

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

DAVID KAPLER,

Plaintiff and Respondent,

v.

CITY OF ALAMEDA et al.,

Defendants and Appellants.

A133001

(Alameda County
Super. Ct. No. HG11570933)

I. INTRODUCTION

Plaintiff and respondent David Kapler resigned as the City of Alameda’s fire chief after he was photographed filling a personal vehicle with city gasoline and an administrative investigation resulted in a termination decision. Kapler then sued the city and several of its officials for breach of contract and wrongful termination. The city and its officials responded with a special motion to strike under Code of Civil Procedure section 425.16¹ (an “anti-SLAPP” motion) claiming (a) their actions in investigating and taking adverse action against Kapler are protected conduct under the statute and (b) Kapler cannot establish a probability of prevailing on his claims. The trial court denied the motion on the first ground—ruling Kapler’s claims do not arise from any protected conduct. We reverse, except as to one of Kapler’s breach of contract theories. As to all other theories and causes of action, we conclude the challenged conduct is

¹ All further statutory reference are to the Code of Civil Procedure unless otherwise indicated.

protected under the anti-SLAPP statute and Kapler has not shown a probability of prevailing on the merits.

II. FACTUAL AND PROCEDURAL BACKGROUND

A city resolution, effective June 25, 2006, established the position of fire chief as an “unrepresented classification not included in any bargaining group.” The city’s municipal code provides the fire chief shall serve “at the pleasure of the City Manager.” (Alameda Muni. Code, § 2-30.1.)

The city hired Kapler as fire chief effective October 1, 2007. According to Kapler, the terms of his employment were set forth in an August 17, 2007, letter from and oral representations by defendant and appellant Debra Kurita, then the city manager.

The letter stated Kapler’s employment was “at will” and he would serve at the “discretion of the City Manager.” It promised a “post-retirement insurance benefit” available under an existing memorandum of understanding, unless Kapler voluntarily resigned before three years of service. The letter also gave Kapler the choice between a city take-home vehicle, which he could use only for city business, and a car allowance of \$250 per month, to be put toward the cost of using his personal vehicle for city business. Kurita orally promised him if he chose the car allowance option, the city would outfit his personal vehicle with emergency response equipment, and, as further reimbursement for city business, would permit him to use gas from pumps at city-owned fire stations. By letter dated October 5, 2007, Kapler opted for the car allowance.

Kapler claims he had the right to fuel not only his Honda Ridgeline truck, which he mostly used for city business and which had been outfitted with emergency response equipment, but also a later-acquired personal car, a blue BMW, which he occasionally used for city business.

Firefighters witnessed Kapler filling up his BMW and snapped photographs. These photographs made their way to the president of the firefighters’ union, Domenick Weaver, who forwarded them to the interim city manager, the mayor, and the press. The

media went into overdrive; reprints of the photos and articles about the city's concerns about Kapler's gas use appeared in the San Francisco Chronicle, the Bay Citizen, the Island and eventually in media outlets across the country. The story continued to have legs throughout the administrative proceedings that followed.

On September 1, 2010, then Interim City Manager Ann Marie Gallant wrote to Kapler, placing him on paid administrative leave while the city investigated his alleged unauthorized use of city gas. An investigator then reviewed Kapler's personnel file and city policy documents, and interviewed Kapler and various present and former city officials, including Kurita, who had made the employment offer. Kapler could not recall any discussions about which particular vehicles he would be entitled to refuel at city pumps, and claimed he had not violated the terms and conditions of his employment. Kurita and other city employees recalled making it clear the gas benefit was limited to the vehicle the city would equip for emergency use. The investigator prepared a 14-page report dated September 15, 2010, summarizing his findings and concluding Kapler fueled his BMW, the non-equipped car, without authorization.

On September 17, 2010, the city informed Kapler by letter that it planned to terminate his employment effective September 22, 2010. The letter stated Kapler was not entitled to a "pre-termination Skelly meeting" because his employment was at-will, but offered him a meeting with the interim city manager should he wish to respond to the termination notice or the investigator's report. The city and Kapler agreed to postpone the meeting and termination so his attorney could have adequate time to prepare.

At the rescheduled meeting on September 27, 2010, Kapler denied his gas use was unauthorized. He then proposed a settlement, and he and the interim city manager signed an agreement. In exchange for Kapler's resignation and release of claims against the city, the city would pay him \$75,000 and provide postseparation insurance benefits for him, alone, but not his spouse. The settlement agreement's preamble reiterated Kapler was an "at-will" employee.

On November 3, 2010, the city council rejected the proposed settlement, and the city proceeded with its plan to terminate Kapler on November 5, 2010. However, before the city physically delivered its written termination notice, Kapler resigned on November 5 in an effort to preserve what he claimed was a 40-year exemplary employment record.

Convinced the stealth photos, and ensuing investigation and termination process, were politically motivated in retaliation for fiscal decisions he had made and which the firefighters' union had opposed, Kapler filed an administrative claim in anticipation of suing the city and various city officials. After the city rejected his claim, he filed a complaint against the city, Council Member Lena Tam, former City Manager Kurita, and Interim City Manager Gallant on April 14, 2011. The complaint alleged nine causes of action.

The first was for breach of contract. Kapler claimed the city had breached his employment agreement by (1) terminating him without cause because he was entitled to use the city gas in question, and (2) not paying postretirement benefits because he had completed three years of service with the city. The third cause of action, for breach of the implied covenant of good faith and fair dealing, was based on the same alleged conduct.

The second cause of action was for intentional interference with an economic relationship. Kapler claimed city officials wrongfully instigated his termination without cause.

The fourth cause of action was for wrongful termination in violation of the employment agreement and the Brown Act. (Gov. Code, § 3500 et seq.) The gas theft claim, according to Kapler, was a pretext for union allies who disliked his policies. The fifth cause of action, for constructive discharge, similarly alleged the city allowed publication of false information about him in the media and then relied on those false reports to wrongfully instigate termination proceedings.

The sixth and seventh causes of action, respectively, were for intentional and negligent infliction of emotional distress. The eighth cause of action was for defamation based on the city's statements he had stolen gas. The ninth and final cause of action alleged that the city had violated the Firefighters Procedural Bill of Rights ("FFBOR"), found in Government Code section 3250 et seq. Although the complaint is unclear, Kapler's respondent's brief on appeal clarifies the city allegedly violated the FFBOR by not providing him an administrative appeal and by allowing the photographs to be disseminated to the media.

On June 16, 2011, the city and individual defendants demurred to the complaint, moved to strike the individual defendants, and moved to strike all causes of action as a SLAPP (Strategic Lawsuit Against Public Participation). On July 13, 2011, the trial court ruled the demurer had some facial merit and, declining to consider Kapler's late-filed opposition, sustained it with leave to amend. The court then dropped the motion to strike the individual defendants pending the filing of a first amended complaint.

On July 25, 2011, the trial court denied defendants' anti-SLAPP motion, ruling Kapler's claims did not arise from defendants' "exercise of the right to petition or right of free speech" and therefore no conduct protected by the anti-SLAPP statute was implicated. The court did not reach the issue of whether Kapler had carried his burden of demonstrating some probability of succeeding on the merits of his claims.

Kapler filed a first amended complaint on August 8, 2011. This pleading retained seven of the originally pleaded causes for action: breach of contract, breach of the covenant of good faith and fair dealing, wrongful termination, constructive discharge, intentional infliction of emotional distress, negligent infliction of emotional distress, and violation of the FFBOR. Kapler later filed an errata clarifying he had also dropped the individual defendants from his suit and was proceeding only against the city.

On August 19, 2011, the city, Tam, and Kurita (but not Gallant) filed a notice of appeal from the order denying the anti-SLAPP motion.

III. DISCUSSION

“The Legislature enacted the anti-SLAPP statute to address the societal ills caused by meritless lawsuits that are filed to chill the exercise of First Amendment rights. [Citation.] The statute accomplishes this end by providing a special procedure for striking meritless, chilling causes of action at the earliest possible stages of litigation.”² (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 443.) Government defendants, whether entities or officials, may, like their private counterparts, invoke the anti-SLAPP statute’s protection. (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 18-19.)

“ ‘Under the statute, the court makes a two-step determination: “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) ‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause fits one of the categories spelled out in section 425.16, subdivision (e)’ [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (§ 425.16, subd. (b)(1))” [Citations.] “Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.” [Citation.] ” (*Tutor-Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604, 609.)

An appellate court reviews an order granting or denying an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326; *Gerbosi v. Gaims, Weil, West*

² The statute provides: “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).)

& *Epstein, LLP, supra*, 193 Cal.App.4th at p. 444; *Tutor-Saliba Corp. v. Herrera, supra*, 136 Cal.App.4th at p. 609.) This includes whether the challenged activity is protected under the statute and whether the plaintiff has established a reasonable probability of success on his or her claim. (*Tutor-Saliba Corp. v. Herrera, supra*, at pp. 609-610.)

Protected Activity

The anti-SLAPP statute applies only to protected activity—that is, activity “in furtherance of a person’s right of petition or free speech under the United States Constitution or California Constitution in connection with a public issue.” (§ 425.16, subds. (b)(1), (e).) Such activity 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.” (§ 425.16, subd. (e).)

“[T]he party moving to strike a cause of action has the initial burden to show that the cause of action ‘aris[es] from [an] act . . . in furtherance of the [moving party’s] right of petition or free speech.’ ” (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) “In determining whether a defendant sustained its initial burden of proof, the court relies on the pleadings and declarations or affidavits.” (*Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324, 329, overruled on other grounds by *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 25; § 425.16, subd. (b); see also *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.)

“Our Supreme Court has recognized the anti-SLAPP statute should be broadly construed [(*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60, fn. 3)]

and that a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a garden variety tort or contract claim when in fact the claim is predicated on protected speech or petitioning activity.” (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1271-1272.) “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, italics omitted.)

Kapler’s causes of action for constructive discharge, intentional and negligent infliction of emotional distress, and violation of the FFBOR arise, at least in part, from the city’s divulging to the media accusations of misconduct and allegedly incriminating photographs. These causes of action, based at least in part on alleged communications by the city and its employees with the media, fall squarely within the ambit of the anti-SLAPP statute. They implicate statements “made in connection with an issue under consideration or review by a legislative . . . body.” (§ 425.16, subd. (e)(2); see *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1041-1042, 1044 [reports on state investigatory audit were protected speech under subdivision (e)(2)]; *Maranatha Corrections, LLC v. Department of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1075, 1085 (*Maranatha Corrections*) [dissemination of letter with misconduct allegations to press was protected under subdivision (e)(2)].) They also implicate statements “made in a . . . public forum in connection with an issue of public interest.” (§ 425.16, subd. (e)(3).) (*Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1115-1116 [subdivision (e)(3) of “section 425.16 extends to public employees who issue reports and comment on issues of public interest relating to their official duties”].)

All of the causes of action, including the breach of contract cause of action, also arise, at least in part, from the city’s investigation into whether Kapler engaged in misconduct and its ultimate decision to terminate his employment.

Statements made during investigations of government employee misconduct are clearly protected under the anti-SLAPP statute. (*Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1544 [allegedly false accusations made during government body’s internal investigation of misconduct protected under subdivision (e)(2)]; *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1061 [“Tichinin’s claims are based on the investigative reports by the Council’s surveillance subcommittee reports, the Council’s hearing, and subsequent resolution adopted by Council condemning him”; conduct protected under subdivision (e)(2).]; cf. *Miller v. City of Los Angeles* (2008) 169 Cal.App.4th 1373, 1383, 1378-1379 [defamation and intentional infliction of emotional distress claims based on city’s “investigation into Miller’s conduct in connection with his public employment and its determination and report that he had engaged in misconduct on the job constituting a conflict of interest as well as theft of City property” arose from protected activity].)

Ultimate personnel actions, such as censure, demotion, or termination, following such investigations are also imbued with anti-SLAPP protection. The cases of *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387 (*Vergos*), and *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600 (*Gallanis-Politis*), are illustrative. In *Vergos*, the trial court ruled the plaintiff’s civil rights cause of action against an administrator who denied his workplace sexual harassment claims did not arise from protected activity. (*Vergos*, *supra*, at p. 1390.) The plaintiff’s cause of action, said the court, was based on allegedly retaliatory “conduct and not on the content of what she stated in any proceeding or in the exercise of the right to petition.” (*Id.* at p. 1397.) The Court of Appeal reversed. “The hearing, processing, and deciding of the grievances (as alleged in the complaint) are meaningless without a communication of the adverse results.” (*Ibid.*) Thus, the administrator’s conduct “as a hearing officer denying plaintiff’s grievances” was protected conduct under subdivision (e)(2). (*Vergos*, at pp. 1390, 1399.)

Gallanis-Politis also involved a retaliation claim. The plaintiff alleged county employees refused to process a request for bonus pay after commencing an investigation undertaken for the sole purpose of blocking the pay. (*Gallanis-Politis, supra*, 152 Cal.App.4th at p. 605.) The trial court denied a motion to strike, assuming the anti-SLAPP statute applied but concluding the plaintiff had demonstrated a reasonable probability of prevailing. (*Id.* at pp. 607-608.) The Court of Appeal agreed the anti-SLAPP statute applied, explaining the “fundamental basis” for the plaintiff’s claim was “the allegedly pretextual investigation . . . and the allegedly false report” which led to a recommendation that the bonus pay request was unfounded. (*Id.* at pp. 610-611.) “Absent the investigation and report, nothing of substance exist[ed] upon which to base a retaliation claim against” (*Id.* at p. 611.) As had the court in *Vergos*, the *Gallanis-Politis* court focused on the inexorable progression from report or suspicion of wrongdoing, to investigation and report, and finally administrative action. The appellate court thus concluded the plaintiff’s retaliation claim arose from protected activity under subdivision (e)(2). (See also *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65 [where peer review process prompted a hospital to terminate agreement with disciplined physician, termination was protected conduct; *Levy v. City of Santa Monica* (2004) 114 Cal.App.4th 1252 [cause of action against city and city councilman seeking declaratory judgment that child’s playhouse conformed with zoning ordinance was subject to special motion to strike because city inspector’s noncompliance finding arose from concerned citizen’s petitioning activity and city’s investigation in response thereto].)³

³ *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, and *McConnell v. Innovative Artists Talent & Literary Agency, Inc.* (2009) 175 Cal.App.4th 169, also involved employment actions, but distinctly different factual scenarios, placing them outside section 425.16. In *Martin*, the plaintiff alleged a long history of specific acts of retaliation, the last of which was his supervisor’s successful effort to have him demoted. The plaintiff’s retaliation claim was grounded primarily on unprotected conduct preceding the board’s investigation and adverse personnel action. (*Martin*,

The instant case is of the same milieu as the cases just discussed. The city's decision to terminate Kapler was the final step in a lengthy, public investigation of alleged misconduct. The investigation and termination decision—itsself memorialized in writing—are protected under subdivision (e)(2) as “written or oral statement[s] or writing[s] 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.” (§ 425.16, subd. (e)(2); *Vergos, supra*, 146 Cal.App.4th at p. 1397.)

The investigation and termination decision in this case are also protected conduct under subdivision (e)(3), which protects statements “made in a place open to the public or a public forum in connection with an issue of public interest,” and subdivision (e)(4), which protects “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)(3)-(4).) Kapler's alleged misuse of city gas, a public asset, was a public issue, and the resulting termination decision was discussed in public fora, namely in city proceedings and in the press. (See *Maranatha Corrections, supra*, 158 Cal.App.4th at p. 1086 [disclosure to local paper of an accusation of public funds misappropriation was protected conduct].)

We reject Kapler's assertion that his alleged misconduct and the city's investigation and disciplinary actions were not “issue[s] of public interest” under subdivision (e)(3) or “public issue[s]” under subdivision (e)(4). Misappropriation of public property is a classic public issue under the anti-SLAPP statute. (See *Maranatha*

supra, at pp. 618-619, 625.) In *McConnell*, the plaintiffs were fired after they filed a lawsuit challenging some of the terms of their employment. (175 Cal.App.4th 169.) While statements related to pending litigation are protected, the letters terminating plaintiffs were not related to any issue involved in the pending lawsuit and therefore did not constitute protected conduct. Neither case purports to be at odds with the numerous cases discussed above holding investigation of suspected misconduct by a government employee and personnel action taken pursuant to such an investigation is protected activity under section 425.16.

Corrections, supra, 158 Cal.App.4th at p. 1086 [the “government’s business is the people’s business and . . . California’s citizens have a right to full disclosure of all information which affects the public fisc”]; *Copley Press, Inc. v. Superior Court* (1998) 63 Cal.App.4th 367, 376 [“the public has a legitimate interest in knowing how public funds are spent and how claims (formal or informal) against public entities are settled”]; *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 102-103, 111 [defamation action based on statements published in newspaper regarding university’s reasons for terminating football coach was subject to an anti-SLAPP motion under subdivision (e)(3)].⁴

Several of Kapler’s causes of action may arise, in part, from unprotected conduct—for example, the breach of contract cause of action is based in part on the claim the city has wrongfully denied Kapler *post*-termination benefits, and the FFBOR cause of action is based in part of the claim the city denied him certain administrative procedures. However, that does not render the anti-SLAPP statute inapplicable. As we have discussed, each cause of action also arises, in part, from protected conduct. “Mixed” causes of action are subject to an anti-SLAPP motion so long as “ ‘at least one of the underlying acts is protected conduct.’ ” (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1551.) When a cause of action alleges multiple, independent bases for relief, as do Kapler’s breach of contract and FFBOR claims, the anti-SLAPP statute applies if any of the alleged bases arises from protected conduct. (*Ibid.*; *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1187 (*Wallace*).)

In sum, all of Kapler’s causes of action are based, in whole or in part, on protected activity and therefore all come within the ambit of the anti-SLAPP statute. The trial court

⁴ Having concluded the city’s conduct is protected under the various provisions of section 425.16, subdivision (e) in the manner discussed above, we need not address the applicability of other provisions of subdivision (e) to the city’s conduct.

accordingly erred in denying defendants' anti-SLAPP motion on the ground they failed to show that the anti-SLAPP statute applies.

Probability of Prevailing on the Merits

When, as here, a trial court erroneously denies an anti-SLAPP motion on the ground the plaintiff's causes of action do not arise from protected activity, an appellate court has two options. It can remand the case to the trial court to address, in the first instance, whether the plaintiff has carried his or her burden of establishing a "probability of prevailing" on the merits. (See, e.g., *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 267.) Or, the Court of Appeal can, itself, in the interests of judicial efficiency, examine the plaintiff's merits showing and decide whether he or she has demonstrated a probability of prevailing on the challenged causes of action. (See, e.g., *Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 312; *Wallace, supra*, 196 Cal.App.4th at p. 1195 ["we have discretion to decide the issue ourselves, since it is subject to independent review"].)

Given the heavy burdens now confronting our trial courts, we turn directly to the second inquiry under the anti-SLAPP statute—whether Kapler has demonstrated a "probability of prevailing" on his causes of action. In this regard, we apply a "summary-judgment-like" test (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714), accepting as true the evidence favorable to the plaintiff and evaluating the defendant's evidence only to determine whether it defeats the plaintiff's evidence as a matter of law. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 823, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) The evidence put forward at this stage must be admissible; even allegations in a verified complaint are insufficient. (*Wallace, supra*, 196 Cal.App.4th at p. 1212.) "In addition to considering the substantive merits of the plaintiff's claims," the court "must also consider all available defenses to the claims" (*No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1026.)

When a cause of action states multiple grounds for relief, “the plaintiff may satisfy its obligation in the second prong by showing a probability of prevailing on any” one of those grounds, regardless of whether the ground arises from protected or unprotected conduct. (*Wallace, supra*, 196 Cal.App.4th at p. 1212 [expressing serious reservations about this rule, but noting it is the law as set forth by our Supreme Court].)

Contract Claims

“[T]erms and conditions of public employment, unlike those of private employment, generally are established by statute or other comparable enactment (e.g., charter provision or ordinance) rather than by contract.” (*White v. Davis* (2003) 30 Cal.4th 528, 564.) Thus, insofar as “the duration of such employment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law.” (*Miller v. State of California* (1977) 18 Cal.3d 808, 813-814; see also *Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1689 [foreclosing claims for breach of contract and breach of the implied covenant].)

“Nonetheless, a long line of California cases establishes that with regard to at least certain terms or conditions of employment that are created by statute, an employee who performs services while such a statutory provision is in effect obtains a right, protected by the contract clause, to require the public employer to comply with the prescribed condition.” (*White v. Davis, supra*, 30 Cal.4th at pp. 564-565, italics omitted.) Thus, our Supreme Court has “caution[ed]” that its “ ‘often quoted language that public employment is not held by contract’ has limited force where . . . the parties are legally authorized to enter (and have in fact entered) into bilateral contracts to govern the employment relationship.” (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1182.) In *Retired Employees Assn.*, the court held “under California law, a vested right to health benefits for retired county employees can be implied under certain circumstances from a county ordinance or resolution.” (*Id.* at 1194.) It further endorsed an appellate court’s statement that “ ‘[w]hen a public

employer chooses instead to enter into a written contract with its employee (assuming the contract is not contrary to public policy), it cannot later deny the employee the means to enforce that agreement.’ ” (*Id.* at p. 1182, quoting *Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 55.)

Kapler’s contract claims are based on two purported breaches of his employment agreement: (1) seeking to terminate him without cause, and (2) refusing to pay postretirement benefits even though he completed three years of service with the city.

Kapler has not shown a probability of succeeding on his breach of contract claim based on his termination. The city’s municipal code provides the fire chief shall serve “at the pleasure of the City Manager.” (Alameda Muni. Code, § 2-30.1.) A 2006 city resolution stated the position of fire chief was an “unrepresented classification not included in any bargaining group.” The August 17 letter awarding Kapler the fire chief job also stated his employment was “at-will” and he would serve at the “discretion of the City Manager.” Even the failed settlement agreement with the city, which Kapler signed, stated he was an “at-will” employee. Kapler has produced no admissible evidence suggesting he was something other than an at-will employee or that his employment contract afforded him any protection from termination without cause.⁵ Therefore, he has not demonstrated a probability of prevailing on this aspect of his contract claim.⁶

⁵ At oral argument, as in his brief, Kapler suggested there might be other municipal enactments inconsistent with the at-will status the city ascribed to him. Kapler, however, has not cited a single such provision to this court, and we consider Kapler’s suggestion no further. (See *McComber v. Wells* (1999) 72 Cal.App.4th 512, 522 [“ ‘[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.’ ”].)

⁶ Kapler’s claim that he was the victim of a political conspiracy between the firefighters’ union, council member Tam, and other unnamed city officials to end his tenure as fire chief, while adding color to his complaint, does not advance his breach of contract claim. At will public officials who serve at the pleasure of a governing body are inevitably subject to prevailing political winds; whether the union and Tam were angered by budget cuts and unhappy with Kapler is immaterial. Kapler has not alleged that he is a

However, Kapler’s breach of contract claim based on withholding post-retirement insurance benefits passes the minimal merits showing required under the anti-SLAPP statute. The August 17, 2007, letter hiring Kapler stated he was entitled to benefits “as described in paragraph 3 of Section 13.1 of the 2001-2008 Fire Management Association MOU unless [he] voluntarily resign[ed] or retire[d] prior to the third anniversary of the date of commencement of employment with the City” This assurance is not, on its face at least, inconsistent with Article III of the city’s charter, which authorizes “a retirement, pension, and insurance system for City officers and employees.” Accordingly, based on the current state of the record, Kapler has met his burden of showing a probability of success on this particular breach of contract claim.⁷ (See *Retired Employees Assn. of Orange County, Inc. v. County of Orange, supra*, 52 Cal.4th at p. 1182.)

Tort Claims

Kapler alleges four tort claims against the city and individual defendants: wrongful termination, constructive discharge, intentional infliction of emotional distress, and negligent infliction of emotional distress. Defendants claim immunity from these claims under the Government Claims Act.

The Government Claims Act, Government Code section 810 et seq., establishes the limits of common law liability for public entities. In general, there is no such liability. “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

member of any protected class and was the victim of unlawful, invidious discrimination. (See *Scotch v. Art Institute of California-Orange County, Inc.* (2009) 173 Cal.App.4th 986, 1007 [in wrongful termination action, must be a causal connection between the employee’s protected status, such as disabled, and the adverse employment decision].)

⁷ We hold only that Kapler has survived the city’s special motion to strike as to this particular breach of contract claim. This is not any kind of prognostication as to whether Kapler will ultimately prevail on the claim, nor does it preclude any further dispositive motions by the city.

employee or any other person.” (Gov. Code, § 815, subd. (a); see *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899 [statute abolishes common law tort liability].)

Kapler contends, however, that two statutory exceptions to governmental immunity allow his tort claims to proceed, namely Government Code sections 815.2 and 815.6.

Government Code section 815.2 subjects public entities to a form of vicarious liability, stating public entities are “liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.” (Gov. Code, § 815.2, subd. (a).) However, no such vicarious liability arises where the public employee is immune from direct liability. (*Id.*, subd. (b).)

The city and individual defendants therefore direct our attention to Government Code section 821.6, which provides: “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.” (Gov. Code, § 821.6.) “ ‘The policy behind section 821.6 is to encourage fearless performance of official duties. [Citations.] State officers and employees are encouraged to investigate and prosecute matters within their purview without fear of reprisal from the person or entity harmed thereby. Protection is provided even when official action is taken maliciously and without probable cause.’ ” (*Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393, 1404-1405 [applying immunity to an internal police misconduct investigation giving rise to claims for intentional infliction of emotional distress and negligent supervision]; see also *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1424 [immunity applies to claim of wrongful termination in violation of public policy].) “[S]ection 821.6 extends to actions taken in preparation for formal proceedings, including

investigation,” (*Patterson*, at p. 1405) and also to “[a]cts undertaken in the course of an investigation, including press releases reporting the progress or results of the investigation.” (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1048.)

Thus, Government Code section 821.6 forecloses direct liability on the part of the city’s employees in investigating and disciplining Kapler and, as a result, the vicarious liability provisions of Government Code section 815.2 do not save Kapler tort causes of action. (See, e.g., *Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1064-1065 [“since its employees were immune, the county was also immune”].) Additionally, section 815.2, which only provides for *vicarious* liability based on employee’s torts, does not save his wrongful termination and constructive discharge causes, which are, by definition, *direct* claims against the city alone and not actions for which city employees could be liable. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 900-901 [an “action for wrongful discharge can only be asserted against *an employer*” and section 815.2 does not make the employer liable for this action].)

Government Code section 815.6, in turn, subjects public entities to direct liability when the “entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury” and its failure to discharge that duty, or to exercise reasonable diligence to discharge it, proximately causes that kind of injury. (Gov. Code, § 815.6.) (See generally *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127 [“The Tort Claims Act draws a clear distinction between the liability of a public entity based on its own conduct, and the liability arising from the conduct of a public employee.”].)⁸

⁸ The employee immunity provided by Government Code section 821.6 “does not provide a defense to a claim of breach of mandatory duty under section 815.6.” (*Roe v. California* (2001) 94 Cal.App.4th 64, 75; see also *Novoa v. County of Ventura* (1982) 133 Cal.App.3d 137, 143 [“a public entity can be liable under Government Code section 815.6 for breach of a mandatory duty even though its employee is immune from liability under section 821.6”; the immunity “would not necessarily be a defense to direct entity liability under section 815.6”].)

Kapler contends the city breached mandatory duties under the FFBOR and injured him by not providing him an administrative appeal and by facilitating the publication of his photograph in the media. These alleged injuries do not create liability under Government Code section 815.6. As our Supreme Court has explained, section 815.6 applies only to an injury of “ ‘such nature that it would be actionable if inflicted by a private person.’ ” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 968 (*Aubry*), quoting Gov. Code, § 810.8 [defining injury], italics omitted.) In *Aubry*, the plaintiff alleged the hospital district’s failure to perform a mandatory duty resulted in workers receiving “less than the prevailing wage while engaged on a public work.” (*Aubry, supra*, at p. 968, italics omitted.) The court continued: “This injury is one which by its very nature could not exist in an action between private persons; if the defendant awarding body were not a public entity, there would be no injury. As a result, the injury alleged in this case is not included within the Tort Claims Act’s definition of injury.” (*Ibid.*)

“Under *Aubry*, we therefore must determine whether the ‘injuries’ ” Kapler alleges “would be actionable against a defendant which was not a public entity.” (*Forbes v. County of San Bernardino* (2002) 101 Cal.App.4th 48, 55.) The FFBOR provisions Kapler cites create obligations for and remedies against only an “employing department” or “licensing or certifying agency.” (Gov. Code, § 3260, subd. (a) [“It shall be unlawful for any employing department or licensing or certifying agency to deny or refuse to any firefighter the rights and protections guaranteed by this chapter.”].) Thus, a FFBOR violation “by its very nature could not exist in an action between private persons.” (*Aubry, supra*, 2 Cal.4th at p. 968.) Accordingly, section 815.6 is not an avenue by which Kapler can pursue his tort claims against the city on the basis of supposed mandatory duties imposed by the FFBOR.⁹ (See *Aubry*, at p. 968.)

⁹ Because the Government Claims Act bars Kapler’s tort claims, we do not consider the applicability of the privileges in Civil Code section 47.

Statutory Claim

We alternatively consider Kapler's FFBOR (Gov. Code, §§ 3250-3262) cause of action as strictly a statutory claim. The FFBOR became effective on January 1, 2008. (Stats. 2007, ch. 591, § 2.) The Legislative Counsel's Digest described the legislation as follows: " 'This bill would enact the Firefighters Procedural Bill of Rights Act to prescribe various rights of firefighters, defined as any firefighter employed by a public agency, including a firefighter who is a paramedic or emergency medical technician, with specified exceptions. The bill would prescribe rights related to, among others, political activity, interrogation, punitive action, and administrative appeals, with specified requirements imposed upon the employing agency and the imposition of a civil penalty for a violation thereof.' " (*International Assn. of Firefighters Local Union 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179, 1187-1188.) The FFBOR was enacted "to mirror the Public Safety Officers Procedural Bill of Rights Act that is applicable to public safety officers." (Sen. Floor Com., Bill Analysis Rep. of Assem. Bill No. 220 (2007-2008 Reg. Sess.) as amended July 2, 2007.)

The FFBOR gives aggrieved firefighters a private right of action in superior court. (Gov. Code, § 3260, subd. (b).) The court may render injunctive relief to remedy a FFBOR violation. (*Id.*, subd. (c).) "In addition . . . upon a finding by a superior court that a fire department, its employees, agents, or assigns, with respect to acts taken within the scope of employment, maliciously violated any provision of this chapter with the intent to injure the firefighter, the fire department shall, for each and every violation, be liable for a civil penalty not to exceed twenty-five thousand dollars (\$25,000) to be awarded to the firefighter whose right or protection was denied and for reasonable attorney's fees as may be determined by the court." (*Id.*, subd. (d).)

As a preliminary matter, we reject the city's only argument on the merits of Kapler's FFBOR claims—that his use of gas was outside his official duties and therefore he had no rights under the FFBOR. It is true "[t]he rights and protections described [in

the FFBOR] shall only apply to a firefighter during events and circumstances involving the performance of his or her official duties.” (Gov. Code, § 3262.) But this cannot reasonably be read to divest a firefighter of the procedural protections afforded by the FFBOR during proceedings to resolve whether or not conduct was authorized and within the scope of the employee’s official duties. (Cf. *Paterson v. City of Los Angeles*, *supra*, 174 Cal.App.4th at p. 1401 [applying Peace Officers’ Bill of Rights to investigation of fraudulent sick leave use, though the Peace Officers’ Bill of Rights does not have an equivalent to section 3262].)

Kapler alleges two violations of the FFBOR. First, he complains the city never offered him an administrative appeal in violation of section 3254, subdivision (c), which states: “A fire chief shall not be removed by a public agency or appointing authority without providing that person with written notice, the reason or reasons for removal, and an opportunity for administrative appeal.”¹⁰ (Gov. Code, § 3254, subd. (c).) However, Kapler offers no evidence, despite being represented by counsel, that he ever asked the city to provide him an administrative appeal during the months leading up to the city’s

¹⁰ In turn, Government Code section 3254.5, subdivision (a) states: “An administrative appeal instituted by a firefighter under this chapter shall be conducted in conformance with rules and procedures adopted by the employing department or licensing or certifying agency that are in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2.” (Gov. Code, § 3254.5, subd. (a).) “Section 11502, subdivision (a) of part 1 of division 3 of title 2 provides in part, ‘All hearings of state agencies required to be conducted under this chapter shall be conducted by administrative law judges on the staff of the Office of Administrative Hearings.’ An alternative is provided by subdivision (b) of section 3254.5, a recent amendment to section 3254.5 (Stats. 2010, ch. 465, § 1) that provides in part, ‘Notwithstanding subdivision (a) [of section 3254.5], if the employing department is subject to a memorandum of understanding that provides for binding arbitration of administrative appeals, the arbitrator or arbitration panel shall serve as the hearing officer in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 and notwithstanding any other provision that hearing officer’s decision shall be binding.’ ” (*International Assn. of Firefighters, Local Union 230 v. City of San Jose*, *supra*, 195 Cal.App.4th at p. 1188.)

final decision to terminate him. We cannot endorse a rule allowing a firefighter to remain silent throughout the duration of disciplinary proceedings, only to claim additional procedural protections long after the fact and for the first time in a lawsuit. (Cf. *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 869 [“Murray admittedly failed to invoke, and thereby forfeited, his right to . . . a formal adversarial hearing of record” before an administrative law judge, as was offered to him by the Federal whistleblower statute.].) Furthermore, Kapler’s preemptive act of resigning to preserve his assertedly exemplary career record is inconsistent with an administrative appeal under the FFBOR.

Kapler also complains the city allowed photographs of him using city gas to reach the media in violation of Government Code section 3253, subdivision (e)(2). This provision states: “When any firefighter is *under investigation and subjected to interrogation by his or her commanding officer, or any other member designated by the employing department* or licensing or certifying agency, that could lead to punitive action, the interrogation shall be conducted under the following conditions: [¶] . . . [¶] The employer shall not cause the firefighter under interrogation to be subjected to visits by the press or news media without his or her express written consent free of duress, and the firefighter’s photograph, home address, telephone number, or other contact information shall not be given to the press or news media without his or her express written consent.” (Gov. Code, § 3253, subd. (e)(2), italics added.)

Although Kapler has sued the city, his “employer,” for disseminating the photographs, the record evidence establishes that the only person who gave photographs to the press was Weaver, the firefighters’ union president, who was neither Kapler’s “commanding officer” nor a designee of the fire department for investigating disciplinary matters. There is no evidence the city otherwise disseminated or facilitated Weaver’s dissemination of the photographs. When Weaver publicized the photographs, Kapler was not yet “under investigation” by the city—rather, the photographs led to the investigation.

Thus, the protections of Government Code section 3253 had not yet attached.¹¹ (See *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1287 [protections of similar Government Code section 3303 of Peace Officers' Bill of Rights inapplicable when prerequisites of an "investigation" not present]; *Shafer v. County of Los Angeles Sheriff's Dept.* (2003) 106 Cal.App.4th 1388, 1399 [same].)

Accordingly, Kapler cannot show a probability of prevailing on his FFBOR cause of action.

Dropped Claims

Finally, we address relics from Kapler's original complaint: (1) causes of action for defamation and intentional interference with an economic relationship, and (2) the naming of individual defendants in most causes of action. Kapler dropped these two causes of action and the individual defendants when he filed his first amended complaint after the trial court sustained the defendant's demurrer with leave to amend.

We typically analyze an anti-SLAPP motion by reference to the complaint actually challenged in the trial court—in this case, the original complaint, not the subsequently filed first amended complaint. (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 463.) Further, when an amended complaint eliminates a cause of action challenged by an anti-SLAPP motion, or even drops the defendant who filed the anti-SLAPP motion, the anti-SLAPP motion does not become moot. An aggrieved defendant is still entitled to the relief an anti-SLAPP motion can provide, namely an award of attorney fees. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1365 [a defendant had standing to appeal denial of anti-SLAPP motion even though plaintiff dismissed it from case before appeal].)

¹¹ Indeed, at the time, Weaver and the press had strong First Amendment interests in the photographs. (See Gov. Code, § 6250 ["access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state"].)

Accordingly, defendants' appeal is not moot as to either the dropped defamation and intentional interference claims or the claims against the individual city officials. For all the reasons we have discussed, Kapler has not carried his burden of showing any probability of succeeding on the two tort claims. Nor has he carried his burden as to any other claim asserted against the individual defendants, except as to his breach of contract claim based on an alleged failure to provide him with post-resignation benefits "as described in paragraph 3 of Section 13.1 of the 2001-2008 Fire Management Association MOU."

Attorney Fees

A party who succeeds on an anti-SLAPP motion is entitled to an award of reasonable attorney fees. (§ 425.16, subd. (c).) Partial success may militate a reduced fee award. (See *Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 341.) Here, the defendants have prevailed on the lion's share of their special motion to strike and therefore are entitled to a fee award for work in both the trial court and on appeal. (See *Carpenter v. Jack In The Box Corp.* (2007) 151 Cal.App.4th 454, 461.) The amount of fees, and any reduction for partial success, is to be determined by the trial court on remand, pursuant to noticed motion. (See *Vergos, supra*, 146 Cal.App.4th at p. 1404.)

DISPOSITION

The order denying defendants' special motion to strike is reversed, except as to Kapler's breach of contract claim (his first cause of action) for alleged deprivation of postresignation benefits. Defendants are awarded costs on appeal. They are also

entitled to an award of reasonable attorney fees, the amount of which is to be determined by the trial court pursuant to noticed motion.

Banke, J.

We concur:

Marchiano, P. J.

Dondero, J.