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California Court of Appeal Rejects Anti-SLAPP Motion in a Retaliation and Wrongful Termination Case

The anti-SLAPP statute (Strategic Lawsuit Against Public Participation), California Code of Civil Procedure section 425.16, is commonly used outside the employment litigation context to test the merits of a lawsuit at an early stage in the litigation. A recent case, *McConnell v. Innovative Artists Talent and Literary Agency, Inc.* illustrates the hesitation of courts to allow these motions in employment litigation.

McConnell, issued by the California Court of Appeal in the Second Appellate District on June 25, 2009, concerns a dispute involving an employment contract between Innovative Talent and two of its Agents. The Agents, while still employed, filed a lawsuit seeking to have the Court declare that they had the right to terminate their employment agreements at will, and to enjoin Innovative from enforcing certain provisions of the agreements. In response to the lawsuit, Innovative immediately sent the Agents letters containing revised job descriptions that forbade the Agents from coming to the office, talking to its clients and employees, having any access to Innovative emails, files or its databases. The Agents promptly opened their own talent agency and amended their complaint to include causes of action for retaliation and wrongful termination.

Innovative responded to the Agents' two new causes of action by filing a special motion to strike using the anti-SLAPP statute. Innovative argued that the revised job description letters were protected speech under the statute because the letters were an integral part of its investigation and evaluation of the Agents' lawsuit. The *McConnell* Court disagreed and denied Innovative's motion for two primary reasons. First, the letters did not mention the lawsuit, Innovative's investigation, or specifically discuss any of the substantive claims at issue in the Agents' complaint. Second, the Agents' claims for retaliation and wrongful termination were not based on the letters, but based on Innovative's conduct – modifying the Agents' job duties.

McConnell reflects a growing trend to carefully scrutinize the contents of alleged protected speech in connection with anti-SLAPP motions. In light of *McConnell*, counsel for employers will want to consider carefully whether the statute protects the communication at issue before filing what may be a futile motion.