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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

ROBERT KNISS,

Plaintiff and Appellant,

v.

TEAMSTERS LOCAL NO. 63, et al.,

Defendants and Respondents.

E064386

(Super.Ct.No. CIVDS1415075)

OPINION

APPEAL from the Superior Court of San Bernardino County. Joseph R. Brisco, Judge. Reversed.

The Law Office of George Moschopoulos and George Moschopoulos for Plaintiff and Appellant.

Hayes & Ortega, Dennis J. Hayes and Tracy J. Jones for Defendant and Respondent, Teamsters Local No. 63.

Beeson, Tayer & Bodine, Susan K. Garea and Lorrie E. Bradley for Defendant and Respondent, International Brotherhood of Teamsters.

Robert Kniss (Kniss) sued his former employers, Teamsters Local No. 63 (Local) and the International Brotherhood of Teamsters (International). The complaint alleged causes of action related to disability discrimination, age discrimination, failure to provide reasonable accommodations, wrongful termination, and retaliation, as well as a Private Attorney General Act (PAGA) claim for Labor Code violations. Local and International (collectively, Teamsters) responded with anti-SLAPP motions.<sup>1</sup> (Code Civ. Proc., § 425.16.)<sup>2</sup> The trial court granted the anti-SLAPP motions. Kniss contends the trial court erred. We reverse the judgment.

## **FACTUAL AND PROCEDURAL HISTORY**

### A. COMPLAINT

The facts in this subsection are taken from Kniss’s complaint. International is a labor organization that includes commercial truck operators. Local is a local chapter of International and is primarily based in Southern California. In or about November 1994, Local hired Kniss as a business agent. In early 2010, International hired Kniss as a Multi-State Grievance Committee Chairman. From 2010 through approximately April 2014, Kniss was concurrently employed by Local and International. Kniss received separate paychecks from Local and International.

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<sup>1</sup> “Anti-SLAPP” refers to a strategic lawsuit against public participation (SLAPP). (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

<sup>2</sup> All subsequent statutory references will be to the Code of Civil Procedure unless otherwise indicated.

As a business agent for Local, Kniss's job duties included organizing membership drives in Southern California. As a Multi-State Grievance Committee Chairman, Kniss's job duties included promoting membership in International. Kniss's job required him to persuade employers that it was beneficial to have unionized employees.

Beginning in March 2014, Teamsters targeted employees of MBM Foods (MBM) for union membership. MBM was a company that provides food delivery services, i.e., trucking services, to various restaurants, such as Carl's Jr. Teamsters decided to "handbill" customers of Carl's Jr. "Handbilling" means distributing paper fliers. Teamsters' organizers, such as Kniss, were directed to stand outside any Carl's Jr. for no less than two hours at a time distributing fliers to customers.

The flier to be distributed to customers "falsely accused Carl's Jr. of: (1) multiple citations [for] health code violations; (2) having roaches, rodents and ants in its food and in its dining areas; and (3) that Carl's Jr. wasn't watching out for their customers because Carl's Jr. bought food from MBM which in turn refused to provide its (MBM's) workers with stable paychecks.' The flier further listed 'Californians for Safe Food and Good Jobs' at the bottom creating the impression that the representations in the flier were in some manner sponsored by a public interest organization."

The foregoing allegations against Carl's Jr. were false, and Teamsters knew the allegations were false. An entity named "Californians for Safe Food and Good Jobs" did not exist. Teamsters "advised their organizers, such as Kniss, that if approached by

law enforcement during their hand billing [*sic*] activities, they were to mislead law enforcement officials as to their identity and their purpose.”

Kniss objected to the handbilling activity for two reasons. First, Kniss believed the handbilling was illegal because (a) the fliers included false accusations against Carl’s Jr., and (b) he was instructed to lie to police if questioned. Second, Kniss was not medically cleared to sit or stand for extended periods of time, such as the two hour handbilling shifts, due to bulging discs and prior back surgeries.

On April 3 or 4, 2014, Kniss expressed his objections, via e-mail, to Randy Cammack, Local’s Secretary-Treasurer. The Secretary-Treasurer position was the highest local chapter position. Cammack oversaw the daily operations of Local. In addition to requesting truthful fliers, Kniss requested a reasonable accommodation to perform the handbilling. Cammack did not respond to Kniss’s e-mail. On April 18, Local terminated Kniss’s employment. On May 1, International terminated Kniss’s employment.

Kniss brought seven causes of action. The first cause of action was for disability and medical discrimination. Kniss alleged Teamsters’ termination of Kniss’s employment was substantially motivated by animus toward Kniss’s disability. (Gov. Code, § 12940.) The second cause of action was for failure to provide a reasonable accommodation. Kniss alleged Teamsters terminated Kniss’s employment rather than provide a reasonable accommodation.

The third cause of action was for failing to engage in an interactive process regarding Kniss’s disability and request for a reasonable accommodation. The fourth

cause of action was for age discrimination. (Gov. Code, § 12940.) Kniss alleged he was over 40 years old, and Teamsters' termination of Kniss's employment was substantially motivated by Kniss's age. The fifth cause of action was for wrongful termination in violation of public policy. Kniss alleged Teamsters' termination of Kniss's employment "was because of reasons that are against the public policies of the State of California, including without limitation his disability and/or perceived disability, his age, his request for reasonable accommodations, and his refusal to participate in the illegal hand billing [*sic*] activities."

The sixth cause of action was for retaliation. (Labor Code, § 1102.5, subd. (c).) Kniss alleged Teamsters directed Kniss to engage in the illegal activities of libel and deceit by distributing the handbills, and when Kniss refused to engage in conduct he believed to be illegal, his employment was terminated. The seventh cause of action was a Private Attorneys General Act (PAGA) claim for retaliation. (Labor Code, § 2698.) Kniss alleged Teamsters violated the Labor Code and he sought civil penalties on behalf of the State of California.

**B. LOCAL'S ANTI-SLAPP MOTION**

On January 28, 2015, Local filed an anti-SLAPP motion against Kniss's complaint. (§ 425.16.) Local asserted the focus of Kniss's lawsuit was Local's lawful handbilling. Local argued that Kniss's lawsuit would chill Local's exercise of its free speech.

Local asserted the flier was drafted after a review of County Public Health Records. Local argued the contents of the flier were accurate, and no lawsuit for

defamation had been filed. Local explained that a memorandum, dated March 10, 2014, and addressed to law enforcement, was given to people who would be handbilling and they were directed to give the memorandum to law enforcement if questioned about their handbilling activities.

Kniss sent Cammack an e-mail reflecting he would not participate in the handbilling because (1) the flyer was designed to intimidate the employer to agree to a union contract without the affected employees voting to be unionized; (2) the assertions about unsanitary conditions in the restaurants were false; and (3) the handbilling constituted racketeering. The e-mail also explained that Kniss had been told to lie if approached by law enforcement. Cammack asked Kniss to meet with him, but Kniss refused.

Kniss was terminated because (1) he was insubordinate when he refused to handbill as directed; (2) Kniss was insubordinate when he refused to meet with Cammack; (3) Kniss supported traditional methods of unionizing, which were ineffective; (4) Kniss made false accusations of illegal activity against Local; and (5) Kniss was dishonest.

In regard to the first anti-SLAPP prong, i.e., protected activity, Local asserted Kniss's lawsuit was directed at Local's protected activity of handbilling. Local argued handbilling is an exercise of Local's First Amendment right of free speech.

#### C. INTERNATIONAL'S ANTI-SLAPP MOTION

On February 9, 2015, International filed an anti-SLAPP motion against Kniss's sixth and seventh causes of action. In regard to the first anti-SLAPP prong,

International asserted Kniss's lawsuit was aimed at International's handbilling, and handbilling constituted International's exercise of free speech. International asserted the handbilling was connected to an issue of public interest or occurred in a public forum.

D. OPPOSITION

On February 11 and 13, 2015, Kniss filed an opposition to Local's motion. Kniss argued the handbilling was incidental to his complaint. Kniss asserted his complaint did not seek to enjoin Teamsters' handbilling. Rather, the gravamen of the complaint was a private employment dispute—not a matter of public concern.

In regard to Kniss's disability and age claims, he asserted the following facts: Kniss sent his initial e-mail to Cammack on April 3, 2014. On April 4, at approximately 7:30 a.m., Cammack left a voicemail for Kniss asking Kniss to contact him to discuss the April 3 e-mail. Kniss returned Cammack's call 17 minutes later. Kniss told Cammack he was unavailable to meet at Cammack's requested time due to a doctor's appointment. Later on April 4, Cammack texted Kniss to inform Kniss that Kniss was suspended with pay. On April 18, Kniss's employment was terminated. Kniss asserted the facts showed Cammack failed to meet with Kniss to discuss a reasonable accommodation. Kniss asserted the dispute was a private matter between an employer and employee, and therefore did not fall within the anti-SLAPP statute.

On April 24, 2015, Kniss filed an opposition to International's anti-SLAPP motion. Kniss repeated the arguments raised against Local's anti-SLAPP motion, in particular that the complained-of acts concerned an employment dispute and were not

protected activity. Also on April 24, Kniss filed an amended opposition to Local's anti-SLAPP motion. Local objected to Kniss filing an amended opposition because Kniss did not have leave of court for the filing. The trial court sustained Local's objection.

E. HEARING

On June 26, 2015, the trial court held a hearing on Teamsters' anti-SLAPP motions. Kniss asserted his lawsuit was not about handbilling. Kniss argued he was not injured by the handbilling, and was not seeking damages related to handbilling. Local asserted that if Kniss's lawsuit were successful, then Local would lose its right to express itself because employees could choose not to express Local's beliefs.

Kniss asserted the lawsuit did not touch on a matter of public concern; rather, it was a private employment dispute. Further, Kniss argued there was no First Amendment protection for instructing an employee to lie to police.

The trial court granted Teamsters' anti-SLAPP motions in their entirety. The court found handbilling and Kniss's refusal to handbill was the gravamen of Kniss's claims. Therefore, the court found the first prong of the anti-SLAPP motion was met. As to the second prong, the court found Kniss failed to refute, via evidence of pretext, Local's argument that it had a legitimate, non-retaliatory reason for terminating Kniss's employment, i.e. Kniss's refusal to follow instructions. As a result, the court concluded Kniss failed to show a probability of prevailing on his claims.

## DISCUSSION

### A. ANTI-SLAPP LAW

“Section 425.16, ‘commonly referred to as the anti-SLAPP statute’ [citation], is intended ‘to provide for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.’ [Citation.] The section authorizes the filing of a special motion that requires a court to strike claims brought ‘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 . . . unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.’

“Section 425.16 “requires that a court engage in a two-step process when determining whether a defendant’s anti-SLAPP motion should be granted.” [Citation.] “First the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. [Citation.] ‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e)’ [citation].” [Citation.] . . . [¶] If the defendant makes this showing, the court proceeds to the second step of the anti-SLAPP analysis. [Citation.] In the second step, the court decides whether the plaintiff has demonstrated a reasonable probability of prevailing at trial on the merits of its challenged causes of action. [Citations.] [¶] Conversely, if the

defendant does not meet its burden on the first step, the court should deny the motion and need not address the second step.’

“‘An appellate court reviews an order granting an anti-SLAPP motion under a de novo standard. [Citation.] In other words, we employ the same two-pronged procedure as the trial court in determining whether the anti-SLAPP motion was properly granted.’ [Citation.]” (*Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510, 1519, fn. omitted.)

B. PROTECTED ACTIVITY

1. *CONTENTION*

Kniss contends the trial court erred by concluding the gravamen of his complaint concerned Teamsters’ protected activity.

2. *LAW*

“In assessing whether a cause of action arises from protected activity, “‘we disregard the labeling of the claim [citation] and instead ‘examine the *principal thrust or gravamen* of a plaintiff’s cause of action . . . .’” . . . . We assess the principal thrust by identifying “[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.” [Citation.] If the core injury-producing conduct upon which the plaintiff’s claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute. [Citation.]” [Citation.]’ [Citation.] “[T]he critical point is whether the plaintiff’s cause of action itself was based on an act in furtherance of the defendant’s right of petition or free speech.’

“When evaluating whether the defendant has carried its burden under the first prong of the anti-SLAPP statute, ‘courts must be careful to distinguish allegations of conduct on which liability is to be based from allegations of motives for such conduct. “[C]auses of action do not arise from motives; they arise from acts.” [Citation.]’ [Citation.] ““The court reviews the parties’ pleadings, declarations and other supporting documents to determine what conduct is actually being challenged, not to determine whether the conduct is actionable.”” (Hunter v. CBS Broadcasting, Inc., supra, 221 Cal.App.4th at p. 1520.)

There are four categories of protected activity. (§ 425.16, subd. (e).) Teamsters contend the conduct underlying Kniss’s claims fall within section 425.16, subdivision (e)(3) and (e)(4). Those two categories include: (1) “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” (§ 425.16, subd. (e)(3)); and (2) “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)(4)).

### 3. GRAVAMEN

Kniss’s version of events was as follows: Kniss contended he sent an e-mail to Cammack. In the e-mail, Kniss objected to the Carl’s Jr. handbilling and requested a reasonable accommodation in order to perform the handbilling. Cammack requested to meet with Kniss at a time when Kniss had a doctor’s appointment. The two did not meet, and then Cammack texted Kniss to inform Kniss that Kniss’s employment was

suspended.<sup>3</sup> In other words, Kniss asserted he tried to reach out to Teamsters to discuss how he could perform the handbilling activities, and Teamsters suspended his employment, then terminated his employment without having a meaningful conversation with him.

Teamsters version of events was as follows: Teamsters contended Kniss sent an e-mail to Cammack objecting to the handbilling and refusing to participate in the handbilling. Cammack asked Kniss to meet with him, but Kniss refused. Kniss's employment was terminated. In other words, Teamsters asserted it tried to reach out to Kniss, to discuss the handbilling issues, but Kniss refused to handbill and refused to discuss the issue.

The dispute in this case is about an employer and employee who each believe they tried to communicate and the other party refused. The gravamen of the complaint is not handbilling—it is about which party refused an attempt to resolve the work issues raised by the handbilling. The handbilling is the background to the complained of act. The complained of act is Teamsters' alleged refusal to communicate with Kniss prior to terminating Kniss's employment. The handbilling is not the act being challenged; the alleged refusal to communicate with Kniss is being challenged. (See *Hunter v. CBS*

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<sup>3</sup> Local objected to Kniss's declaration describing the contents of the text message, on the basis of hearsay (Evid. Code, § 1200) and best evidence (Evid. Code, § 1521). The trial court sustained the objection. Because we are describing the contents of Kniss's argument, not reviewing an evidentiary issue, we refer to the contents of the text message. (See *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906 [admissibility of evidence relates to the second-prong of the analysis, i.e., the probability of prevailing prong].)

*Broadcasting, Inc., supra*, 221 Cal.App.4th at p. 1520 [““collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute””].)

#### 4. *FIRST CAUSE OF ACTION*

Kniss’s first cause of action was for disability and medical discrimination. Kniss asserted he requested a reasonable accommodation, and his employment was terminated shortly thereafter. The gravamen of this cause of action is Teamsters’ alleged failure to speak with Kniss about his request for a reasonable accommodation to perform the handbilling. Kniss asserts Teamsters essentially responded to his request for a reasonable accommodation by terminating his employment. This cause of action is not about Teamsters’ protected activity because (1) Kniss wanted an accommodation to perform the handbilling, thus helping Teamsters to express itself; and (2) the complained of act is the termination of employment following a request for accommodation—the complained of act is not handbilling.

#### 5. *SECOND CAUSE OF ACTION*

Kniss’s second cause of action was for failure to provide a reasonable accommodation. Kniss needed a reasonable accommodation because he could not stand for two hours at a time to conduct handbilling due to bulging discs in his back. Kniss alleged he requested a reasonable accommodation, but Teamsters “did not engage in any interactive process with [Kniss].”

The gravamen of this cause of action is Teamsters’ alleged failure to speak with Kniss about his request for a reasonable accommodation. Kniss asserts he tried to communicate with Teamsters, but Teamsters refused and then terminated his

employment. The gravamen of this cause of action is not handbilling—it is the alleged failure to communicate about methods to accommodate Kniss’s injuries/disabilities.

6. *THIRD CAUSE OF ACTION*

Kniss’s third cause of action was for failure to engage in an interactive process. Kniss asserted he requested reasonable accommodations in order to perform his job duties, but Teamsters refused to communicate with him, did not provide him any accommodations, and then terminated his employment. The complained-of act in this cause of action is Teamsters’ alleged failure to communicate with Kniss about accommodations that would help Kniss perform his job duties. Kniss is not suing due to a desire to stop handbilling. He is suing because he needs accommodations in order to perform activities such as handbilling, and Teamsters allegedly terminated Kniss’s employment rather than discuss possible accommodations. This cause of action is not about handbilling or an attempt to stop handbilling. Rather, it is about Teamsters’ alleged failure to discuss disability accommodations with Kniss.

7. *FOURTH CAUSE OF ACTION*

Kniss’s fourth cause of action was for age discrimination. Kniss asserted he was fired due to being over 40 years old. The gravamen of this cause of action is Teamsters’ act of terminating Kniss’s employment due to Kniss’s age. There is nothing in this cause of action concerning handbilling.

8. *FIFTH CAUSE OF ACTION*

Kniss’s fifth cause of action was for wrongful termination in violation of public policy. Kniss asserted he was fired due to “his disability and/or perceived disability, his

age, his request for reasonable accommodations, and his refusal to participate in the illegal hand billing [*sic*] activities.” The allegations about Kniss’s disability, age, and request for reasonable accommodations are discussed *ante*—the complained-of act is an alleged refusal to communicate followed by terminating Kniss’s employment. Those allegations are not about handbilling.

In this cause of action, Kniss asserts part of the reason he was wrongfully terminated in violation of public policy is that he refused to participate in the allegedly illegal handbilling. Kniss’s refusal to handbill is the motivation for the complained-of act. The action Teamsters took is termination of Kniss’s employment. While handbilling is mentioned in this cause of action, it is not the complained-of act. (See *Hunter v. CBS Broadcasting, Inc.*, *supra*, 221 Cal.App.4th at p. 1520 [““[C]auses of action do not arise from motives; they arise from acts.””].) Therefore, the gravamen of this cause of action is not protected activity.

#### 9. SIXTH CAUSE OF ACTION

Kniss’s sixth cause of action was for retaliation. Kniss asserted Teamsters required Kniss to disseminate “false” writings that would tend to “injure MBM’s customers.” Kniss asserted Teamsters instructed him to “engage in deceit.” Kniss asserted Teamsters violated a variety of laws, including unfair competition laws (Bus. & Prof. Code, § 17200), the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 et seq.), and laws about lying to law enforcement (Pen. Code, §§ 148, 148.9). Kniss alleged, “[Teamsters’] termination of [Kniss] in retaliation for refusing to

participate in what [Kniss] reasonably believed to be [Teamsters'] unlawful conduct violates [laws against retaliation].”

In the sixth cause of action, Kniss asserted Teamsters engaged in fraud or other illegal activity, and fired him for refusing to participate in such activity. This claim arises out of Teamsters' act of terminating Kniss's employment. Kniss would not have brought this cause of action but for his employment being terminated. It is the act of terminating Kniss's employment that is the gravamen of this cause of action, e.g. Kniss is not seeking to enjoin the handbilling.

The reason for the termination, i.e., the motivation, may be the refusal to participate in allegedly illegal activities. The alleged illegal activities are not the complained-of act, they are only the motivation for the complained-of act, which is termination of Kniss's employment. (*Hunter v. CBS Broadcasting, Inc.*, *supra*, 221 Cal.App.4th at p. 1520 [““[C]auses of action do not arise from motives; they arise from acts””].) Therefore, the gravamen of the cause of action is not protected activity.

#### 10. SEVENTH CAUSE OF ACTION

The seventh cause of action was a PAGA claim. (Labor Code, § 2698.) Kniss alleged Teamsters violated the Labor Code as described in “the factual allegations of the Complaint and the letters sent to the Labor and Workforce Development Agency, as described above.” Kniss cited Labor Code section 1102.5, subdivision (f), within this cause of action. That subdivision describes penalties that may be assessed for “each violation of this section.” Thus, we infer Kniss is alleging a violation of Labor Code section 1102.5.

Labor Code section 1102.5 prohibits an employer from making or enforcing a rule prohibiting employees from disclosing information to a law enforcement agency if the employee has reasonable cause to believe the information concerns a violation of law. (Labor Code, § 1102.5, subd. (a).) The statute also prohibits an employer from retaliating against an employee due to the employee (1) disclosing information to a person in authority; (Labor Code, § 1102.5, subd. (b)) and (2) refusing to participate in illegal activity (Labor Code, § 1102.5, subd. (c)).

We infer Kniss is asserting Teamsters violated the Labor Code by (1) instructing him to lie to law enforcement officers (Labor Code, § 1102.5, subd. (a)), and (2) terminating Kniss's employment when he objected to the handbilling (Labor Code, § 1102.5, subds. (b) & (c)).

Kniss alleged Teamsters instructed handbillers to "mislead law enforcement officials as to their identity and their purpose," if officers approached the handbillers. Based upon the complaint and other documents, it appears the instruction that employees lie to law enforcement was not made in a place open to the public or a public forum; rather, it was a direction given only to employees, i.e., a private forum. Therefore, the speech is not protected under section 425.16, subdivision (e)(3). The instruction to lie to law enforcement was not made in furtherance of the right of petition, or in connection with a public issue, or in connection with an issue of public interest. The speech Kniss is discussing in this portion of the cause of action is speech Teamsters directed at employees about speaking with law enforcement officers. The audience here was Teamsters' own employees, and they were discussing talking to police. Therefore,

the speech is not in furtherance of petitioning activity—the audience was not Carl’s Jr. customers.

In regard to termination, the analysis is the same as that given *ante* in the discussion of the individual causes of action. The act of termination is the act at issue. Therefore, the gravamen of the cause of action is not protected activity.

#### 11. *SUMMARY*

In sum, the trial court erred by concluding the gravamen of Kniss’s lawsuit is handbilling. Kniss’s lawsuit is not about handbilling. Handbilling is merely incidental background information in this lawsuit. The lawsuit does not concern Teamsters’ protected activity. The anti-SLAPP motion should not have been granted. The judgment will be reversed.

#### 12. *TEAMSTERS’ ARGUMENTS*

Local asserts that if Kniss’s lawsuit succeeds then Local’s employees can choose not to publicize Local’s views, which would leave Local with no means of expression. We see nothing in Kniss’s lawsuit that would result in a rule reflecting employees can refuse to perform their job duties and retain their jobs. Kniss’s lawsuit is about discrimination and being fired for objecting to forced illegal activity. Nothing in those causes of action would prevent Local from lawful expression. Therefore, we find Local’s argument to be unpersuasive.

Teamsters assert this case is analogous to *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257 (*Tuszynska*.) *Tuszynska* concerned an attorney who provided legal services to members of the Riverside Sheriffs’ Association (the Association), under the

auspices of the Association's Legal Defense Trust (the Trust), which was a prepaid legal services plan. (*Id.* at p. 261.) The attorney sued the Association, the Trust, and others (collectively, the defendants) alleging that she received fewer case referrals because she was female. The defendants filed anti-SLAPP motions. The defendants asserted the gravamen of the attorney's lawsuit was protected petitioning activity, in particular decisions made regarding who would represent Association members. (*Ibid.*)

The trial court denied the defendants' motions, reasoning the gravamen of the attorney's complaint was defendants' conduct in failing to refer legal work due to the attorney being female. This court disagreed with the trial court. This court concluded the gravamen of the complaint was protected activity because the complained-of acts "were based on communications and statements defendants made 'in connection with an issue under consideration or review by a . . . judicial body . . .'" (§ 425.16, subd. (e)(2)), namely, [the] defendants' attorney selection and litigation funding decisions on behalf of [Association] members." (*Tuszynska, supra*, 199 Cal.App.4th at pp. 261-262.)

Local asserts the instant case is analogous to *Tuszynska* because, in *Tuszynska*, the attorney's gender discrimination claims arose from defendants' litigation decisions, and, in the instant case, Kniss's claims arose from Teamsters' handbilling. The analogy fails. In *Tuszynska*, the complained-of acts were decisions regarding who should represent Association members in litigation. The attorney argued that the gravamen of her lawsuit was not those decisions, but rather the gender discrimination motivating those decisions. (*Tuszynska, supra*, 199 Cal.App.4th at p. 268.)

As explained *ante*, it is acts—not motivation—that constitutes a cause of action. (*Hunter v. CBS Broadcasting, Inc.*, *supra*, 221 Cal.App.4th at p. 1520.) In *Tuszynska*, the complained-of acts were protected activities, and the unprotected conduct was the motivation behind the acts. The instant case is the direct opposite.

In *Tuszynska*, the complained-of act of not referring cases to the attorney (protected activity) was motivated by gender discrimination (unprotected activity). Anti-SLAPP applies because there is a complained-of act that falls within a category of protected activity. In the instant case, the complained-of acts of terminating Kniss’s employment and not communicating with Kniss (unprotected activities) may have been partially motivated by the handbilling issues (protected activity). Anti-SLAPP does not apply because the complained-of acts do not fit within the enumerated categories of protected activities. The handbilling is a motivation—it is not a complained-of act. Therefore, this case is not analogous to *Tuszynska*.

International contends that in order for Kniss to succeed on his sixth and seventh causes of action, Kniss will be required to prove the handbills were illegal speech, i.e., libel or fraud, and therefore Teamsters’ petitioning activity underlies Kniss’s causes of action. The sixth cause of action is for retaliation. International is contending that anti-SLAPP motions typically require an examination of acts rather than motives, but for purposes of proving retaliation, Kniss will need to prove an improper motive for liability to attach, thus motive is relevant.

The retaliation statute provides, “An employer . . . shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of

state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.” (Labor Code, § 1102.5, subd. (c).) ““The retaliatory motive is “proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.””” (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69.)

Thus, in proving a retaliatory motive, Kniss may have to show that he engaged in the protected activity of refusing to distribute false handbills, that his employers were aware of his protected activity, and that his employment was terminated shortly thereafter. As part of showing Kniss engaged in a protected activity, he may need to show that the contents of the handbills were false. Importantly, the purpose of Kniss seeking to establish the falsity of the handbills is not to curtail Teamsters’ ability to handbill. Rather, Kniss will seek to establish the falsity of the handbills for the sake of showing his refusal to handbill was proper and thus his termination was improper. Kniss’s retaliation claim does not arise from the act of handbilling. It arises from the termination of his employment. The alleged falsity of the handbills is only relevant in proving the alleged impropriety of terminating Kniss’s employment. Thus, the retaliation cause of action does not arise from an act in furtherance of Teamsters’ right of petition or free speech—it arises from the termination of Kniss’s employment. (§ 425.16, subd. (b)(1) [“arising from any act of that person in furtherance of the person’s right of petition or free speech”].)

The seventh cause of action was a PAGA claim for alleged violations of the Labor Code. The acts at issue are (1) termination, and (2) instructing Kniss to lie to law enforcement. Handbilling is not the act for which Kniss is suing, e.g. Kniss is not seeking to enjoin the handbilling. Kniss is suing because he believes the Labor Code was violated. Therefore, we find International’s argument to be unpersuasive. (See *Un Hui Nam v. Regents of the University of California* (2016) 1 Cal.App.5th 1176, 1190 [““the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.”” [Citation.] Nor does protected activity that is incidental to a cause of action justify an anti-SLAPP dismissal”].)

Local asserts this court must focus on the “injury-producing conduct,” rather than the “damage-producing conduct.” Local contends the injury-producing conduct is the handbilling. Local cites *Renewable Resources Coalition, Inc. v. Pebble Mines Corp.* (2013) 218 Cal.App.4th 384 (*Renewable*), to support its argument. In *Renewable*, the Renewable Resources Coalition, Inc. (Coalition) sued the defendants alleging the defendants had purchased Coalition’s confidential documents and used those documents in a prior case against Coalition that alleged election law violations. The defendants brought an anti-SLAPP motion against Coalition’s complaint. The trial court granted the motion. The appellate court reversed. (*Id.* at p. 387.)

The appellate court explained, “[T]he trial court erroneously focused on the Coalition’s damages allegations, i.e., that the Coalition was forced to defend itself in the [election law] proceeding. Instead, the proper focus should have been on the ‘allegedly

wrongful and injury-producing conduct’ [citation] which gave rise to the Coalition’s damages. [¶] Simply stated, to determine the applicability of the anti-SLAPP statute, we look to the allegedly wrongful and injurious conduct of the defendant, *rather than the damage which flows from said conduct*. Here, the gravamen of the Coalition’s actions was that the . . . defendants allegedly wrongfully purchased the Coalition’s confidential documents . . . . Said purchase was not an act by the . . . defendants in furtherance of their right of petition or free speech, making the anti-SLAPP procedure inapplicable.” (*Renewable, supra*, 218 Cal.App.4th at pp. 396-397.)

Local contends, “[Kniss’s] termination may have caused his alleged damages, but the alleged injury-producing conduct and the focus of [Kniss’s] claims is Local[’s] handbilling.” As explained *ante*, the focus on Kniss’s claims is not handbilling. Handbilling is background information related to the alleged employment related acts of (1) discriminating based on disability; (2) failing to provide reasonable disability accommodations; (3) failing to communicate regarding reasonable accommodations; (4) discriminating based on age; (5) wrongfully terminating Kniss; (6) retaliating against Kniss by terminating his employment; and (7) violating the Labor Code.

C. REMAINING CONTENTIONS

Kniss contends he established a probability of prevailing on his claims. We do not need to address the second-prong of the anti-SLAPP analysis because we have concluded the first-prong was not satisfied. (*Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 582.)

Kniss contends the trial court erred by sustaining Local's objections to Kniss's evidence, in particular, objections 11 through 32, 34, 38, and 39. Because the judgment must be reversed, this issue is moot. (See *Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1253 [reversal renders remaining contentions moot].)

**DISPOSITION**

The judgment is reversed. Appellant, Robert Kniss, is awarded his costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER  
J.

We concur:

McKINSTER  
Acting. P. J.

SLOUGH  
J.