

***Cho v. Chang* – 2013 Cal.App. LEXIS 715**
**Former employee who claimed to be sexually harassed may not be sued by targeted
coworker for harm to reputation resulting from sexual harassment allegations.**

FACTS AND PROCEDURAL POSTURE

Appellant Jessica Chang sued her former employer, Midway International, Inc. and a former coworker, respondent Howard Cho, for sexual harassment and related torts. Appellant alleged that Cho groped and fondled her during two holiday events held for Midway employees. Appellant further alleged that, following these events, Cho began engaging in hostile behavior, including insulting and berating Appellant in front of her coworkers. Chang reported to Midway's Vice-President and submitted a written claim. After Midway's investigation failed, Appellant filed a discrimination claim with the EEOC and DFEH; she was granted a right-to-sue letter and filed her complaint. Respondent Cho filed a cross-complaint for defamation and intentional infliction of emotional distress based on Appellant's written report to Midway, her claims filed with the EEOC and DFEH, and statements she made to coworkers.

Appellant filed an anti-SLAPP (strategic lawsuit against public participation) motion in response to the cross-complaint and sought attorney's fees. The trial court found that Appellant's statements to coworkers were not protected, though the other statements were. The Anti-SLAPP motion was granted on the protected activity, but denied for the unprotected statements to coworkers. The court also denied the request for attorney's fees. This appeal followed.

DISCUSSION

Appellant contended that the trial court erred by partially denying her anti-SLAPP motion because her comments to coworkers were protected by the litigation privilege and could not be used by respondent to demonstrate a probability of success. When a court reviews a defendant's anti-SLAPP motion, the court must first determine whether the defendant can demonstrate that the challenged cause of action arises from a protected activity. To be protected, an act must be taken in furtherance of the defendant's right of petition or free speech. If the defendant establishes such a showing, the court must then determine whether the plaintiff can demonstrate that he has a probability of prevailing. Respondent's cross-complaint was based on Appellant's claims filed with the EEOC and DFEH, her report to Midway, and her comment to coworkers. The court followed the trial court's finding that the EEOC/DFEH claims and the report to Midway were protected activities.

With regard to the comments made to coworkers, the court reasoned that Appellant's action was based upon allegations of conduct by the Respondent, so it did not follow that her statements to third parties about that conduct were protected. The court stated that protected activity must be "in connection with" the anti-SLAPP suit; though the quoted phrase is not narrowly construed, it is read with the other language of the statute in mind and does not encompass any statement made to anyone about a topic. Protected activities must have some nexus with the anti-SLAPP suit. Appellant offered no evidence to demonstrate that her

statements to coworkers were made to seek assistance with the action. The court held that without any evidence to support her contentions that the statements were made in connection with the anti-SLAPP motion, Appellant's comments to her coworkers were not protected. Appellant also argued that her statements were made in furtherance of her constitutional rights in connection with a public issue; but this argument was also unsupported by evidence and rejected.

The court then addressed the problem presented by a cause of action presenting mixed claims, where some claims are protected by anti-SLAPP law and some are not. Appellate courts have recognized difficulty in the application of the anti-SLAPP law where there is a single mixed cause of action presented. The court recognized that anti-SLAPP cases have gradually allowed for protected activity and unprotected activity to be separated for purposes of a motion to strike. This separation of activities allows a cause of action to proceed against unprotected activity while protected activities are struck. In light of this new separation of claims approach, the court turned its attention to *Taus v. Loftus*, (2007) 40 Cal.4th 683. In *Taus*, the court decided that a plaintiff must demonstrate a probability of success on each claim to avoid having a particular claim struck. In *Wallace v. McCubbin*, the court further interpreted the *Taus* decision as allowing a part of a cause of action to be struck where the plaintiff fails to demonstrate a probability of prevailing on that particular part. (2011) 196 Cal.App.4th 1169. However, other courts have found the *Taus* decision to be repudiated by the Supreme Court in *Oasis West Realty, LLC v. Goldman*, (2012) 51 Cal.4th 811. *Oasis* quoted a case which stated that "once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff has established that its cause of action has some merit and the entire cause of action stands." However, the court distinguished the quoted case on the grounds that it was a mixed cause of action; however, neither *Taus* nor *Oasis* were mixed causes of action.

In resolving this dispute, the court turned to the guiding principle for applying the anti-SLAPP statute to a mixed cause of action: The purposes of the anti-SLAPP statute should not be frustrated by pleading tactics that combine allegations of protected and unprotected activity under a single cause of action. The court recognized that if an entire cause of action were struck because of a mix of protected and unprotected claims, this would be inconsistent with the purpose of the statute. The court stated that by striking claims invoking protected activity but allowing unprotected claims to remain, the purpose of the statute would not be disturbed. When the trial court held that the anti-SLAPP motion should only be granted as to the protected activity, it acted in line with the purpose of the statute.

DISPOSITION: The court affirmed the judgment of the trial court.