy DIR's burden as to the alleged negligence identified in section B.2, ¶ 1, items (1), (3), (4), (5), (6), (9), (10) and (12), or section B.2, ¶ 2, items (1), (2), (3), (5) and (6).

Nevertheless, as to the alleged acts or omissions in section B.2, ¶ 1, item (11), and ¶ 2, item (4) - i.e. that "DIR attempted to force me to withdraw my claim" - the court determines that this qualifies for protection under section 425.16(e)(1) and (2). At unnumbered page 6 of the complaint, Plaintiff alleges that "Ms. Daly even attempted to get me to withdraw my case (Attachment 14)" because she "wanted to avoid a negative decision that would become a matter of public record." Although the attachments to the complaint are not numbered, it appears that Attachment 14 is a form provided by DIR to Plaintiff dated August 25, 2016, captioned "Withdrawal of DLSE Retaliation Claim," stating "I withdraw my Labor Commissioner's Office Retaliation Complaint," with a space for her signature (which was not signed). This qualifies as a written ... statement or writing" in the course of an official proceeding authorized by law under section 425.16(e)(1) and (2).

The court also determines that DIR met its burden of showing that the alleged acts or omissions in section B.2, ¶ 1, items (2), (7), (8) and (11), qualify for protection under section 425.16(e)(1) and (2). Items (2) and (7) are both statements by DIR in its December 2016 determination letter pertaining to its investigation and conclusions. (Complaint, pp. 10:15-20 and 11:22-12:2.) Item (8) is a statement by Deputy Santos that "the Division does not have jurisdiction over claims for overtime, rest period premiums, differential pay, or waiting time penalties for county employees." (Id., p. 16:15-21.) Plaintiff's allegations that DIR "negligently" made these determinations and statements does not change the fact that the statements and determinations were made by Deputy Commissioners or the Assistant Commissioner in the context of the official investigations initiated by Plaintiff's wage and retaliation complaints. (See Lab. Code §§ 98.2 and 98.7.) Thus, such challenged activity constitutes a "written or oral statement or writing made" in an executive or official proceeding, or "made in connection with an issue under consideration or review" in such a proceeding, under section 425.16(e)(1) and (2).

In her initial and supplemental opposition papers, Plaintiff does not address or counter the cited and other authority as to protected activity under sections 425.16(e)(1) and (2). Instead, she cites general principles applicable to anti-SLAPP motions, argues (without citing authority) that "professional negligence" is not an "act ... in furtherance of the person's right of petition or free speech" under the statute, and argues that she has never "prevented DIR from free speech and free petitioning." As discussed above, the labeling of the statements and determinations by DIR deputy commissioners in the course of their investigation as "professional negligence" does not alter the fact that such statements and determinations were made in the course of an official proceeding authorized by law. The fact that Plaintiff is suing the DIR based on such statements and determinations is precisely the form of "chilling" activity that section 425.16 is designed to guard against, regardless of whether Plaintiff acted to restrain DIR from making such statements and determinations in the first instance. (See, e.g., Navellier, supra, 29 Cal.4th at pp. 93 ["Considering the purpose of the [anti-SLAPP] provision, ... the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights," quoting Church of Scientology v. Wollersheim (1996) 42 Cal.App.4th 628, 652.])

D. The Court Cannot Strike the Allegations of Unprotected Activity.

In its initial memorandum, DIR argued that the entire negligence cause of action "is subject to a special motion to strike ... if at least one of the underlying acts is protected activity, unless the allegations of protected activity are merely incidental to the unprotected activity." (Memo., p. 8, citing Salma v. Capon (2008) 161 Cal.App.4th 1275, 1287 ["A mixed cause of action is subject to section 425.16 if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity."]) In Baral, supra, 1 Cal.5th at p. 396, however, the California Supreme Court stated that "[w]hen relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded" in the first step of the anti-SLAPP analysis, and if the plaintiff is unable to demonstrate a probability of prevailing on a claim based on protected

conduct, allegations of such "protected activity" are stricken. The Court further stated: "the term 'cause of action' in the anti-SLAPP statute ... refers to claims for relief that are based on allegations of protected activity." (Id.)

In its order of May 18, 2018, the court continued the hearing in part for the parties to address whether, consistent with Baral, the court can strike portions of the negligence claim that are not based on protected activity. In its supplemental brief, DIR acknowledges that "in a 'mixed cause of action,' an anti-SLAPP motion 'may challenge any claim for relief founded on allegations of protected activity,' but 'it does not reach claims based on unprotected activity.'" (Supp. Brief, p. 3, quoting Baral, supra, 1 Cal.5th at p. 382.) Thus, the court determines that it will not strike the allegations in the negligence cause of action as to the matters identified in section B.2, first paragraph, items (1), (3), (4), (5), (6), (9), (10) and (12), or items (1), (2), (3) and (5) identified in the second paragraph of section B.2 above.

E. Plaintiff Did Not Meet Her "Prong Two" Burden as to the Protected Activity.

"If the court determines that relief is sought based on allegations arising from activity protected by the statute, ... the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken." (Baral, supra, 1 Cal.5th at p. 396.) Plaintiff did not meet this burden as to all of the alleged conduct on which the libel cause of action is based or as to the acts or omissions alleged in the negligence cause of action as identified in section B.2, ¶ 1, items (2), (7), (8) and (11), and ¶ 2, item (4).

As discussed in DIR's memoranda of points and authorities, Plaintiff's claims for relief based on such statements and determinations by DIR are legally deficient as a matter of law in light of the statutory immunities applicable to entities such as DIR who are sued for their statements and conduct in carrying out their governmental functions.

First, the challenged statements and conduct are immune under Government Code section 820.2, which states: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Under this statute, immunity applies to "basic policy decisions [which have] ... been [expressly] committed to coordinate branches of government," and as to which judicial interference would thus be "unseemly." (Caldwell v. Montoya (1995) 10 Cal.4th 972, 981, quoting Johnson v. State of California (1968) 69 Cal.2d 782, 793.) Although "ministerial" decisions that merely implement a basic policy already formulated are not immunized, immunity applies "to deliberate and considered policy decisions, in which a '[conscious] balancing [of] risks and advantages ... took place." (Id.)

Plaintiff's claims that the deputy labor commissioners assigned to her wage and retaliation complaints, and Assistant Labor Commissioner Rood, made false statements and erroneous determinations in the course of investigating and determining whether to pursue her claims allege precisely the type of "deliberate and considered policy decisions" covered by the section 820.2 immunity. (Cf. Masters v. San Bernardino County Employees Retirement Assn. (1995) 32 Cal.App.4th 30, 45 ["Adjudicatory decisions of administrative tribunals are a classic example of the kind of discretion vested in public officials which is intended to be immunized"]; Yee v. Mobilehome Park Rental Review Bd. (City of Escondido) (1998) 62 Cal.App.4th 1409, 1427 [members of mobile home rent review board were immune from liability from their determination under section 820.2 despite claim they abused their discretion in failing to receive substantial evidence in support of a rental increase decision]; Ogborn v. City of Lancaster (2002) 101 Cal.App.4th 448, 460 [director of city department of community development who presided at nuisance abatement hearing was entitled to immunity from trespass and conversion claims based on entry and demolition of tenant's house following the hearing].)

Labor Code section 98.7, pertaining to complaints of employment discrimination made to the DIR, gives the DIR broad discretion in investigating such complaints and determining whether to pursue claims against the employer identified therein. (See, e.g., Lab. Code § 98.7(a) ["The division may, with or without receiving a complaint, commence investigating an employer...."]; Lab. Code § 98.7(b)(1) ["The Labor Commissioner may hold an investigative hearing whenever the Labor Commissioner determines that a hearing is necessary to fully establish the facts.... If a complainant files an action in court against an employer based on the same or similar facts as a complaint made under this section, the Labor

Commissioner may, at his or her discretion, close the investigation. If a complainant has already challenged his or her discipline or discharge through the State Personnel Board, or other internal governmental procedure, or through a collective bargaining agreement grievance procedure that incorporates antiretaliation provisions under this code, the Labor Commissioner may reject the complaint."]; Lab. Code § 98.7(c)(1) ["If the Labor Commissioner determines a violation has occurred, the Labor Commissioner may issue a determination in accordance with this section or issue a citation in accordance with Section 98.74."]) Similar discretion is provided under Labor Code § 98.3, pertaining to pursuing claims against employers for wages. (See Lab. Code § 98.3 ["The Labor Commissioner may prosecute all actions for the collection of wages, penalties, and demands of persons who in the judgment of the Labor Commissioner are financially unable to employ counsel and the Labor Commissioner believes have claims which are valid and enforceable."])

Second, the challenged statements and determinations are immune under Government Code § 821.6, which states: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." "California courts construe section 821.6 broadly in furtherance of its purpose to protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil suits." (Doe v. State (2017) 8 Cal.App.5th 832, 843-844, quoting Gillan v. City of San Marino (2007) 147 Cal.App.4th 1033, 1048.) "Courts have long held that acts undertaken in the course of an investigation or in preparation for instituting a judicial proceeding cannot give rise to liability, even if no proceeding is ultimately instituted." (Id., citing Gillan, supra, 147 Cal.App.4th at p. 1048; Richardson-Tunnell v. School Insurance Program for Employees (SIPE) (2007) 157 Cal.App.4th 1056, 1062; Ingram v. Flippo (1999) 74 Cal.App.4th 1280, 1293 [district attorney was immune under section 821.6 for making known the results of his investigation into alleged wrongdoing, including in a press release, "even though he decided not to prosecute an action at the time."]) As discussed above, the applicable statutes give the Labor Commissioner broad discretion in investigating and deciding whether to pursue administrative or judicial proceedings against an employer who is the subject of a retaliation or wage claim.

Third, the allegedly libelous statements are immune under Government Code § 818.8, which states: "A public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional." Thus, Plaintiff's allegations that DIR employees made false statements, such as that "DIR lied that it had sent me the Determination Letter" or "DIR lied that I knew that I was going to be fired from AHS prior to sending my letter to Ms. Harding" or "DIR lied that it didn't have jurisdiction over 'county employees' and denied my wage claim" (Complaint, unnumbered p. 23:3-11), are subject to immunity under this statute.

Fourth, the challenged statements and conduct are privileged from liability under Civil Code section 47, which states: "A privileged publication or broadcast is one made: (a) In the proper discharge of an official duty" or "(b) ... (3) in any other official proceeding authorized by law...." (See, e.g., Ingram v. Flippo, supra, 74 Cal.App.4th at pp. 1293-1294 [official duty privilege under section 47(a) and 47(b)(3) applied to statements by district attorney in press release as to the results of his investigation into wrongdoing]; Silberg v. Anderson (1990) 50 Cal.3d 205, 213 [purpose of the privilege "is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing"].) This conclusion is consistent with numerous cases holding that statements made in connection with government investigations are privileged under section 47. (See, e.g., Braun v. Bureau of State Audits (1998) 67 Cal.App.4th 1382, 1389-1390 ["statements made in furtherance of Reporting Act audits are absolutely privileged under Civil Code section 47"]; Kemmerer v. County of Fresno (1988) 200 Cal.App.3d 1426, 1441 [civil service investigation]; O'Shea v. General Telephone Co. (1987) 193 Cal.App.3d 1040, 1047-1049 [California Highway Patrol background employment investigation]; Dong v. Board of Trustees (1987) 191 Cal.App.3d 1572, 1594 [National Institutes of Health investigation]; Green v. Cortez (1984) 151 Cal.App.3d 1068, 1073 [internal police investigation]; King v. Borges (1972) 28 Cal.App.3d 27, 32 [Real Estate Commissioner investigation].)

Fifth, Government Code section 815(a) states: "Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." Plaintiff's second cause of action for "professional negligence" seeks to impose liability on the DIR for allegedly negligently investigating Plaintiff's retaliation claim, including by making the statements identified in section B.2, ¶ 1, items (2), (7), (8) and (11), and ¶ 2, item (4), on which the negligence claim is based in part. The cited statutory basis for such cause of action is Civil Code § 1714, which states a general principle that "[e]veryone is

responsible ... for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person...." A common law negligence theory, even if based on Civil Code § 1714, is not a sufficient statutory basis for imposing liability on a public entity. (See Eastburn v. Regional Fire Protection Authority (2003) 31 Cal.4th 1175, 1180 and 1182.)

Although Plaintiff alleges elsewhere in the complaint that DIR or its deputy commissioners violated a "mandatory duty" pursuant to Government Code section 815.6, liability on this theory requires proof that DIR was "under a mandatory duty imposed by an enactment" that was "designed to protect" against the injury claimed and that the injury was "proximately caused" by the public entity's failure to discharge its mandatory duty. (Haggis v. City of Los Angeles (2000) 22 Cal.4th 490, 498; Gov. Code § 815.6.) The first "and foremost" precondition to liability is that "the enactment at issue be obligatory, rather than merely discretionary or permissive, in its directions to the public entity...." (Haggis, supra, 22 Cal.4th at p. 498.)

"Thus, actionable mandatory duties have been found where a county failed to release an arrestee after dismissal of charges as required by Penal Code section 1384 (Sullivan v. County of Los Angeles (1974) 12 Cal.3d 710), or where the agency failed to register a dismissal of charges as required by Penal Code section 1384 (Bradford v. State of California (1973) 36 Cal.App.3d 16), or where the entity failed to release the arrestee under the duty to release on bail prescribed by Penal Code section 1295 (Shakespeare v. City of Pasadena (1964) 230 Cal.App.2d 375)." (de Villers v. County of San Diego (2007) 156 Cal.App.4th 238, 260.) "In each of these cases, the required action was clear and discrete and required no evaluation of whether it had in fact occurred." (Id.) "In contrast, when the statutorily prescribed act involves debatable issues over whether the steps taken by the entity adequately fulfilled its obligation, we believe the act necessarily embodies discretionary determinations by the agency regarding how best to fulfill the mandate, and this discretion removes the duty from the type of activity that supports a claim under section 815.6." (Id., p. 271.)

Plaintiff's allegations identified in section B.2, ¶ 1, items (2), (7), (8) and (11), and ¶ 2, item (4) - to the effect that DIR employees made false statements about the Labor Commissioner's jurisdiction or about Plaintiff's former employer's explanation about the alleged wage violations, or sent a letter to Plaintiff encouraging her to withdraw her retaliation claim - do not state a violation of a duty to take "required action [that] was clear and discrete and required no evaluation" sufficient for liability under section 815.6.

Plaintiff's opposition papers do not sufficiently address or overcome any of the above statutory immunities or other arguments rendering her claims legally deficient, and Plaintiff failed to introduce admissible evidence sufficient to support her causes of action despite such immunities. Instead, Plaintiff argues that DIR failed sufficiently to "explain" or prove the truth of its statements and determinations in the investigation, and argues that she did not perform medical negligence towards a patient as DIR intimated in its investigation. (See, e.g., Opp., pp. 6-10.) As discussed above, however, Plaintiff's claims are legally deficient because of statutory immunities and privileges designed to protect governmental agencies and their employees against lawsuits directed to their statements and discretionary decisions made in the course of carrying out their duties, regardless of the asserted validity or invalidity of those decisions. Plaintiff's arguments urging the erroneous or deficient nature of the investigations do not effectively counter this authority or meet her burden of showing the legal sufficiency of her claims.

F. Plaintiff's Objections to DIR's Methods of Service

Plaintiff's Objections to DIR's Methods of Service of Replies and Written Objections to Evidence, filed on April 4, 2018, and Plaintiff's Objection to DIR's Method of Serving me with two Oppositions on April 04, 2018, are OVERRULED. Though DIR's reply papers were served by regular mail instead of overnight mail, they were served well before the fifth court day before the hearing as required by C.C.P. § 1005(c), such that Plaintiff received such papers by that deadline. DIR's opposition to Plaintiff's objections, filed on April 4, 2018, could not have been filed sooner given that Plaintiff did not serve her objections until that date. Further, Plaintiff has not shown any prejudice from the method of service of the reply papers, objections or opposition to Plaintiff's objections. (See C.C.P. § 475.) All parties had a sufficient opportunity to address all papers filed by all parties in the two hearings held on this motion as well as in the supplemental papers the court permitted in its order of May 18, 2018, after continuing the motion for a second hearing.

G. Defendant's Written Objections to Evidence

Defendant's Written Objections to Evidence, filed on March 23, 2018, and numbered 1 through 56, are SUSTAINED IN PART and OVERRULED IN PART. All of these objections are to arguments made in Plaintiff's memorandum of points and authorities in opposition to the motion, filed on March 21, 2018, on the ground that the arguments were not supported by a declaration under penalty of perjury. Some of the arguments were supported by an accompanying declaration filed on March 21, 2018, so the objections are overruled to the extent the declaration addressed the challenged matters. As to the remaining objections, the court sustains them to the following extent: the court has treated the challenged portions of the opposition memorandum as argument only, and not evidence.

H. Requests for Judicial Notice

DIR's Request for Judicial Notice, filed on March 15, 2018, is GRANTED, but the court does not take judicial notice of the purported legal effect of the attached document.

Plaintiff's Request to take a Judicial Notice, filed on March 19, 2018, and Plaintiff's Second Request to Take a Judicial Notice, filed on April 9, 2018, are GRANTED, but the court does not take judicial notice of the truth of any of the matters asserted in the attached exhibits and does not make any determination that the matters are relevant to the instant motion. The court notes that the Requests do not include a reservation number on the caption page so it is not clear whether they relate to the instant motion or to another motion that was on calendar on April 10, 2018, of which there were two others.

I. Reasonable Attorney's Fees

Because DIR prevailed in large part on its anti-SLAPP motion, it is entitled to its reasonable attorney's fees and costs incurred on this motion. (See C.C.P. § 425.16(c)(1); Ketchum v. Moses (2001) 24 Cal.4th 1122, 1131.) The court has broad authority to determine the amount of a reasonable fee. (Ketchum, supra, 24 Cal.4th at pp. 1136 and 1141; see also PLCM Group v. Drexler (2000) 22 Cal.4th 1084, 1094-1095.) The fee setting inquiry generally focuses on the "lodestar" - i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. (Id., p. 1095; Ketchum, supra, 24 Cal.4th at p. 1136) That figure may then be adjusted based on numerous factors, "in order to fix the fee at the fair market value for the legal services provided." (Id.).)

The declarations in support of the motion and reply attested that DIR's counsel expended ten hours on the motion and six hours on the reply. DIR also seeks compensation for six hours spent in connection with Plaintiff's motions to take discovery and to continue the hearings on the anti-SLAPP, demurrer and other motion to strike hearing. The court will not include such additional time, as compensation is to be limited to expenses in connection with the anti-SLAPP motion itself. (See, e.g., Lafayette Morehouse, Inc. v. Chronicle Publishing Co. (1995) 39 Cal.App.4th 1379, 1383.) DIR also seeks compensation for five hours at the hearing on April 10, 2018 and on the supplemental papers. The court will include compensation for such time, bringing the total for the "lodestar" calculation to 21 hours.

As to the reasonable hourly rate, DIR has requested $400 per hour, attaching a declaration of Nicholas Seitz asserting that this is "at or below the market with attorneys with my education and experience" and discussing his experience and qualifications. Though the court finds the quality of Mr. Seitz's representation high, and could award compensation at the $400 amount sought, the court determines that an appropriate rate in the circumstances of the instant case is $250 per hour. The court further determines that compensation for 21 hours at $250 per hour provides DIR with reasonable and appropriate compensation for the services performed in connection with the anti-SLAPP motion.

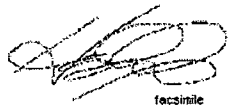
J. Conclusion

In accordance with the above, IT IS ORDERED that the entire First cause of action for libel, as well as the preliminary factual allegations described above in section B.1, first paragraph, are STRICKEN from the complaint. IT IS FURTHER ORDERED that the preliminary factual allegations described above in section B.2, first paragraph, items (2), (7), (8) and (11), and section B.2, second paragraph, item (4), are STRICKEN from the complaint.

IT IS FURTHER ORDERED that DIR is awarded fees against Plaintiff under C.C.P. section 425.16(c)(1) in the amount of $5,250.00.

The clerk is directed to serve copies of this order, with proof of service, to counsel and to self-represented parties of record by mail, which shall satisfy the purposes of notice of entry of order under C.C.P. § 1019.5(a).

Dated: 08/17/2018




Judge Harry Jacobs

**Appendix C.**

Order of the Superior Court of Alameda County that sustained DIR's Demurrer without leave to amend to the remaining allegations within the Second Cause of Action 'Professional Negligence" and that dismissed the action in case No. RG17881790, August 17, 2018.

Tatyana E. Drevaleva
10660 Hidden Mesa Place
Monterey, CA 93940____

Division of Labor Standards
Enforcement
Attn: Seitz, Nicholas
455 Golden Gate Avenue
9th Floor
San Francisco, CA 94102

# Superior Court of California, County of Alameda
# Rene C. Davidson Alameda County Courthouse

| | |
|---|---|
| Drevaleva<br>Plaintiff/Petitioner(s)<br>VS.<br>Department of Industrial Relations<br>Defendant/Respondent(s)<br>(Abbreviated Title) | No. RG17881790<br>Order<br>Demurrer to Complaint<br>Sustained |

The Demurrer to Plaintiff's Complaint, filed by State of California, Department of Industrial Relations ("DIR"), Division of Labor Standards Enforcement (sued as "Department of Industrial Relations") on February 9, 2018, was set for hearing on June 26, 2018, at 3:00 p.m. in Department 22 before the Honorable Harry Jacobs. A tentative ruling was published and was contested.

The matter was argued and submitted. Good cause appearing, IT IS HEREBY ORDERED as follows:

A. First Cause of Action

The demurrer to the First cause of action for libel is DROPPED as moot in light of the court's accompanying order granting DIR's special motion to strike the First cause of action from the complaint pursuant to C.C.P. section 425.16. Nevertheless, even if the court had not stricken the cause of action pursuant to section 425.16, it would sustain DIR's demurrer to the entire First cause of action for the reasons discussed below and in the court's accompanying order on the special motion to strike.

B. Second Cause of Action

As discussed in the court's accompanying order on the special motion to strike, the Second cause of action for "Negligence (California Civil Code Section 1714(a))" arises out of DIR's investigation and handling of retaliation and wage claims Plaintiff filed with the DIR against her former employer, Alameda Health System ("AHS"), in September 2013 and October 2013. (Complaint, unnumbered pp. 4 and 16.)

In her preliminary factual allegations, Plaintiff refers to the following alleged acts or omissions as supporting her "negligence" claim against DIR: (1) Assistant Labor Commissioner Rood's and Deputy Healy's alleged failure to mail the December 29, 2016 determination letter to Plaintiff (Complaint, unnumbered p. 7:15-21); (2) Assistant Labor Commissioner Rood's statement in the December 29, 2016 determination letter that the question of whether Plaintiff performed negligently during her employment for AHS was beyond the Labor Commissioner's jurisdiction (id., p. 10:15-20); (3) Deputy Daly's alleged failure to ask AHS for a detailed explanation of Plaintiff's actions that AHS considered negligent (id., p. 10:20-27); (4) Deputy Daly's alleged failure to accept Plaintiff's explanation of why the termination of her employment was retaliatory (id., p. 10:27-28); (5) Deputy Daly's alleged failure to interview all the witnesses identified in Plaintiff's June 18, 2014 letter (id., p. 11:1-14); (6) Deputy Daly's alleged failure to investigate Plaintiff's claim and suspect that AHS was lying (id., p. 11:15-21); (7) Assistant Labor Commissioner Rood's statement in the December 29, 2016 determination letter that

AHS explained to Plaintiff why her complaints about alleged wage violations were invalid (id., p. 11:22-12:2); (8) Deputy Santos's statement in the January 7, 2014 letter that "the Division does not have jurisdiction over claims for overtime, rest period premiums, differential pay, or waiting time penalties for county employees" (id., p. 16:15-21); (9) Deputy Santos's alleged failure to advise in the January 7, 2014 letter how Plaintiff could pursue her wage claim (id., p. 16:22-27); (10) DIR's investigation of Plaintiff's retaliation claim spanning more than three years (id., p. 16:14-15); (11) DIR's alleged attempt to force Plaintiff to withdraw her retaliation claim (id., p. 22:17-18); and (12) DIR's alleged failure to recognize fraud and negligence by AHS (id., p. 22:20-21.)

In the portion of the complaint designated "Summary," Plaintiff summarizes the "Second cause of action: Negligence (California Civil Code Section 1714(a)," as follows: "1) DIR failed to contact with all witnesses whom I listed in my letter to Ms. Daly dated June 18th, 2014 and August 6th, 2016, 2) DIR recklessly disregarded the main witness Dr. Sina Rachmani who can confirm that my EKG reading was correct, 3) DIR processed my claim for a huge amount of time - over three years causing me a lot of suffering, pain, and pushing me into a huge financial debt, 4) DIR attempted to force me to withdraw my claim thus depriving me the opportunity to get reinstated back to work and to get all not received wages, benefits, and other compensation, 5) DIR never sent me the Determination letter thus depriving me an opportunity to file an appeal with Ms. Baker, 6) intentionally failing to recognize fraud and negligence committed by AHS towards me. DIR knew that I didn't perform negligence toward the patient but continued to support my retaliator AHS." (Complaint, unnumbered p. 23.)

In its accompanying order granting in part DIR's special motion to strike, the court ordered the portion of the cause of action described in item (4) of the above paragraph, and items (2), (7), (8) and (11) of the paragraph above that, stricken from the complaint pursuant to C.C.P. section 425.16. Thus, the demurrer is DROPPED as moot to the extent it addresses those portions of the cause of action. Nevertheless, even if the court had not stricken such portions of the cause of action pursuant to section 425.16, it would sustain DIR's demurrer to the entire Second cause of action for the reasons discussed below.

The demurrer to the remaining portions of the Second cause of action is SUSTAINED, pursuant to C.C.P. § 430.10(e), WITHOUT LEAVE TO AMEND. Plaintiff has not included allegations sufficient to constitute a cause of action against DIR based on such alleged conduct. As discussed in DIR's memoranda of points and authorities, Plaintiff's claims for relief are legally deficient as a matter of law in light of the statutory immunities applicable to entities such as DIR who are sued for their statements and conduct in carrying out their governmental functions.

First, the alleged statements and conduct supporting the negligence cause of action are immune under Government Code section 820.2, which states: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Under this statute, immunity applies to "basic policy decisions [which have] ... been [expressly] committed to coordinate branches of government," and as to which judicial interference would thus be "unseemly." (Caldwell v. Montoya (1995) 10 Cal.4th 972, 981, quoting Johnson v. State of California (1968) 69 Cal.2d 782, 793.) Although "ministerial" decisions that merely implement a basic policy already formulated are not immunized, immunity applies "to deliberate and considered policy decisions, in which a '[conscious] balancing [of] risks and advantages ... took place." (Id.)

Plaintiff's claims that the deputy labor commissioners assigned to her wage and retaliation complaints failed to contact certain witnesses, "disregarded" another witness, unduly delayed processing her claim and failed to send a determination letter to a specified address, as well as making false statements and erroneous determinations in the process, allege precisely the type of involve the type of "deliberate and considered policy decisions" covered by the section 820.2 immunity. (Cf. Masters v. San Bernardino County Employees Retirement Assn. (1995) 32 Cal.App.4th 30, 45 ["Adjudicatory decisions of administrative tribunals are a classic example of the kind of discretion vested in public officials which is intended to be immunized"]; Yee v. Mobilehome Park Rental Review Bd. (City of Escondido) (1998) 62 Cal.App.4th 1409, 1427 [members of mobile home rent review board were immune from liability from their determination under section 820.2 despite claim they abused their discretion in failing to receive substantial evidence in support of a rental increase decision]; Ogborn v. City of Lancaster (2002) 101 Cal.App.4th 448, 460 [director of city department of community development who presided at nuisance abatement hearing was entitled to immunity from trespass and conversion claims based on entry and demolition of tenant's house following the hearing].)

Labor Code section 98.7, pertaining to complaints of employment discrimination made to the DIR, gives the DIR broad discretion in investigating such complaints and determining whether to pursue claims against the employer identified therein. (See, e.g., Lab. Code § 98.7(a) ["The division may, with or without receiving a complaint, commence investigating an employer...."]; Lab. Code § 98.7(b)(1) ["The Labor Commissioner may hold an investigative hearing whenever the Labor Commissioner determines that a hearing is necessary to fully establish the facts.... If a complainant files an action in court against an employer based on the same or similar facts as a complaint made under this section, the Labor Commissioner may, at his or her discretion, close the investigation. If a complainant has already challenged his or her discipline or discharge through the State Personnel Board, or other internal governmental procedure, or through a collective bargaining agreement grievance procedure that incorporates antiretaliation provisions under this code, the Labor Commissioner may reject the complaint."]; Lab. Code § 98.7(c)(1) ["If the Labor Commissioner determines a violation has occurred, the Labor Commissioner may issue a determination in accordance with this section or issue a citation in accordance with Section 98.74."]) Similar discretion is provided under Labor Code § 98.3, pertaining to pursuing claims against employers for wages. (See Lab. Code § 98.3 ["The Labor Commissioner may prosecute all actions for the collection of wages, penalties, and demands of persons who in the judgment of the Labor Commissioner are financially unable to employ counsel and the Labor Commissioner believes have claims which are valid and enforceable."])

Second, the alleged "negligent" acts or omissions are immune under Government Code § 821.6, which states: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." "California courts construe section 821.6 broadly in furtherance of its purpose to protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil suits." (Doe v. State (2017) 8 Cal.App.5th 832, 843-844, quoting Gillan v. City of San Marino (2007) 147 Cal.App.4th 1033, 1048.) "Courts have long held that acts undertaken in the course of an investigation or in preparation for instituting a judicial proceeding cannot give rise to liability, even if no proceeding is ultimately instituted." (Id., citing Gillan, supra, 147 Cal.App.4th at p. 1048; Richardson-Tunnell v. School Insurance Program for Employees (SIPE) (2007) 157 Cal.App.4th 1056, 1062; Ingram v. Flippo (1999) 74 Cal.App.4th 1280, 1293 [district attorney was immune under section 821.6 for making known the results of his investigation into alleged wrongdoing, including in a press release, "even though he decided not to prosecute an action at the time."]) As discussed above, the applicable statutes give the Labor Commissioner broad discretion in investigating and deciding whether to pursue administrative or judicial proceedings against an employer who is the subject of a retaliation or wage claim, including whether to commence an investigation, whether to hold an investigative hearing, whether to close the investigation, whether to reject the complaint, whether to issue a determination or send a citation in accordance with Section 98.74, and whether to prosecute an action for the collection of wages, penalties, and demands of employees. (See, e.g., Lab. Code § 98.7, subds. (a), (b)(1) and (c)(1), and § 98.3.)

Third, Government Code section 815(a) states: "Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." Plaintiff's second cause of action for "professional negligence" seeks to impose liability on the DIR for allegedly negligently investigating Plaintiff's retaliation claim, including by failing to interview certain witnesses, "negligently" believing explanations made by AHS, negligently determining the Labor Commissioner lacked jurisdiction as to Plaintiff's wage claims, and the like. The cited statutory basis for such cause of action is Civil Code § 1714, which states a general principle that "[e]veryone is responsible ... for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person...." A common law negligence theory, even if based on Civil Code § 1714, is not a sufficient statutory basis for imposing liability on a public entity. (See Eastburn v. Regional Fire Protection Authority (2003) 31 Cal.4th 1175, 1180 and 1182.)

Fourth, to the extent the negligence claim is based on DIR's statements and determinations, DIR is privileged from liability under Civil Code section 47, which states: "A privileged publication or broadcast is one made: (a) In the proper discharge of an official duty" or "(b) ... (3) in any other official proceeding authorized by law...." (See, e.g., Ingram v. Flippo, supra, 74 Cal.App.4th at pp. 1293-1294 [official duty privilege under section 47(a) and 47(b)(3) applied to statements by district attorney in press release as to the results of his investigation into wrongdoing]; Silberg v. Anderson (1990) 50 Cal.3d 205, 213 [purpose of the privilege "is to assure utmost freedom of communication between

citizens and public authorities whose responsibility is to investigate and remedy wrongdoing"].) This conclusion is consistent with numerous cases holding that statements made in connection with government investigations are privileged under section 47. (See, e.g., Braun v. Bureau of State Audits (1998) 67 Cal.App.4th 1382, 1389-1390 ["statements made in furtherance of Reporting Act audits are absolutely privileged under Civil Code section 47"]; Kemmerer v. County of Fresno (1988) 200 Cal.App.3d 1426, 1441 [civil service investigation]; O'Shea v. General Telephone Co. (1987) 193 Cal.App.3d 1040, 1047-1049 [California Highway Patrol background employment investigation]; Dong v. Board of Trustees (1987) 191 Cal.App.3d 1572, 1594 [National Institutes of Health investigation]; Green v. Cortez (1984) 151 Cal.App.3d 1068, 1073 [internal police investigation]; King v. Borges (1972) 28 Cal.App.3d 27, 32 [Real Estate Commissioner investigation].)

Fifth, although Plaintiff alleges in one or two places in the complaint that DIR or its deputy commissioners violated a "mandatory duty" pursuant to Government Code section 815.6, liability on this theory requires establishing that DIR was "under a mandatory duty imposed by an enactment" that was "designed to protect" against the injury claimed and that the injury was "proximately caused" by the public entity's failure to discharge its mandatory duty. (Haggis v. City of Los Angeles (2000) 22 Cal.4th 490, 498; Gov. Code § 815.6.) The first "and foremost" precondition to liability is that "the enactment at issue be obligatory, rather than merely discretionary or permissive, in its directions to the public entity...." (Haggis, supra, 22 Cal.4th at p. 498.)

"Thus, actionable mandatory duties have been found where a county failed to release an arrestee after dismissal of charges as required by Penal Code section 1384 (Sullivan v. County of Los Angeles (1974) 12 Cal.3d 710), or where the agency failed to register a dismissal of charges as required by Penal Code section 1384 (Bradford v. State of California (1973) 36 Cal.App.3d 16), or where the entity failed to release the arrestee under the duty to release on bail prescribed by Penal Code section 1295 (Shakespeare v. City of Pasadena (1964) 230 Cal.App.2d 375)." (de Villers v. County of San Diego (2007) 156 Cal.App.4th 238, 260.) "In each of these cases, the required action was clear and discrete and required no evaluation of whether it had in fact occurred." (Id.) "In contrast, when the statutorily prescribed act involves debatable issues over whether the steps taken by the entity adequately fulfilled its obligation, we believe the act necessarily embodies discretionary determinations by the agency regarding how best to fulfill the mandate, and this discretion removes the duty from the type of activity that supports a claim under section 815.6." (Id., p. 271.)

Plaintiff's allegations supporting her "negligence" cause of action - including that DIR failed to contact certain witnesses, "disregarded" another witness, unduly delayed processing Plaintiff's claim, failed to send a determination letter to a specified address, made incorrect statements about the Labor Commissioner's jurisdiction, negligently believed Plaintiff's former employer's explanation about the matters, or sent a letter to Plaintiff encouraging her to withdraw her retaliation claim - do not state the type of failure to take "required action [that] was clear and discrete and required no evaluation" sufficient for liability under section 815.6. For example, though Labor Code section 98.7(a) states that a retaliation complaint "shall be investigated by a discrimination complaint investigator in accordance with this section," and section 98.7(b)(1) states that the "investigation shall include, where appropriate, interviews with the complainant, respondent, and any witnesses who may have information concerning the alleged violation, and a review of any documents that may be relevant to the disposition of the complaint," it does not mandate interviewing the complainant, specified witnesses or other investigatory actions in each and every case regardless of the circumstances, instead embodying "discretionary determinations by the agency regarding how best to fulfill the mandate." (de Villers, supra, 156 Cal.App.4th at p. 271.)

As to the sending of a "determination letter," Plaintiff has not included allegations as to a "mandatory duty imposed by an enactment," which is "obligatory, rather than merely discretionary or permissive," that was "designed to protect" against the injury claimed or that the injury was "proximately caused" by the public entity's failure to discharge its mandatory duty. (Haggis, supra, 22 Cal.4th at p. 498.) Though section 98.7(d)(1) states that if "the Labor Commissioner determines no violation has occurred, he or she shall notify the complainant and respondent and shall dismiss the complaint," it does not specify that this must be in the form of a "determination letter" or specify exactly how the Commissioner is to "notify" the complainant. Plaintiff has not alleged that she was not notified of the determination (and in fact acknowledges she was) but instead that a "letter" was not sent to a particular mailing address.

As to Plaintiff's allegation that the determination was not made within one year after the filing of the

complaint as specified in Labor Code section 98.7(e), Plaintiff has not alleged facts showing harm proximately caused to her by the alleged delay, or established that this provision of section 98.7(e) was "designed to protect" Plaintiff against any such injury. (See Haggis, supra, 22 Cal.4th at p. 498; Gov. Code § 815.6.) Plaintiff acknowledges she was notified early in the investigation that DIR was not intending to exercise its discretion to pursue a claim against her former employer based on her retaliation and wage claims, even though the formal determination as to the retaliation claim was not sent until late 2016. Plaintiff has not alleged that she was precluded from pursuing her own claims against AHS for alleged retaliation and/or wage claims, and in fact acknowledges she brought a separate action against AHS in federal court (which is currently on appeal to the Ninth Circuit Court of Appeals). Under the Labor Code statutes at issue, the Labor Commissioner has discretion whether to pursue claims against an employer, independent of the employee's right to pursue such claims on his or her own behalf.

Plaintiff's opposition papers do not sufficiently address or overcome any of the above statutory immunities or other arguments rendering her claims legally deficient. Instead, Plaintiff argues that DIR failed sufficiently to "explain" or prove the truth of its statements and determinations in the investigation, and argues that she did not perform medical negligence towards a patient as DIR intimated in its investigation. As discussed above, however, Plaintiff's claims are legally deficient because of statutory immunities and privileges designed to protect governmental agencies and their employees against lawsuits directed to their statements and discretionary decisions made in the course of carrying out their duties, regardless of the asserted validity or invalidity of those decisions. Plaintiff's arguments urging the erroneous or deficient nature of the investigations do not effectively counter this authority or meet her burden of showing the legal sufficiency of her claims.

C. Plaintiff Did Not Request Leave to Amend

Plaintiff's opposition papers do not request leave to amend or make a sufficient showing how she could amend to overcome the above deficiencies. (See Goodman v. Kennedy (1976) 18 Cal.3d 335, 349.) To the contrary, in response to the court's inquiry at the hearing on June 26, 2018 whether Plaintiff was requesting leave to amend or had a basis for amending, Plaintiff stated that she had no intention of amending the complaint and instead would file an appeal if the demurrer were sustained. Accordingly, the court does not grant leave to amend, which was not requested.

D. Requests for Judicial Notice

As discussed in the court's accompanying order on the special motion to strike, Plaintiff filed a Request to take a Judicial Notice on March 19, 2018 and a Second Request to Take a Judicial Notice on April 9, 2018. The Requests do not include a reservation number on the caption page so it is not clear whether they relate to the instant demurrer or to another motion that was on calendar on April 10, 2018, of which there were two others. In the event the Requests pertain to the instant demurrer, they are GRANTED, but the court does not take judicial notice of the truth of any of the matters asserted in the attached exhibits and does not make any determination that the matters are relevant to the instant demurrer.

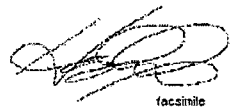
E. Conclusion

In accordance with the above, IT IS ORDERED that DIR's demurrer to the complaint is SUSTAINED WITHOUT LEAVE TO AMEND as to all portions of the complaint remaining after the court's accompanying order striking portions thereof. As discussed above, even if the court had not stricken such portions of the complaint pursuant to section 425.16, it would sustain DIR's demurrer to the entire complaint for the reasons discussed above and in the court's accompanying order.

Accordingly, IT IS ORDERED that the entire action is DISMISSED.

The clerk is directed to serve copies of this order, with proof of service, to counsel and to self-represented parties of record by mail, which shall satisfy the purposes of notice of entry of order under C.C.P. § 1019.5(a).

Dated: 08/17/2018




Judge Harry Jacobs

**Appendix D.**

Order of the Superior Court of Alameda County that denied my Motion for Specified Discovery Despite the Pending anti-SLAPP Motion, No. RG17881790, May 18, 2018.

Tatyana E. Drevaleva
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# Superior Court of California, County of Alameda
# Rene C. Davidson Alameda County Courthouse

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| Drevaleva<br>Plaintiff/Petitioner(s)<br>VS.<br>Department of Industrial Relations<br>Defendant/Respondent(s)<br>(Abbreviated Title) | No. RG17881790<br>Order<br>Motion for Discovery<br>Denied |

The Motion for Specified Discovery Despite the Pending anti-SLAPP Motion, filed by Plaintiff Tatyana E. Drevaleva ("Plaintiff") on March 13, 2018, was set for hearing on April 10, 2018, at 3:00 p.m. in Department 22 before the Honorable Harry Jacobs. A tentative ruling was published and was contested.

The matter was argued and submitted. Good cause appearing, IT IS HEREBY ORDERED THAT the motion is DENIED.

In this motion, Plaintiff seeks an order allowing her to conduct specified discovery notwithstanding the filing of the Special Motion to Strike Plaintiff's Complaint Pursuant to Code of Civil Procedure Section 425.16, filed by State of California, Department of Industrial Relations ("DIR"), Division of Labor Standards Enforcement on March 9, 2018. Pursuant to C.C.P. § 425.16(g): "All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision."

Decisions that have considered what constitutes such a showing of good cause have described it as a showing "that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case." ((Lafayette Morehouse, Inc. v. Chronicle Publishing Co. (1995) 37 Cal.App.4th 855, 868.) "The showing should include some explanation of 'what additional facts [plaintiff] expects to uncover....'" (1-800 Contacts, Inc. v. Steinberg (2003) 107 Cal.App.4th 568, 593, quoting Sipple v. Foundation for Nat. Progress (1999) 71 Cal.App.4th 226, 247.) Discovery may not be obtained merely to "test" the opponent's declarations. (Id.) Good cause does not exist if the plaintiff's complaint is legally deficient, such that "no amount of discovery will cure that defect." (Garment Workers Center v. Superior Court (2004) 117 Cal.App.4th 1156, 1162.)

Here, Plaintiff seeks responses to Requests for Admission, Special Interrogatories and a Request for Production of Documents, aimed at having DIR produce the evidence it has (or admit it has no evidence) as to DIR's purported statements, in the course of its investigation and determination of Plaintiff's retaliation claim against her former employer Alameda Health Systems ("AHS"). More specifically, Plaintiff contends as follows: "DIR said in its letter to me dated June 16, 2014 that I had conducted negligence toward the patient, and I knew that I would be terminated from my employment from AHS prior to sending my September 05, 2013 letter to Mr. Harding. DIR said in its December 29, 2016 Determination that I had conducted negligence towards the patient. DIR also mentioned about an

alleged email from Ms. Littlepage who was my 'direct supervisor." According to DIR, that email preceded my letter to Mr. Harding." (Motion, p. 3.) Plaintiff seeks to have DIR produce documents and information about these alleged statements, which Plaintiff contends are defamatory, or admit it has no such documents or information. (Id., pp. 4-6.)

The court determines that Plaintiff has not shown good cause for conducting the specified discovery because it is immaterial to the determination of the pending anti-SLAPP motion. In its anti-SLAPP motion, DIR has asserted that all of Plaintiff's claims are subject to statutory immunities applicable to entities such as DIR who are sued for their statements and conduct in carrying out their governmental functions. As discussed in the accompanying memorandum, the challenged statements and conduct appear to fall generally within immunities under Government Code §§ 820.2 (discretionary immunity), 821.6 (prosecution immunity), 818.8 (misrepresentation immunity), 815(a) (general immunity absent statutory liability), and Civil Code section 47 (official duty privilege). As further discussed therein, Plaintiff's allegations that the deputy commissioners failed to interview some of the witnesses listed in her papers, or erroneously believed AHS's witnesses or credited their documents rather than her own, or otherwise failed to carry out the investigation with "due care," do not state the type of conduct required for liability under section 815.6 for failure to discharge a mandatory duty (which is not the basis of either of Plaintiff's causes of action in any event).

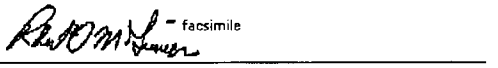
Although the court has not yet issued a ruling on that motion, the discovery that Plaintiff seeks to take is not material to the court's determination of it. Even if the requested discovery were to result in evidence that DIR does not have evidence that Plaintiff committed "medical negligence" toward a patient, or that Plaintiff was unaware that she would be terminated before she sent a letter to her supervisor raising workplace issues, this would be insufficient to overcome the various immunities addressed in DIR's motion. Such evidence goes only to whether the DIR's statements or determinations were well-founded, rather than to whether they were made in the context of an official proceeding in carrying out the discretion accorded to the DIR in investigations of this type so as to be entitled to immunity and privilege. Plaintiff's requested discovery, which is focused on the allegedly erroneous or deficient nature of the investigations, would be insufficient (even if it were to be fruitful) to counter the applicable authority showing the legal deficiencies of her claims or meet her burden of showing the legal sufficiency of her claims.

Further, Plaintiff argues in her reply on her accompanying motion to continue the hearing date that "DIR is clearly unable to satisfy my Discovery request because DIR doesn't have any documented evidence that I committed medical negligence towards the patient," that she "already obtained a copy of my personnel record from AHS in 2013," and that she "already submitted requests to obtain public records to DIR, office of Attorney General, and the Public Records Coordinator." (Reply, pp. 1-2.) Further, Plaintiff has already attached various documents to her complaint (and requests for judicial notice) purportedly supporting her contentions. Under the circumstances, it appears that further discovery would serve no purpose in the determination of Plaintiff's claims, but would simply delay the proceedings and impose needless burden and expense on the parties.

Plaintiff's objection to DIR's method of service of the opposition papers is overruled. Though the papers were served by regular mail instead of overnight mail, they were served well before the ninth court day before the hearing as required by C.C.P. § 1005(c), such that Plaintiff received such papers by that deadline. Further, Plaintiff has not shown any prejudice from the method of service. (See C.C.P. § 475.)

The clerk is directed to serve copies of this order, with proof of service, to counsel and to self-represented parties of record by mail, which shall satisfy the purposes of notice of entry of order under C.C.P. § 1019.5(a).

Dated: 05/18/2018




Judge Robert McGuiness

**Appendix E.**

Order of the Superior Court of Alameda County that denied my Motion for Reconsideration of the Court's Order that denied my Motion for Specified Discovery Despite the Pending anti-SLAPP Motion, No. RG17881790, July 27, 2018.

Tatyana E. Drevaleva
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# Superior Court of California, County of Alameda
# Rene C. Davidson Alameda County Courthouse

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| Drevaleva<br>Plaintiff/Petitioner(s)<br>VS.<br>Department of Industrial Relations<br>Defendant/Respondent(s)<br>(Abbreviated Title) | No. RG17881790<br>Order<br>Motion for Reconsideration<br>Denied |

The Motion for Reconsideration of the Court's Order Denying My Motion for Specified Discovery Despite the Pending anti-SLAPP Motion, filed by Plaintiff Tatyana E. Drevaleva ("Plaintiff") on May 24, 2018, was set for hearing on July 26, 2018, at 3:00 p.m. in Department 22 before the Honorable Harry Jacobs. A tentative ruling was published and was contested.

The matter was argued and submitted. Good cause appearing, IT IS HEREBY ORDERED THAT the motion is DENIED.

The motion seeks reconsideration of the court's order of May 18, 2018 (the "5/18/18 order"), in which the court denied Plaintiff's motion seeking leave to conduct discovery notwithstanding the pending "anti-SLAPP" motion filed by the defendant sued as Department of Industrial Relations ("DIR") on March 9, 2018. Preliminarily, the court needs to clarify that the order was issued by Judge Harry Jacobs, who heard the motion and took it under submission on April 10, 2018, rather than by Judge Robert McGuiness whose facsimile signature appears on it. This was the result of a clerical error, in that the court prepared the order using its "Domain" program, which automatically placed Judge McGuiness's signature on the order when Judge Jacobs approved it because the case is assigned for all purposes to Judge McGuiness. Despite the all-purpose assignment, Judge Jacobs is temporarily handling some of the matters assigned to Judge McGuiness, including the instant case. Accordingly, the 5/18/18 order is hereby amended to reflect that it was issued by Judge Harry Jacobs instead of by Judge Robert McGuiness.

As to the substance of the 5/18/18 order, the court determines that Plaintiff has not made a sufficient showing to warrant reconsideration or modification of the order in any other respect. A party seeking reconsideration of a prior order "shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." (C.C.P. § 1008(a).) The "clear legislative intent [is] to restrict motions to reconsider to circumstances where a party offers the court some fact or authority that was not previously considered by it." (Gilberd v. AC Transit (1995) 32 Cal.App.4th 1494, 1500.) "A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the [new or different matter] at an earlier time." (New York Times Co. v. Superior Court (2005) 135 Cal.App.4th 206, 212.)

Although Plaintiff has cited some new authority and specified some new facts that occurred after the hearing on the prior motion, such facts and authority do not warrant reconsideration of the 5/18/18 order. As stated in that order, after an anti-SLAPP motion is filed, discovery is stayed unless a party,

on motion, shows "good cause" to take "specified discovery" while the motion is pending. (C.C.P. § 425.16(g).) Such showing "should include some explanation of 'what additional facts [plaintiff] expects to uncover....'" (1-800 Contacts, Inc. v. Steinberg (2003) 107 Cal.App.4th 568, 593, quoting Sipple v. Foundation for Nat. Progress (1999) 71 Cal.App.4th 226, 247.) Discovery may not be obtained merely to "test" the opponent's declarations. (Id.)

The "new" facts set forth in Plaintiff's declaration, which she asserts bear on her need to take discovery, are: (1) that she received "two different versions of Ms. Littlepage's September 04, 2013 email and three pages of handwritten notes from DIR that I was unable to read"; and (2) that "DIR still hasn't provided me with any document that confirms the fact of medical negligence" or that "confirms interviews with witnesses and the acts of reviewing records within AHS." (Drevaleva Decl., ¶¶ 5-7.) Plaintiff asserts she needs to conduct discovery because she "need[s] to find the truth about this email." (Id., ¶ 11.) The court does not find this to be "good cause" for taking additional discovery or for further delaying the court's determination on the anti-SLAPP motion, which has already been argued a second time and is under submission.

First, Plaintiff has not attached either version of the September 4, 2013 email to her declaration or clearly explained how this bears on the determination of the anti-SLAPP motion. A copy of the email was attached as Exhibit B to the Declaration of Catherine Daly filed with DIR's anti-SLAPP motion on March 9, 2018. It pertains to a purported decision on that date by the director of nursing at Alameda Health System ("AHS"), Plaintiff's prior employer, to release Plaintiff from probation on September 13, 2013. Regardless of the truth of that email, or whether there is another version of it, there does not appear to be any dispute that DIR received a copy of it during its investigation of Plaintiff's retaliation complaint against AHS. The court is not persuaded that any further evidence as to this email would be material to the court's determination of the anti-SLAPP motion. That determination does not hinge on the truth or accuracy of the September 4, 2013 email. Instead, as discussed in the 5/18/18 order, the determination hinges on whether DIR is being sued for its statements and determinations in the context of an official proceeding so as to be subject to immunities, as DIR argues. The truth of the email, or whether it was altered, does not affect this.

Second, Plaintiff's argument that DIR has not provided her a document that "confirms the fact of medical negligence" is not a "new fact" that provides "good cause" for Plaintiff to undertake "specified" additional discovery. Instead, it is an argument going to the truth or falsity of AHS's asserted justification for terminating Plaintiff's employment, or to the truth or falsity of statements made by DIR as to such asserted reason. The court's determination of the anti-SLAPP motion does not hinge on this, nor does it provide any reason for the court to delay determining that motion so Plaintiff can do further discovery. As discussed in the 5/18/18 order, "[e]ven if the requested discovery were to result in evidence that DIR does not have evidence that Plaintiff committed 'medical negligence' toward a patient, or that Plaintiff was unaware that she would be terminated before she sent a letter to her supervisor raising workplace issues, this would be insufficient to overcome the various immunities addressed in DIR's motion. Such evidence goes only to whether the DIR's statements or determinations were well-founded, rather than to whether they were made in the context of an official proceeding in carrying out the discretion accorded to the DIR in investigations of this type so as to be entitled to immunity and privilege."

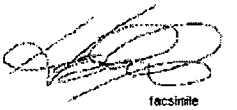
Third, Plaintiff's newly raised citations to authority as to her right to obtain public records from DIR (or the State of California), and the fact that she served Public Records Act ("PRA") requests, do not bear on the court's determination of the anti-SLAPP motion. In the 5/18/18 order, the court did not preclude Plaintiff from obtaining any such documents or determine she is not entitled to them. Instead, it merely denied Plaintiff's request to serve discovery in the instant case, outside the context of any PRA requests, and to delay the determination of the anti-SLAPP motion based thereon. As stated in the 5/18/18 order, "it appears that further discovery would serve no purpose in the determination of Plaintiff's claims, but would simply delay the proceedings and impose needless burden and expense on the parties."

Plaintiff's arguments in the instant motion, as in the prior motion, focus primarily on her argument that AHS's and/or DIR's statements about her competency in her prior job were untrue, rather than on an asserted need to take "specified" additional discovery bearing on the issues raised in the anti-SLAPP motion. Plaintiff has already made her argument about the asserted untruth of such statements repeatedly in her opposition to the anti-SLAPP motion. Additional discovery is not necessary to bring that argument, once again, to the court's attention. Further, at the hearing on July 27, 2018, Plaintiff acknowledged she received copies of what appeared to be all of DIR's claim investigation files with the

exception of documents withheld pursuant to claims of privilege. This further undercuts any assertion that Plaintiff needs to conduct additional discovery, beyond such PRA requests, at this point.

The clerk is directed to serve copies of this order, with proof of service, to counsel and to self-represented parties of record by mail, which shall satisfy the purposes of notice of entry of order under C.C.P. § 1019.5(a).

Dated: 07/27/2018




Judge Harry Jacobs

**Appendix F.**

Order of the Superior Court of Alameda County that directed the Parties to complete additional briefing regarding DIR's anti-SLAPP Motion, No. RG17881790, May 18, 2018.

Tatyana E. Drevaleva
10660 Hidden Mesa Place
Monterey, CA 93940____

Division of Labor Standards
Enforcement
Attn: Seitz, Nicholas
455 Golden Gate Avenue
9th Floor
San Francisco, CA 94102

# Superior Court of California, County of Alameda
# Rene C. Davidson Alameda County Courthouse

| | |
|---|---|
| Drevaleva<br>Plaintiff/Petitioner(s)<br>VS.<br>Department of Industrial Relations<br>Defendant/Respondent(s)<br>(Abbreviated Title) | No. RG17881790<br>Order<br>Motion to Strike Complaint |

The Special Motion to Strike Plaintiff's Complaint Pursuant to Code of Civil Procedure Section 425.16, filed by State of California, Department of Industrial Relations ("DIR"), Division of Labor Standards Enforcement (sued as "Department of Industrial Relations") on March 9, 2018, was set for hearing on April 10, 2018, at 3:00 p.m. in Department 22 before the Honorable Harry Jacobs. A tentative ruling was published and was contested.

The matter was argued and submitted. Good cause appearing, IT IS HEREBY ORDERED THAT the motion is CONTINUED to 3:00 p.m. on June 12, 2018, in Dept. 22, Administration Building, 4th Floor, 1221 Oak St., Oakland, for supplemental briefing as discussed below.

A. Background

The complaint, filed by Plaintiff Tatyana E. Drevaleva ("Plaintiff") on November 8, 2017, alleges two causes of action: a first cause of action for "Libel (Code of Civil Procedure, 340(c))" and a second cause of action for "Negligence (California Civil Code Section 1714(a))." (Complaint, unnumbered pp. 22-23 of 26.) Both causes of action arise out of DIR's investigation and handling of retaliation and wage claims Plaintiff filed with the DIR against her former employer, Alameda Health System ("AHS"), in September 2013 and October 2013. (Complaint, unnumbered pp. 4 and 16; Decl. of Catherine Daly, ¶ 6 and Exh. A; Decl. of Bobit Santos, ¶¶ 6-9.)

The libel cause of action alleges the following: "1) DIR said that I had committed negligence towards the patient even though my former employer AHS never said it. Despite my numerous requests, DIR never explained what my specific actions were that constituted negligence, 2) DIR said that I had missed my appointment on September 13th, 2016" though "DIR never provided me with evidence that the appointment really existed, 3) DIR lied that it had sent me the Determination Letter so I could file an appeal with Director of DIR Ms. Baker.... 4) DIR lied that I knew that I was going to be fired from AHS prior to sending my letter to Mr. Harding.... [and] 5) DIR lied that it didn't have jurisdiction over 'county employees' and denied my wage claim." (Complaint, unnumbered pp. 22-23.)

The negligence cause of action alleges: "1) DIR failed to contact with all witnesses whom I listed in my letter to Ms. Daly dated June 18th, 2014 and August 6th, 2016, 2) DIR recklessly disregarded the main witness Dr. Sina Rachmani who can conform that my EKG reading was correct, 3) DIR processed my claim for a huge amount of time - over three years causing me a lot of suffering, pain, and pushing me into a huge financial debt, 4) DIR attempted to force me to withdraw my claim thus depriving me the opportunity to get reinstated back to work and to get all not received wages, benefits, and other

compensation, 5) DIR never sent me the Determination letter thus depriving me an opportunity to file an appeal with Ms. Baker, 6) intentionally failing to recognize fraud and negligence committed by AHS towards me. DIR knew that I didn't perform negligence toward the patient but continued to support my retaliator AHS." (Complaint, unnumbered p. 23.)

B. The Court Needs Additional Briefing as to One Aspect of the Second Cause of Action

On April 9, 2018, the court published a detailed tentative ruling stating that it was inclined to grant the anti-SLAPP motion in full. The tentative ruling stated that it appeared DIR met its initial burden of showing that the acts and omissions on which Plaintiff bases her claims for relief are acts of DIR "in furtherance of [its] right of petition or free speech under the United States or California Constitution in connection with a public issue" as defined in C.C.P. section 425.16. The tentative ruling stated, among other things, that "all of the challenged statements and determinations by deputy commissioners occurred in the course of the DIR's investigation and determinations of Plaintiff's wage and retaliation complaints...."

In reviewing the papers filed in connection with the motion and considering the arguments made at the hearing, the court determines that it needs supplemental briefing from the parties as to a matter that has not been sufficiently addressed. As reflected above, one of the bases for the "negligence" cause of action is Plaintiff's allegation that "DIR never sent me the Determination letter thus depriving me an opportunity to file an appeal with Ms. Baker...." DIR does not expressly address this allegation in arguing that the negligence cause of action is based on protected activity. Instead, it argues that the entire negligence cause of action "is subject to a special motion to strike ... if at least one of the underlying acts is protected activity, unless the allegations of protected activity are merely incidental to the unprotected activity." (Memo., p. 8, citing Salma v. Capon (2008) 161 Cal.App.4th 1275, 1287 ["A mixed cause of action is subject to section 425.16 if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity."])

In Baral v. Schnitt (2016) 1 Cal.5th 376, 396, the California Supreme Court articulated the following framework for analyzing anti-SLAPP motions: "At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." The Court further stated: "the term 'cause of action' in the anti-SLAPP statute ... refers to claims for relief that are based on allegations of protected activity." (Id.)

It is not clear to what extent the above framework affects the principle quoted above from Salma v. Capon, supra, 161 Cal.App.4th at p. 1287, that an entire cause of action is subject to being stricken if it is based in part on protected activity that is not merely incidental to the cause of action. It is also not clear the extent to which Plaintiff's allegation that DIR never sent her the "Determination letter" is an allegation of "protected activity" under section 425.16(e). Accordingly, the court requests supplemental briefing from the parties on the following matters:

(1) Is Plaintiff's allegation that "DIR never sent me the Determination letter thus depriving me an opportunity to file an appeal with Ms. Baker" an allegation of "protected activity" under C.C.P. § 425.16(e)?

(2) If the above alleged act or omission is not itself "protected activity," can the court nevertheless strike it as part of the second cause of action, if DIR establishes that the second cause of action is based on other protected activity that is not merely incidental to the cause of action? In other words, if DIR meets its initial burden to show that the second cause of action is based at least in part on non-incidental protected activity, does the burden shift to Plaintiff to show that her negligence cause of action is legally sufficient and factually substantiated as to all aspects, including as to the aspects not based on protected activity? Under Baral v. Schnitt, supra, can the court strike out an entire cause of action even if portions of it are not based on protected activity?

(3) Aside from whether it constitutes protected activity, does Plaintiff have a viable claim for relief against DIR based on her allegation that "DIR never sent me the Determination letter thus depriving me an opportunity to file an appeal with Ms. Baker"? Does Plaintiff contend that this is a mandatory duty based on a statute or regulation? If so, which?

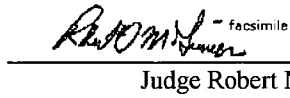
(4) If DIR prevails on the anti-SLAPP motion, it is entitled to its reasonable attorney's fees and costs incurred on it. (See C.C.P. § 425.16(c)(1).) The declarations in support of the motion and reply attest that DIR's counsel expended ten hours on the motion and six hours on the reply, but do not sufficiently address how the hourly rate of $400.00 was calculated.

(5) The court notes that Plaintiff filed several declarations on April 24, 2018 and April 30, 2018, despite their not being filed in connection with a specific motion (and not having a hearing date or reservation number reflected on the caption) and despite not having leave of court to do so. On May 2, 2018, DIR filed an "Opposition to Plaintiff's Pleading Entitled 'Public Records from DIR,'" to which Plaintiff filed a reply on May 8, 2018. The court will not consider any of these papers, as the court did not grant any party leave to file them. Notwithstanding the above, in light of the fact that the court has now set the matter for a continued hearing, the court grants leave to both parties to submit brief and concise supplemental papers that address information or documents obtained after the hearing on April 10, 2018, and that bear on the issues raised in the anti-SLAPP motion. Any such papers must clearly explain how the new information and documents bear on issues raised in the anti-SLAPP motion.

By May 30, 2018, both parties may file and serve supplemental papers addressing the matters in items (1) through (5) above. By June 5, 2018, both parties may file and serve supplemental papers responding to the supplemental papers filed by the other party.

The clerk is directed to serve copies of this order, with proof of service, to counsel and to self-represented parties of record by mail, which shall satisfy the purposes of notice of entry of order under C.C.P. § 1019.5(a).

Dated: 05/18/2018




Judge Robert McGuiness

**Appendix G.**

Order of the Superior Court of Alameda County that denied my Verified Petition for Writ of Mandate to Compel DIR to Issue the Improperly Withheld Public Records, No. RG17881790, August 17, 2018.

Tatyana E. Drevaleva
10660 Hidden Mesa Place
Monterey, CA 93940____

# Superior Court of California, County of Alameda
## Rene C. Davidson Alameda County Courthouse

| | |
|---|---|
| Drevaleva<br>Plaintiff/Petitioner(s)<br>VS.<br>Department of Industrial Relations<br>Defendant/Respondent(s)<br>(Abbreviated Title) | No. RG17881790<br>Order<br>Petition for Alternative Writ of Mandate Denied |

The Petition for Writ of Mandate and Declaratory Relief to Compel DIR to Issue Public Records, filed by Plaintiff Tatyana Drevaleva ("Plaintiff") on May 24, 2018, was set for hearing on July 26, 2018, at 3:00 p.m. in Department 22 before the Honorable Harry Jacobs. A tentative ruling was published and the parties appeared at the hearing to address it.

The matter was argued and submitted. Good cause appearing, IT IS HEREBY ORDERED THAT the petition is DENIED.

First, the petition is procedurally deficient. It seeks an order compelling the defendant sued as Department of Industrial Relations ("DIR") to "issue Public Records ... pursuant to Government Code Section 6259(a) and to obtain ... Declaratory Relief." Relief pursuant to section 6259(a) requires a "verified petition to the superior court of the county where the records or some part thereof are situated [attesting] that certain public records are being improperly withheld from a member of the public...." Instead, Plaintiff's "petition" is in the form of a notice of motion, filed in her pending case seeking damages from DIR for alleged libel and negligence. Further, the "petition" itself is not "verified," which requires the pleader to certify or declare "under penalty of perjury that the foregoing is true and correct." (See C.C.P. § 2015.5; Myzer v. Emark Corp. (1996) 45 Cal.App.4th 884, 890, n. 4.) Although there is an accompanying "Declaration to Petition" signed under penalty of perjury, attesting to some of the same matters raised in the "petition," it does not specifically identify the Public Records Act ("PRA") requests made by Plaintiff. While this deficiency may be lessened to some extent by the memorandum and attached exhibits, this does not entirely cure the deficiency.

It is also not clear that Plaintiff properly served the "petition" on DIR. (See, e.g., C.C.P. § 1096 [application for writ "must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the Court."])

DIR also asserts the petition needed to be accompanied by a "summons." The court is not persuaded that DIR's authority establishes this.

Second, even if the court were to overlook the procedural irregularities and consider the petition as a properly filed and served petition for relief under Government Code section 6259(a), such requested relief is unwarranted. DIR's opposition, filed on July 6, 2018, attests that DIR replied to Plaintiff's first PRA request on April 18, 2018, and replied to Plaintiff's second PRA request on June 13, 2018. (Decl. of Nicholas Patrick Seitz, ¶¶ 5 and 8.) Other than asserting that the second response was untimely, Plaintiff has not specified in what manner, if any, the documents produced by DIR were insufficient. In correspondence to the court on July 20, 2018, Plaintiff acknowledged that her friend picked up the records on July 19, 2018, but stated that she "will not be able to view the Public Records myself prior to the hearing" and will ask the court to review them in camera at the hearing. As stated at the hearing,

there is no good cause for the court to review the documents in camera given that Plaintiff had not yet reviewed the records herself by the time of the hearing or identified what (if any) deficiencies there were in the production.

Instead, as stated at the hearing, the court took the matter under submission and directed Plaintiff to file and serve a status report by August 6, 2018, after her review of the public records provided by DIR and/or the State of California in response to her PRA requests. The status report was solely to address whether Plaintiff contended "that certain public records are being improperly withheld" from her pursuant to her PRA requests. (See Gov. Code section 6259(a).) The status report was solely to address the sufficiency or deficiency of the DIR's and/or State's production of records in response to the PRA requests.

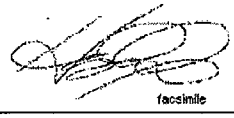
On August 3, 2018, Plaintiff filed a "Statement that I received Public Records from DIR." The statement attests that Plaintiff's friend Liliya picked up the records from the Labor Commissioner on July 19, 2018, and that Plaintiff received the records from Liliya on July 21, 2018. Though the statement is accompanied by "Objections to Public Records from DIR," those objections do not identify any deficiency in DIR's production of records. Instead, Plaintiff discusses the content of the records, including whether they support Plaintiff's contention that there are no records reflecting the truth of DIR's statements about her termination or the reasons therefor. Such discussion is irrelevant to a petition under Government Code section 6259(a), authorizing relief where a petitioner attests "that certain public records are being improperly withheld from a member of the public...." As Plaintiff has not attested that any such records are being improperly withheld from her, there is no basis for relief under that statute.

Third, the petition or motion seeks "declaratory relief" but does not sufficiently specify the form of such relief, stating that Plaintiff is "asking the Court to confirm two ca[u]ses of action - Libel and Professional Negligence." (Memo., p. 4.) The court does not understand this request. Further, it falls outside the scope of Government Code §§ 6258 and 6259, which authorize proceedings to enforce a member of the public's "right to inspect or to receive a copy of any public record" and a determination that "certain public records are being improperly withheld from a member of the public...." (Id.)

Fourth, to the extent the petition or motion seeks attorney's fees, it is deficient because Plaintiff is not an attorney and has not offered evidence of having incurred "attorney's fees" to an attorney in any specified amount. (See, e.g., Trope v. Katz (1995) 11 Cal.4th 274, 292 [self-represented litigant is not entitled to recover for the value of his or her own time].) Further, fees are authorized under section 6259(d) only "should the plaintiff prevail in litigation filed pursuant to this section." Plaintiff did not prevail as to the instant motion or petition.

The clerk is directed to serve copies of this order, with proof of service, to counsel and to self-represented parties of record by mail, which shall satisfy the purposes of notice of entry of order under C.C.P. § 1019.5(a).

Dated: 08/17/2018




Judge Harry Jacobs

**Appendix H.**

Order of the Superior Court of Alameda County that denied my Motion for Costs and Attorney's Fees pursuant to Government Code, Section 6259(d),

No. RG17881790, October 04, 2018.

Tatyana E. Drevaleva
10660 Hidden Mesa Place
Monterey, CA 93940____

# Superior Court of California, County of Alameda
# Rene C. Davidson Alameda County Courthouse

| | |
|---|---|
| Drevaleva<br>Plaintiff/Petitioner(s)<br>VS.<br>Department of Industrial Relations<br>Defendant/Respondent(s)<br>(Abbreviated Title) | No. RG17881790<br>Order<br>Motion for Attorney Fees Denied |

The Motion for Attorney's Fees Pursuant to Government Code Section 6259(d), filed by Plaintiff Tatyana Drevaleva ("Plaintiff") on July 19, 2018, was set for hearing on October 2, 2018, at 3:00 p.m. in Department 22 before the Honorable Robert McGuiness. A tentative ruling was published and was contested.

The matter was argued and submitted. Good cause appearing, IT IS HEREBY ORDERED THAT the motion is DENIED.

First, the motion is duplicative of Plaintiff's request for attorney's fees in her "Petition for Writ of Mandate and Declaratory Relief to Compel DIR to Issue Public Records," filed on May 24, 2018. In its order of August 17, 2018, the court denied that petition along with Plaintiff's request for attorney's fees therein. The court determined that, among other things: (1) the petition was procedurally deficient under Government Code Section 6259(a), part of the Public Records Act ("PRA"); (2) it was not clear that Plaintiff properly served the "petition" on the defendant sued as Department of Industrial Relations ("DIR"); (3) DIR's opposition to that petition showed that DIR replied to Plaintiff's first PRA request on April 18, 2018, and replied to Plaintiff's second PRA request on June 13, 2018, and Plaintiff did not show that DIR's responses were deficient, even though she contends they were untimely; (4) relief on a "petition" under section 6259(a) is authorized only where a petitioner attests "that certain public records are being improperly withheld from a member of the public"; and (5) Plaintiff did not show an entitlement to attorney's fees.

In the portion addressing attorney's fees, the court stated: "Fourth, to the extent the petition or motion seeks attorney's fees, it is deficient because Plaintiff is not an attorney and has not offered evidence of having incurred 'attorney's fees' to an attorney in any specified amount. (See, e.g., Trope v. Katz (1995) 11 Cal.4th 274, 292 [self-represented litigant is not entitled to recover for the value of his or her own time].) Further, fees are authorized under section 6259(d) only 'should the plaintiff prevail in litigation filed pursuant to this section.' Plaintiff did not prevail as to the instant motion or petition." (8/17/18 order, p. 2.)

Thus, the court has already addressed Plaintiff's request for attorney's fees under section 6259(d) and determined that she is not entitled to them. On August 21, 2018, Plaintiff filed a Notice of Appeal from eight orders or rulings of the court, including the above order of August 17, 2018. Thus, this court no longer has jurisdiction to consider this request, which is embraced by the appeal. (See C.C.P. § 916; Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 189.)

Second, even if the court had jurisdiction to determine the duplicative request, it would deny it for the same reasons it denied the first one, including those enumerated (1) through (5) above.

The clerk is directed to serve copies of this order, with proof of service, to counsel and to self-represented parties of record by mail, which shall satisfy the purposes of notice of entry of order under C.C.P. § 1019.5(a).

Dated: 10/04/2018

- facsimile

Judge Robert McGuiness

## Appendix I.

Order of the Superior Court of Alameda County that denied my Motion for Costs and Attorney's Fees pursuant to C.C.P. §128.5, No. RG17881790, October 04, 2018.

Tatyana E. Drevaleva
10660 Hidden Mesa Place
Monterey, CA 93940____

# Superior Court of California, County of Alameda
# Rene C. Davidson Alameda County Courthouse

| | |
|---|---|
| Drevaleva<br>Plaintiff/Petitioner(s)<br>VS.<br>Department of Industrial Relations<br>Defendant/Respondent(s)<br>(Abbreviated Title) | No. RG17881790<br>Order<br>Motion for Attorney Fees Denied |

The Motion for Mandatory Costs and Attorney's Fees to the Plaintiff Who Partially Prevailed on the anti-SLAPP Motion, filed by Plaintiff Tatyana Drevaleva ("Plaintiff") on September 10, 2018, was set for hearing on October 2, 2018, at 3:00 p.m. in Department 22 before the Honorable Robert McGuiness. A tentative ruling was published and was contested.

The matter was argued and submitted. Good cause appearing, IT IS HEREBY ORDERED THAT the motion is DENIED.

The motion seeks costs and attorney's fees because Plaintiff asserts she "partially prevailed" on the special motion to strike Plaintiff's complaint pursuant to Code of Civil Procedure Section 425.16, filed on March 9, 2018, by State of California, Department of Industrial Relations ("DIR"), Division of Labor Standards Enforcement (sued as "Department of Industrial Relations"). In its order of August 17, 2018, the court granted DIR's special motion to strike in large part, ordering that the "entire First cause of action for libel, as well as all of the preliminary factual allegations described above in section B.1, first paragraph, are STRICKEN from the complaint." The court further ordered "the preliminary factual allegations described above in section B.2, first paragraph, items (2), (7), (8) and (11), and section B.2, second paragraph, item (4)," which were portions of the second cause of action for negligence and preliminary factual allegations supporting the requests for relief, stricken from the complaint. (8/17/18 order, p. 9, § J.) The court also determined: "Because DIR prevailed in large part on its anti-SLAPP motion, it is entitled to its reasonable attorney's fees and costs incurred on this motion. (See C.C.P. § 425.16(c)(1); Ketchum v. Moses (2001) 24 Cal.4th 1122, 1131.)" (8/17/18 order, p. 9, § I.) The court ordered that "DIR is awarded fees against Plaintiff under C.C.P. section 425.16(c)(1) in the amount of $5,250.00." (Id., p. 9, § J.)

Plaintiff is correct that the court did not grant the anti-SLAPP motion in its entirety, as the court determined DIR did not meet its burden of showing that some portions of the second cause of action for negligence, and factual allegations supporting the requested relief, fell within any of the subdivisions of section 425.16(e). (8/17/18 order, p. 4, § C.) (The entire remainder of the action was dismissed pursuant to DIR's demurrer.) Nevertheless, this alone does not entitle Plaintiff to an award of fees. Section 425.16(c)(1) states: "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." The court determines that Plaintiff is not entitled to costs or attorney's fees under this statute, or under C.C.P. § 128.5, for several reasons.

First, the court likely lacks jurisdiction to consider Plaintiff's request for fees and costs. As discussed above, in its order of August 17, 2018, the court determined that "DIR prevailed in large part on its anti-SLAPP motion" and thus was "entitled to its reasonable attorney's fees and costs incurred on this motion" under section 425.16(c)(1). (8/17/18 order, p. 9, § J.) On August 21, 2018, Plaintiff filed a

Notice of Appeal from eight orders or rulings of the court on August 17, 2018, including the above order. Thus, the correctness of the court's determination that DIR was the prevailing party on the anti-SLAPP motion, as well as the award of attorney's fees in connection therewith, are before the Court of Appeal and this court no longer has jurisdiction to vary those determinations. (See C.C.P. § 916; Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal.4th 180, 189.) Plaintiff's request to be determined the "prevailing" party on the motion is in conflict with the court's order and is thus a matter embraced by the appeal. (Id.)

Second, even if the court has jurisdiction to consider Plaintiff's request, the court determines that Plaintiff is not a "plaintiff prevailing on the motion." As discussed above, the court granted DIR's anti-SLAPP motion in large part, striking the entirety of the first of Plaintiff's two causes of action and portions of the second. "A defendant need not succeed in striking every challenged claim to be considered a prevailing defendant entitled to recover attorney fees and costs under the statute. Instead, a defendant is entitled to recover fees and costs in connection with a partially successful motion, unless the results obtained are insignificant and of no practical benefit to the defendant." (City of Industry v. City of Fillmore (2011) 198 Cal.App.4th 191, 218, citing Mann v. Quality Old Time Service, Inc. (2006) 139 Cal.App.4th 328, 339-340; see also Cole v. Patricia A. Meyer & Associates, APC (2012) 206 Cal.App.4th 1095, 1123.) Plaintiff has not cited authority supporting her position that she is a "plaintiff prevailing on the motion" simply because it was not granted in full.

Third, Plaintiff has not established that the anti-SLAPP motion was "frivolous or ... solely intended to cause unnecessary delay." "Frivolous in this context means that any reasonable attorney would agree the motion was totally devoid of merit." (L.A. Taxi Cooperative, Inc. v. The Independent Taxi Owners Assn. of Los Angeles (2015) 239 Cal.App.4th 918, 932; Gerbosi v. Gaims, Weil, West & Epstein, LLP (2011) 193 Cal.App.4th 435, 450; see also C.C.P. § 128.5(b)(2) ["'Frivolous' means totally and completely without merit or for the sole purpose of harassing an opposing party."]) Clearly, the motion was not "totally and completely without merit" as it was granted in large part. Nor has Plaintiff met her burden to show that the motion - even as to the portion thereof not granted - was "solely intended to cause unnecessary delay" or was filed in "subjective bad faith." (Bach v. McNelis (1989) 207 Cal.App.3d 852; Abbett Electric Corp. v. Sullwold (1987) 193 Cal.App.3d 708.) As discussed above, the motion was successful as to the libel cause of action and portions of the negligence cause of action and achieved a result that was significant and of practical benefit to DIR. Although the court did not grant the motion in its entirety, it did sustain a demurrer as to all portions of the negligence cause of action that were not stricken, and finds that DIR's motion to strike such portions was not frivolous, intended to cause delay or filed in bad faith.

Fourth, Plaintiff has not demonstrated that she hired an attorney to represent her in this matter or incurred any "attorney's fees." Instead, she seeks an award of attorney's fees in the amount of $40,000.00 "as a means of controlling burdensome and unnecessary legal tactics." (Memo., p. 17.) Plaintiff has not shown she paid any such expenses to anyone who assisted her, much less a licensed California attorney. A self-represented litigant, even if a licensed California attorney, has not incurred "attorney's fees" compensable under section 425.16(c)(1). (See Witte v. Kaufman (2006) 141 Cal.App.4th 1201, 1210-1211; Sands & Associates v. Juknavorian (2012) 209 Cal.App.4th 1269, 1278; Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC (2014) 230 Cal.App.4th 244, 252-253; see also Trope v. Katz (1995) 11 Cal.4th 274, 292 [applying same principle to request for attorney's fees under Civil Code § 1717].)

Plaintiff's cited cases do not contravene this well established principle. Instead, Plaintiff relies primarily on Abandonato v. Coldren (1995) 41 Cal.App.4th 264, 269, in which the Court of Appeal distinguished Trope, supra, 11 Cal.4th 274, and upheld an award of attorney fees to a self-represented attorney as a sanction against the plaintiff for bad faith tactics under Code of Civil Procedure section 128.5. In Musaelian v. Adams (2009) 45 Cal.4th 512, 517-520, the California Supreme Court disapproved of Abandonato, applying the Trope v. Katz principle and holding that attorney fees could not be awarded to an attorney representing himself as a sanction under section 128.7. In so holding, the court noted the similarity between the language in that statute authorizing "reasonable attorney's fees" and the language in Civil Code § 1717 authorizing such fees. (Id., p. 517; see also id., p. 519 [the statute "speaks not to compensating a party for the party's time and effort, but only to reimbursing reasonable attorney fees or other expenses."]) The operative language of section 128.5, authorizing "reasonable attorney's fees" and other expenses, is not distinguishable from that of section 128.7, and the Court expressly disapproved Abandonato "to the extent ... inconsistent with our holding here." (Id., at p. 520.)

Although the above principle would not necessarily preclude Plaintiff's request for reimbursement of costs or actual expenses, including transportation costs, Plaintiff obtained a fee waiver for her filing fees in this action and is not entitled to an award for those or other expenses given that DIR's motion was neither frivolous nor in bad faith.

At the hearing, Plaintiff addressed the portion of the court's order of August 17, 2018, ordering "that DIR is awarded fees against Plaintiff under C.C.P. section 425.16(c)(1) in the amount of $5,250.00." Plaintiff stated that she has attempted to pay this amount to DIR on several occasions and that DIR rejected her payment for various reasons. At the hearing, DIR's counsel stipulated that DIR will not seek to enforce this aspect of the order, or to collect any payment from Plaintiff, during the pendency of Plaintiff's appeal from the August 17, 2018 order. DIR also stated that it will not oppose Plaintiff's Motion for a Temporary Stay of the Court's Order Directing the Plaintiff to Pay Attorney's Fees to DIR's Counsel, filed on September 20, 2018, and scheduled for hearing on November 13, 2018.

The clerk is directed to serve copies of this order, with proof of service, to counsel and to self-represented parties of record by mail, which shall satisfy the purposes of notice of entry of order under C.C.P. § 1019.5(a).

Dated: 10/04/2018

Robert M. Lower - facsimile

Judge Robert McGuiness

**Appendix J.**

Order of the Court of Appeal for the First District, Division Four that denied my Petition for Rehearing in Appeal No. A155165, A155187, A155899, January 16, 2020.

COPY

**CALIFORNIA COURT OF APPEAL**
**FIRST APPELLATE DISTRICT**
**DIVISION FOUR**



TATYANA DREVALEVA,
Plaintiff and Appellant,
v.
DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA,
Defendant and Respondent.

A155165, A155187, A155899
Alameda County
Sup. Ct. No. RG17881790

BY THE COURT:

On January 6, 2020, appellant filed a petition for rehearing. Accompanying the petition, appellant filed the following documents:

1) "Application for Permission to Exceed the Limit of 10(ten) Pages of Attachments Prescribed by California Rules of Court, Rule 8.204(d),"
2) "Request to Take a Judicial Notice,"
3) "Request for Permission to File a Supplemental Brief in Support of My Petition for Rehearing," and
4) "Motion to Supplement the Record on Appeal."

The petition for rehearing is denied. Each application, request, and motion is denied.

Date: JAN 16 2020 STREETER, ACTING P.J.

_____ P.J.

**Appendix K.**

Order of the California Supreme Court that denied my Petition for Review No. S260407, April 15, 2020.

Court of Appeal, First Appellate District, Division Four - Nos. A155165, A155187, A155899

**S260407**

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**



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TATYANA E. DREVALEVA, Plaintiff and Appellant,

v.

DEPARTMENT OF INDUSTRIAL RELATIONS, Defendant and Respondent.

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AND CONSOLIDATED CASES

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The petition for review is denied.

CANTIL-SAKAUYE

*Chief Justice*

**Appendix L.**

Order of the California Supreme Court that denied my Petition for Writ of Mandate No. S260480, April 15, 2020.

S260480

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

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TATYANA E. DREVALEVA, Petitioner,

v.

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR,
Respondent;

DEPARTMENT OF INDUSTRIAL RELATIONS, Real Party in Interest.

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The petition for writ of mandate is denied.

CANTIL-SAKAUYE

*Chief Justice*

**Appendix M.**

Order of the California Supreme Court that denied my Petition for Writ of Mandate No. S262066, July 08, 2020.

S262066

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

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TATYANA E. DREVALEVA, Petitioner,

v.

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR,
Respondent;

ALAMEDA HEALTH SYSTEM et al., Real Parties in Interest.

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The petition for writ of mandate is denied. Petitioner's Motion to Reinstate/Cite the Record and Emergency Motion and Request to Contact the Ninth Circuit are denied.

CANTIL-SAKAUYE

*Chief Justice*

**Appendix N.**

Order of the Court of Appeal for the First District, Division four that declared me a vexatious litigant, August 31, 2020.

Filed 8/31/20

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

| | |
|---|---|
| TATYANA DREVALEVA,<br>Plaintiff and Appellant,<br>v.<br>ALAMEDA HEALTH SYSTEM et al.,<br>Defendants and Respondents. | A158862<br><br>(Alameda County Super. Ct. No. RG19010635) |

**BY THE COURT[1]:**

On July 21, 2020, we ordered appellant Tatyana Drevaleva to show cause why she should not be declared a vexatious litigant pursuant to Code of Civil Procedure[2] section 391 et seq. based on her conduct and motion practice in six appeals. Having considered her response, we now declare her a vexatious litigant pursuant to section 391, subdivisions (b)(1)–(3) and impose prefiling orders pursuant to section 391.7.

[1] Streeter, Acting P. J., Tucher, J., and Brown, J.

[2] Undesignated statutory references are to the Code of Civil Procedure.

## I. BACKGROUND AND PROCEDURAL HISTORY[3]

Alameda Health System (AHS) hired Drevaleva as a cardiac monitor technician in 2013. In an August 2013 conversation with her supervisor, Drevaleva challenged her part-time employee status, lack of paid breaks during her work shifts, unpaid shift differentials, and unpaid overtime compensation. After nothing in her wages or employee status changed, on September 5, 2013, Drevaleva sent her supervisor a letter reiterating her questions. On September 7, 2013, AHS terminated Drevaleva for her failure to comply with AHS employment standards. She then filed a retaliation claim with the Department of Industrial Relations, Division of Labor Standards Enforcement (DIR), seeking a variety of remedies including overtime wages and differential pay.

In December 2016, after a thorough investigation, DIR determined Drevaleva was terminated for a legitimate, non-retaliatory reason—her negligence had seriously harmed a patient—and denied Drevaleva's claim. An AHS email dated September 4, 2013 documented its decision to terminate Drevaleva before she authored her September 5 letter.

Drevaleva filed several state and federal lawsuits against AHS and DIR related to her termination, alleging discrimination, retaliation, libel, negligence, fraud, and violations of the Labor Code.

### *A. Appeals*

In the seven-year period immediately preceding our July 2020 Order to Show Cause, Drevaleva has maintained the following six appeals in propria persona (pro per) arising from these lawsuits, and each appeal has been finally determined adversely to her.

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[3] We take these facts largely from the unpublished opinions in *Drevaleva v. Department of Industrial Relations* (Dec. 20, 2019, A155165, A155187, A155899) and *Drevaleva v. Alameda Health System* (May 29, 2020, A158282).

(1) *Drevaleva v. Department of Industrial Relations* (Dec. 20, 2019, A155165, A155187, A155899) (nonpub. opn.) (*Drevaleva I–III*) are three pro per appeals by Drevaleva. In *Drevaleva I* (A155165), filed on August 21, 2018, she challenged an August 17, 2018 trial court order partially granting DIR's anti-SLAPP motion to strike under Code of Civil Procedure section 425.16 and sustaining DIR's demurrer without leave to amend. (See § 425.16 [describing procedural remedy to dismiss nonmeritorious actions that chill the valid exercise of constitutional right of free speech].) She filed an additional notice of appeal on August 29, 2018 (*Drevaleva II, supra,* A155187), challenging trial court rulings on a motion to take discovery. On November 21, 2018, Drevaleva filed a third notice of appeal (*Drevaleva III, supra,* A155899) from an order denying her request for prevailing party attorneys' fees under Code of Civil Procedure section 425.16. We subsequently consolidated the appeals for the purposes of record preparation, briefing, oral argument, and decision. We affirmed all orders in favor of DIR. (*Drevaleva I–III, supra,* A155165, A155187, A155899.)

(2) *Drevaleva v. Department of Industrial Relations* (Dec. 19, 2019, A156248) (nonpub. opn.) (*Drevaleva IV*)—a pro per appeal by Drevaleva filed January 16, 2019. In that appeal, Drevaleva challenged 1) the denial of her motion to stay the trial court proceedings pending a determination of a similar lawsuit filed in federal court; and 2) the trial court's refusal to issue a writ of mandate requiring DIR to transfer her case to the Department of Industrial Relations, Department of General Services. (*Ibid.*) We determined Drevaleva forfeited these claims by failing to raise them in *Drevaleva I–III*, which she conceded was an appeal of a final judgment. *Drevaleva IV, supra,* A156248.) Although we noted that Drevaleva "should not get a chance to resurrect issues that she forfeited in her earlier appeal by

filing a new notice of appeal from the same final judgment," we nonetheless assessed the merits of her appeal. (*Ibid.*) After engaging in that review, we concluded the trial court did not abuse its discretion by denying Drevaleva's requests and affirmed the orders in favor of DIR. (*Ibid.*)

(3) *Drevaleva v. Alameda Health System* (March 20, 2020, A157851) (nonpub. opn.) (*Drevaleva V*)—a pro per appeal by Drevaleva from a judgment. After DIR determined that AHS terminated Drevaleva for legitimate, non-discriminatory reasons, she presented AHS with a government claim in August 2018. (*Ibid.*; see Gov. Code, § 945 [allowing lawsuits against public entities].) Drevaleva alleged she suffered over $500,000 in losses, including lost health and dental insurance, loss of the ability to purchase a home or car, and loss of the ability to become a physician assistant as a result of DIR's investigation and findings that she was terminated from AHS due to medical negligence. (*Drevaleva V, supra,* A157851.)

AHS rejected this claim as untimely and directed Drevaleva to petition the court for relief from Government Code section 945.4, regarding government claim presentation requirements. (*Drevaleva V, supra,* A157851; see Gov. Code, § 945.6, subd. (a) [identifying timelines for providing written or other notice to public entity of claim].) Drevaleva filed a verified petition requesting this relief, which the trial court rejected. (*Drevaleva V, supra,* A157851.) The trial court entered a judgment of dismissal with prejudice in May 2019. (*Ibid.*) The trial court also denied her additional request for sanctions against AHS and her motion under section 663 to vacate the court's judgment. (*Ibid.*)

Drevaleva filed a notice of appeal of all three orders on July 16, 2019. Our decision on this appeal acknowledged that litigants are required to fulfill

government claim presentation requirements for all monetary demands, regardless of the theory of an action. (*Drevaleva V, supra,* A157851.) Drevaleva, however, conceded both in the trial court and on appeal that she did not seek money or damages. (*Ibid.*) We thus deemed her verified petition frivolous and unnecessary and affirmed the court's rulings in favor of AHS. (*Ibid.*)

(4) *Drevaleva v. Alameda Health System* (May 29, 2020, A158282) (nonpub. opn.) (*Drevaleva VI*)—an appeal by Drevaleva in pro per filed on September 9, 2019 challenging the trial court's denial of her request for attorneys' fees because she was self-represented. As relevant here, Drevaleva filed a petition pursuant to the California Public Records Act (CPRA) (Gov. Code, § 6250 et seq.), seeking documents relating to her termination from AHS and the DIR investigation of her wage and unlawful termination claims. (*Drevaleva VI, supra,* A158282.) AHS produced three documents in its possession responsive to the CPRA request and declared it did not have any additional responsive documents. (*Ibid.*) The trial court thus denied Drevaleva's petition as moot because AHS produced the documents, declared Drevaleva the prevailing party because her petition compelled AHS to produce the requested documents, and entered a judgment of dismissal. (*Ibid.*)

Drevaleva sought attorneys' fees and costs under section 128.5, governing sanctions, and Government Code section 6259, governing CPRA attorney fees—both of which requests the trial court rejected as unsupported by evidence that Drevaleva actually incurred attorneys' fees, or that there were any actions justifying sanctions. (*Drevaleva VI, supra,* A158282.) We affirmed the trial court's rulings in favor of AHS. (*Ibid.*)

In November 2019, Drevaleva filed a Notice of Appeal in this case, *Drevaleva v. Alameda Health System* (A158862), challenging the trial court's order granting AHS's motion to strike her complaint against AHS—which alleged libel, abuse of process, and intentional infliction of emotional distress based on a statement in a federal court brief that she was terminated for poor performance—pursuant to section 425.16 (the anti-SLAPP statute).[4]

**B. Order to Show Cause, Vexatious Litigant**

Based on this extensive history of filing unsuccessful appeals, we issued an order to Drevaleva to show cause why she should not be declared a vexatious litigant as a result of, among other things, her adverse determinations in *Drevaleva I-III, supra*, A155165, A155187, A155899; *Drevaleva IV, supra*, A156248; *Drevaleva V, supra*, A157851; and *Drevaleva VI, supra*, A158282. Drevaleva was authorized to submit an opposition, and the matter was set for a hearing. After full briefing and extensions of deadlines, the matter was argued and submitted.

## II. DISCUSSION

The " 'vexatious litigant' " statutes under section 391 et seq. " 'are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants.' " (*In re Marriage of Rifkin & Carty* (2015) 234 Cal.App.4th 1339, 1345.) In order to deem a party a vexatious litigant, a court must find the party falls under at least one of the four separate definitions for a vexatious litigant. (§ 391, subd. (b).)

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[4] We address the merits of the appeal in a separate unpublished opinion affirming the trial court's order. (*Drevaleva v. Alameda Health System* (August 31, 2020, A158862.)

Courts have the authority to enter a prefiling order prohibiting individuals deemed vexatious litigants from filing new in pro per litigation without first obtaining leave of the presiding judge where the litigation is to be filed. (§ 391.7, subd, (a); *Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 221 (*Bravo*).) Permission to file may be granted "only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay." (§ 391.7, subd. (b).) The prefiling requirement "does not deny the vexatious litigant access to the courts but operates solely to preclude the initiation of meritless lawsuits and their attendant expenditures of time and costs." (*Bravo,* at pp. 221–222.)

Drevaleva, acting in *pro per*, has filed many appeals adversely determined against her; has repeatedly attempted to relitigate claims against the same defendants that have been finally determined; and has repeatedly filed unmeritorious motions, pleadings and other papers, all of which support a finding that she is a vexatious litigant. (§ 391 et seq.) We address each of these bases in turn.

***A. Section 391, Subdivision (b)(1)—Appeals***

As relevant here, a "vexatious litigant" is a person who "[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been . . . finally determined adversely to the person." (§ 391, subd. (b)(1).) " 'Litigation' means any civil action or proceeding, commenced, maintained or pending in any state or federal court," which also includes any appeal. (§ 391, subd. (a); *McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1216 (*McColm*).) An adverse determination means the litigant does not win the proceeding that she began, and a determination is final when all avenues for direct review have been

exhausted. (*Garcia v. Lacey* (2014) 231 Cal.App.4th 402, 406; *Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 993.)

As described above, Drevaleva has filed six appeals, A155165, A155187, A155899, A156248, A158282, and A157851, five of which have been "finally determined adversely" to her because they affirmed the trial court's orders.[5] These appeals alone establish her status as a vexatious litigant. (See § 391, subd. (b)(1).)[6]

Drevaleva nonetheless challenges this conclusion for several reasons, none of which is persuasive. First, citing section 391.1, she claims that only a defendant, not an appellate court, can move to designate a plaintiff a vexatious litigant upon notice and a hearing. Drevaleva's reading of section 391.1 is accurate, but that provision is not applicable here. (§ 391.1 ["a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security" upon a showing "that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he or she will prevail in the litigation against the moving defendant"].) As noted above, section 391.7 expressly states that "the court may, *on its own motion*" enter a prefiling order against a vexatious litigant. (§ 391.7, subd. (a), italics

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[5] Drevaleva has exhausted her avenues for review in *Drevaleva I-III, supra*, A155165, A155187, A155899; *Drevaleva IV, supra*, A156248; and *Drevaleva V, supra*, A157851. Her petition for review of our decision in *Drevaleva VI, supra*, A158282 is currently pending in the California Supreme Court.

[6] Although we do not rely on any of Drevaleva's federal litigation in assessing whether she meets the criteria for a vexatious litigant, we note that she has filed several federal cases that have been determined adversely to her. (*Drevaleva v. Alameda Health Sys.* (9th Cir. Dec. 24, 2019) 789 Fed. Appx. 51, 52 [affirming district court's dismissal of discrimination complaint]; *Drevaleva v. Wilkie* (N.D. Cal., Nov. 7, 2019) 2019 U.S. Dist. LEXIS 194053 [dismissing with prejudice Drevaleva's complaint against West Los Angeles Veterans Affairs Medical Center alleging discrimination]; *Drevaleva v. United States* (N.D. Cal., Sept. 20, 2019) 2019 U.S. Dist. LEXIS 161366 [dismissing Drevaleva's complaint against Minneapolis Veterans Affairs Medical Center and entering final judgment against her].)

added.) Our Supreme Court has confirmed that a Court of Appeal may, on its own motion, declare a party a vexatious litigant in the first instance on appeal. (*John v. Superior Court* (2016) 63 Cal.4th 91, 99–100.)

Second, Drevaleva argues that "litigation" under section 391 does not encompass an "appeal." (See § 391, subd. (b)(1).) This is incorrect. " 'Litigation' for purposes of vexatious litigant requirements encompasses civil trials and special proceedings, but it is broader than that. It includes proceedings initiated in the Courts of Appeal by notice of appeal or by writ petitions other than habeas corpus or other criminal matters." (*McColm, supra*, 62 Cal.App.4th at p. 1219.) Drevaleva's six appeals identified above thus constitute "litigations" within the purview of the vexatious litigant statute. (See, e.g., *In re Whitaker* (1992) 6 Cal.App.4th 54, 56 [identifying party as a vexatious litigant under § 391, subd. (b)(1) due to sixteen appeals, where eight were affirmed, seven dismissed, and one reversed].)

Finally, Drevaleva claims that *Drevaleva I-III, supra*, A155165, A155187, A155899 only count as one appeal rather than three because they were consolidated for the purposes of record preparation, briefing, oral argument, and decision. Not so. "Litigation" includes proceedings initiated in the Courts of Appeal "by notice of appeal." (*McColm, supra*, 62 Cal.App.4th at p. 1219.) As Drevaleva filed six notices of appeal, there were six prior appeals, five of which have been determined adversely to her. (Cf. *In re R.H.* (2009) 170 Cal.App.4th 678, 684–686, 693 [where a pro per litigant initiated multiple appeals from a single action in the trial court, each appeal considered a separate litigation even when some were consolidated for decision].)

### *B. Section 391, Subdivision (b)(2)—Attempts to Relitigate Claims or Issues*

Section 391, subdivision (b)(2) further defines a vexatious litigant as a person who "repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the [final] determination . . . or (ii) the cause of action, claim, controversy, or any of the issues of fact or law" against the same defendant or defendants. (§ 391, subd. (b)(2); see also *Holcomb v. U.S. Bank Nat. Assn.* (2005) 129 Cal.App.4th 1494, 1505 [" 'repeatedly' " refers to "a past pattern or practice on the part of the litigant that carries the risk of repetition in the case at hand"].) As demonstrated below, Drevaleva's practice of repeatedly filing requests based on the same facts and issues that we have already decided in an attempt to relitigate or challenge the validity of those decisions warrants a finding that Drevaleva is a vexatious litigant under section 391, subdivision (b)(2).[7]

For example, in *Drevaleva VI, supra,* A158282, we affirmed the denial of her request for attorneys' fees or sanctions in a May 29, 2020 opinion. In addition to filing a petition for rehearing, Drevaleva immediately filed various documents and requests *after* issuance of the opinion, including the following attempts to relitigate that decision: (1) a notice filed in June 2020 that she had found the physical records on appeal for *Drevaleva V* and a previously-dismissed appeal (A157784), and a request that she be permitted to use those records rather than the formal record on appeal to identify AHS's counsel's bad faith tactics in support of her request for sanctions; (2) another

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[7] Indeed, rather than responding to this court's Order to Show Cause, which requested an explanation of her actions in *Drevaleva VI, supra,* A158282 and *Drevaleva V, supra,* A157851, Drevaleva used it as an opportunity to relitigate *Drevaleva I, supra,* A155165, claiming that "DIR failed to obtain the explanations and evidence regarding this allegation" of negligence.

request filed in June 2020 to allow her to use her own copies of the record on appeal in *Drevaleva VI* to provide support for her request for sanctions against AHS, and to demonstrate the trial court acted fraudulently by denying her request for sanctions ; and (3) a request filed in July 2020 to consider various legal articles about awarding pro se litigants fees under the Federal Rules of Civil Procedure (28 U.S.C.), rule 11.

Drevaleva displayed the same pattern after we issued our decision in *Drevaleva V, supra,* A157851. Nearly two months after we affirmed the trial court orders and rejected her petition for a rehearing, Drevaleva filed a motion to reinstate her appeal. She claimed she found her physical copy of the record on appeal, which would allow her to provide this Court with necessary citations to support her claims and decide her case "anew."

In her current appeal *Drevaleva v. Alameda Health System*, A158862, Drevaleva has similarly requested we reinstate all her previously, finally determined appeals for further proceedings in this Court. She further filed a separate motion on June 3, 2020, asking us to take judicial notice of significant portions of discovery for the purpose of demonstrating that AHS's counsel, rather than AHS, responded to discovery requests. To Drevaleva, this demonstrates that AHS never participated in any of her previous lawsuits and supports her assertion that the judgments underlying two of her dismissed appeals must be reversed because they were unlawful due to AHS's alleged lack of participation.

These requests and responses sufficiently demonstrate Drevaleva fulfills the vexatious litigant criteria under section 391, subdivision (b)(2).

### *C. Section 391, Subdivision (b)(3)—Frivolous Motions, Unnecessary Burdens*

Finally, Drevaleva is a vexatious litigant under section 391, subdivision (b)(3) because "[i]n any litigation while acting in propria persona, [she] repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay." (§ 391, subd. (b)(3.) To qualify under subdivision (b(3), the motions must be "so devoid of merit and be so frivolous that they can be described as a ' "flagrant abuse of the system," ' have 'no reasonable probability of success,' lack 'reasonable or probable cause or excuse' and are clearly meant to ' "abuse the processes of the courts and to harass the adverse party." ' " (*Morton v. Wagner* (2007) 156 Cal.App.4th 963, 972.) A review of even a few of Drevaleva's recent motions and requests demonstrates that she adequately fulfills these criteria.

In *Drevaleva VI, supra,* A158282, she moved for all of the Justices in this Division to recuse themselves from adjudicating her appeal. Rather than citing any authority or evidence warranting recusal, she asserted in a conclusory manner that the Justices were biased, prejudiced, and would rule in favor of AHS and DIR because those agencies' employees and the Justices all worked in the same building with each other. (*Ibid.*) Requests to recuse justices in the absence of any evidence supporting the existence of any relationship, personal or otherwise, between the justices and other litigants are frivolous, and Drevaleva's request is no different. (See *In re Koven* (2005) 134 Cal.App.4th 262, 273.)

In that same appeal, Drevaleva moved to disqualify counsel representing AHS because she alleged it had a conflict of interest under the

American Bar Association Model Rules of Professional Conduct[8], rule 1.7. (*Drevaleva VI, supra,* A158282.) But there was no basis for a disqualification motion grounded on conflict of interest because Drevaleva did not have an attorney-client relationship with AHS's counsel. (*Great Lakes Construction, Inc. v. Burman* (2010) 186 Cal.App.4th 1347, 1356 [requiring an attorney-client relationship or other confidential relationship with counsel to disqualify an attorney from representation].) She fails to cite any authority for her request, and there is nothing in Drevaleva's additional documents, including her "Objections to Defendants' Filing Named 'Opposition to Appellant's Motion to Disqualify Opposing Counsel,' addressing AHS's arguments regarding her motion to disqualify counsel.[9] (*Drevaleva VI, supra,* A158282.)

In another request, Drevaleva attempted to conduct unnecessary discovery, imploring this court to "schedule a hearing and to order an **Officer** of [AHS] *itself* to personally come to the hearing and to declare under the penalty of perjury and under the laws of the State of California that this Officer was responsible for every statement that was presented to the Superior Court and the Court of Appeal for the First District, Division Four" during her trial court proceedings and appeals so that she could identify the person who owes her attorney fees. (*Drevaleva VI, supra,* A158282.) She cites nothing to support this court's alleged authority to issue a subpoena against an unknown employee at AHS to determine who must pay attorney fees to which Drevaleva, as a pro se litigant, is not in any event entitled.

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[8] All references to the Rules of Professional Conduct are to the American Bar Association Model Rules of Professional Conduct

[9] We denied these motions and additional requests.

In her pending appeal, *Drevaleva v. Alameda Health System* (A158862), Drevaleva filed more than five different motions and requests on May 4, 2020 alone. One was a "Motion to Deny the Narayan Travelstead Professional Law Corporation's Right for Self-Representation" based on AHS's counsel's failure to submit a declaration under penalty of perjury that it had personal knowledge of the factual assertions presented in AHS's brief. She also filed another frivolous "Motion to Disqualify the Opposing Counsel the Narayan Travelstead Professional Law Corporation from Representing Defendant Alameda Health System" because of an alleged conflict of interest under Rules of Professional Conduct, rule 1.7—largely repeating the arguments that were made and rejected in her motion to disqualify counsel in *Drevaleva IV*. (See *In re Whitaker*, *supra*, 6 Cal.App.4th at p. 56 [repeating arguments that have been made and rejected by the same court is frivolous conduct].)

On May 28, 2020, Drevaleva filed various documents, notifying us of related case *Drevaleva v. Harding*, filed against her former AHS supervisor in Alameda County Superior Court. She also requested that we, among other things, issue an order extending the deadline for serving a trial court summons on the respondent because she did not know his current location. She further requested us to order Equifax-Verification Services, a third-party without any ties to Drevaleva or respondent Harding, to disclose information about the respondent. She did not identify any legal basis for these requests.

A few days later, on June 3, Drevaleva filed a "1) Second Additional Information to My Notice of a Related Case [and] 2) Request for an Order." In this request, she admitted she was simply repeating her request filed on May 28. But she also demanded that we listen to the oral argument recording in an entirely different and completed appeal, *Drevaleva V*, to assess the veracity of statements made by AHS's counsel. She further

requested, without citing any legal authority or evidence, that we notify the California Supreme Court and Attorney General of the State of California of potential criminal conduct by AHS counsel for possibly falsifying and lying about a signature by a process server. We denied these requests on June 16, 2020.

In another instance, rather than filing a focused response to our July 2020 Vexatious Litigant Order to Show Cause, Drevaleva spent her time threatening to pursue efforts to have the Judicial Council permanently disqualify the Justices of this Division and to "indict all of them for a civil conspiracy" with AHS, AHS's counsel, and DIR because our decisions prevented her from being reinstated at AHS. Aside from parroting the statutes for civil conspiracy, Drevaleva cites no facts supporting her conclusory allegations. Indeed, Drevaleva admits, "I don't have any direct evidence of possible conspiracy between the Justices and AHS."

Drevaleva's further refusal to adhere to court instructions prohibiting overly voluminous materials is apparent. She filed a request for permission to exceed the page and word count of her opening brief on November 25, 2019. The next day, she filed a nearly identical second request for the same relief but increased her word count request by only 30 words. On May 4, 2020, she filed the decisions in 13 cases from various Courts of Appeal throughout California without offering any explanation of their relevance to her appeal or pending motions.

On August 13, 2020, Drevaleva requested additional time to respond to this Court's Order to Show Cause why she should not be declared a vexatious litigant. We granted her request, stating that she "shall file a single brief" on August 17, 2020. Instead of complying with our directive, Drevaleva filed three briefs, totaling over 200 pages, between August 17 and 18. This

response was submitted in addition to her previously-filed "Initial and Partial Response to the July 21, 2020 Order to Show Cause"—a document totaling 54 pages, including exhibits of other federal courts orders dismissing Drevaleva's lawsuits as frivolous.[10]

The sheer number and volume of irrelevant and frivolous documents that Drevaleva has filed or submitted have resulted in unnecessary burdens on this Court and respondents. (Cf. *In re Marriage of Schnabel* (1994) 30 Cal.App.4th 747, 755 [consequences of frivolous filings include that " '[o]ther appellate parties, many of whom wait years for a resolution of bona fide disputes, are prejudiced by the useless diversion of this court's attention. . . . [T]he appellate system and the taxpayers of this state are damaged by what amounts to a waste of this court's time and resources' "].) Drevaleva thus fulfills the vexatious litigant criteria under section 391, subdivision (b)(3).

## III. DISPOSITION

Tatyana Drevaleva is hereby declared a vexatious litigant within the meaning of section 391, subdivisions (b)(1)–(3). Pursuant to section 391.7, henceforth she may not file any new litigation in the courts of the State of California in propria persona without first obtaining leave of the presiding judge or presiding justice of the court where the litigation is proposed to be filed. (§ 391.7, subd. (a).) Disobedience of this order may be punished as a contempt of court. (*Ibid.*) The clerk of this court is directed to provide a copy

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[10] Three days after the deadline for filing her reply brief (which she filed on August 21, 2020), Drevaleva submitted a "Response to the Order to Show Cause, Part 4," a 122-page document in which she largely reiterated her dissatisfaction with AHS's and DIR's responses to many of her discovery requests in the trial court. We struck this filing as untimely and in violation of our August 14, 2020 order setting deadlines and requiring her to file a "single brief" in response to the order to show cause.

of this opinion and order to the Judicial Council. (*Id.*, subd. (f).) Copies shall also be mailed to the presiding judge and clerk of Alameda County Superior Court.

Dated: _____

**Appendix O.**

Order of the Court of Appeal for the First District, Division Four clarified the August 31, 2020 Order that declared me a vexatious litigant, September 04, 2020.

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION FOUR

TATYANA E. DREVALEVA,
Plaintiff and Appellant,
v.
ALAMEDA HEALTH SYSTEM et al.,
Defendants and Respondents.

A158862
Alameda County
Sup. Ct. No. RG19010635

BY THE COURT*:

On September 3, 2020, appellant submitted a "Request to File a New Litigation by the Vexatious Litigant" (Request to File) with an accompanying "Request for Clarification of the August 31, 2020 Order that Declared Me a Vexatious Litigant" (Request for Clarification). The clerk of this court is directed to file the Request to File and the Request for Clarification as of September 3, 2020, the date the court received the requests.

The Request to File is denied as moot, as the Request for Clarification does not constitute "new litigation" within the meaning of Code of Civil Procedure section 391.7 and the August 31, 2020 Order.

The court grants appellant's Request for Clarification by clarifying that (1) the August 31, 2020 Order applies only to California state courts, and not to any federal courts; and (2) the August 31, 2020 order does not apply to motions or other filings in any cases that were pending in California state courts on or before August 31, 2020.

Date:_____ _____P.J.

*Streeter, Acting P.J., Tucher, J. and Brown, J. participated in the decision.

## Appendix P.

A former version of the California Labor Code Section 98.7.

# 2016 California Code
# Labor Code - LAB
# DIVISION 1 - DEPARTMENT OF INDUSTRIAL RELATIONS
# CHAPTER 4 - Division of Labor Standards Enforcement
# Section 98.7.

**Universal Citation:** CA Labor Code § 98.7 (2016)

**98.7.** (a) Any person who believes that he or she has been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner may file a complaint with the division within six months after the occurrence of the violation. The six-month period may be extended for good cause. The complaint shall be investigated by a discrimination complaint investigator in accordance with this section. The Labor Commissioner shall establish procedures for the investigation of discrimination complaints. A summary of the procedures shall be provided to each complainant and respondent at the time of initial contact. The Labor Commissioner shall inform complainants charging a violation of Section 6310 or 6311, at the time of initial contact, of his or her right to file a separate, concurrent complaint with the United States Department of Labor within 30 days after the occurrence of the violation.

(b) Each complaint of unlawful discharge or discrimination shall be assigned to a discrimination complaint investigator who shall prepare and submit a report to the Labor Commissioner based on an investigation of the complaint. The Labor Commissioner may designate the chief deputy or assistant Labor Commissioner or the chief counsel to receive and review the reports. The investigation shall include, where appropriate, interviews with the complainant, respondent, and any witnesses who may have information concerning the alleged violation, and a review of any documents that may be relevant to the disposition of

the complaint. The identity of a witness shall remain confidential unless the identification of the witness becomes necessary to proceed with the investigation or to prosecute an action to enforce a determination. The investigation report submitted to the Labor Commissioner or designee shall include the statements and documents obtained in the investigation, and the findings of the investigator concerning whether a violation occurred. The Labor Commissioner may hold an investigative hearing whenever the Labor Commissioner determines, after review of the investigation report, that a hearing is necessary to fully establish the facts. In the hearing the investigation report shall be made a part of the record and the complainant and respondent shall have the opportunity to present further evidence. The Labor Commissioner shall issue, serve, and enforce any necessary subpoenas.

(c) If the Labor Commissioner determines a violation has occurred, he or she shall notify the complainant and respondent and direct the respondent to cease and desist from the violation and take any action deemed necessary to remedy the violation, including, where appropriate, rehiring or reinstatement, reimbursement of lost wages and interest thereon, payment of reasonable attorney s fees associated with any hearing held by the Labor Commissioner in investigating the complaint, and the posting of notices to employees. If the respondent does not comply with the order within 10 working days following notification of the Labor Commissioner s determination, the Labor Commissioner shall bring an action promptly in an appropriate court against the respondent. If the Labor Commissioner fails to bring an action in court promptly, the complainant may bring an action against the Labor Commissioner in any appropriate court for a writ of mandate to compel the Labor Commissioner to bring an action in court against the respondent. If the complainant prevails in his or her action for a writ, the court shall award the complainant court costs and reasonable attorney s fees, notwithstanding any other law. Regardless of any delay in bringing an action in court, the Labor Commissioner shall not be divested of jurisdiction. In any action, the court may permit the claimant to intervene as a party plaintiff to the action and shall have jurisdiction, for cause shown, to restrain the violation and to order all appropriate relief. Appropriate relief includes, but is not limited to, rehiring or reinstatement of the complainant, reimbursement of lost wages and interest thereon, and any other compensation or equitable relief as is appropriate under the circumstances of the case. The Labor Commissioner shall petition the court for appropriate temporary relief or restraining order unless he or she determines good cause exists for not doing so.

(d) (1) If the Labor Commissioner determines no violation has occurred, he or she shall notify the complainant and respondent and shall dismiss the complaint. The Labor

Commissioner may direct the complainant to pay reasonable attorney s fees associated with any hearing held by the Labor Commissioner if the Labor Commissioner finds the complaint was frivolous, unreasonable, groundless, and was brought in bad faith. The complainant may, after notification of the Labor Commissioner s determination to dismiss a complaint, bring an action in an appropriate court, which shall have jurisdiction to determine whether a violation occurred, and if so, to restrain the violation and order all appropriate relief to remedy the violation. Appropriate relief includes, but is not limited to, rehiring or reinstatement of the complainant, reimbursement of lost wages and interest thereon, and other compensation or equitable relief as is appropriate under the circumstances of the case. When dismissing a complaint, the Labor Commissioner shall advise the complainant of his or her right to bring an action in an appropriate court if he or she disagrees with the determination of the Labor Commissioner, and in the case of an alleged violation of Section 6310 or 6311, to file a complaint against the state program with the United States Department of Labor.

(2) The filing of a timely complaint against the state program with the United States Department of Labor shall stay the Labor Commissioner s dismissal of the division complaint until the United States Secretary of Labor makes a determination regarding the alleged violation. Within 15 days of receipt of that determination, the Labor Commissioner shall notify the parties whether he or she will reopen the complaint filed with the division or whether he or she will reaffirm the dismissal.

(e) The Labor Commissioner shall notify the complainant and respondent of his or her determination under subdivision (c) or paragraph (1) of subdivision (d), not later than 60 days after the filing of the complaint. Determinations by the Labor Commissioner under subdivision (c) or (d) may be appealed by the complainant or respondent to the Director of Industrial Relations within 10 days following notification of the Labor Commissioner s determination. The appeal shall set forth specifically and in full detail the grounds upon which the appealing party considers the Labor Commissioner s determination to be unjust or unlawful, and every issue to be considered by the director. The director may consider any issue relating to the initial determination and may modify, affirm, or reverse the Labor Commissioner s determination. The director s determination shall be the determination of the Labor Commissioner. The director shall notify the complainant and respondent of his or her determination within 10 days of receipt of the appeal.

(f) The rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law.

(g) In the enforcement of this section, there is no requirement that an individual exhaust

administrative remedies or procedures.

*(Amended by Stats. 2013, Ch. 732, Sec. 3. Effective January 1, 2014.)*

## Appendix R.

The California anti-SLAPP statute of the California Code of Civil Procedure, Section 425.16.

**CODE OF CIVIL PROCEDURE - CCP**

**PART 2. OF CIVIL ACTIONS [307 - 1062.20]** *( Part 2 enacted 1872. )*

**TITLE 6. OF THE PLEADINGS IN CIVIL ACTIONS [420 - 475]** *( Title 6 enacted 1872. )*

**CHAPTER 2. Pleadings Demanding Relief [425.10 - 429.30]** *( Chapter 2 repealed and added by Stats. 1971, Ch. 244. )*

**ARTICLE 1. General Provisions [425.10 - 425.55]** *( Article 1 added by Stats. 1971, Ch. 244. )*

**425.16.** (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b) (1) 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 Constitution or the 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.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c) (1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in 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, or (4) 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.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this

section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j) (1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

*(Amended by Stats. 2014, Ch. 71, Sec. 17. (SB 1304) Effective January 1, 2015.)*