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Speakers Only: Governmental Entities Must be Engaged in "Communicative Activity" to Qualify for Anti-SLAPP Protection

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On January 22, the Washington Supreme Court decided *Henne v. City of Yakima*, its first decision interpreting Washington's anti-SLAPP statute (SLAPP is short for Strategic Lawsuit Against Public Participation). This case has significant First Amendment implications and provides insight into how the Court might decide several other anti-SLAPP cases currently under review.

At issue in *Henne* was whether a government entity is entitled to the free speech protections afforded by Washington's anti-SLAPP statute. That statute, RCW 4.24.525, was enacted in 2010 to address the proliferation of lawsuits designed to discourage defendants from exercising their First Amendment rights. The statute allows a defendant who is sued for engaging in "action involving public participation and petition" to file a special motion to strike the plaintiff's claims. RCW 4.24.525(2). If successful, the defendant is entitled to recover costs, attorney's fees and a $10,000 statutory penalty. RCW 4.24.525(6)(a).

The plaintiff in *Henne* sued his employer, the City of Yakima (the "City"), for subjecting him to a hostile work environment. The crux of the plaintiff's claims was that the City subjected him to unlawful harassment by investigating spurious complaints lodged by several of his coworkers. The City filed a special motion to strike, arguing that the coworkers' complaints amounted to "action involving public participation and petition" protected by the anti-SLAPP statute. The trial court ruled that the City lacked standing to file the motion because it had not been sued for its *own* action involving public participation and petition.

On appeal to the Washington Court of Appeals, the City argued that the anti-SLAPP statute applies broadly to any claim arising from public participation and petition, regardless of the source of that activity. The plaintiff countered that the statute only protects "persons" who engage in such activity, and that the City was not a "person" as that term is defined in the statute. The Court of Appeals sided with the City, noting that the definition of "person" contained a catchall provision for "other legal or commercial entities," such as municipal corporations.

The Washington Supreme Court reversed. At the outset, the Court parted ways with the Court of Appeals in its framing of the issue. The Court explained that the issue was not whether the City was a "person" under the statute, but, more narrowly, whether the City had been sued as a result of having engaged in the type of free speech activity that the statute protects. In drawing this distinction, the Court noted that the Legislature's purpose in enacting the anti-SLAPP statute was to insulate persons who exercise their First Amendment rights from frivolous lawsuits arising from that activity—lawsuits that would otherwise chill free speech. In light of this purpose, the Court reasoned, only persons who affirmatively engage in "communicative activity" are entitled to the statute's protections; those who merely "receive" protected communications cannot avail themselves of the statute because their

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First Amendment rights are not at risk of being chilled. Since the City had merely fielded complaints about the plaintiff and did not engage in any "communicative activity" of its own, the Court held, it lacked standing to pursue an anti-SLAPP motion.

The rule of *Henne* is clear: "a governmental entity lacks standing to bring an anti-SLAPP motion under RCW 4.24.525 where the governmental entity has not *engaged in the communicative activity on which the suit is based.*" In the wake of this decision, governmental entities should exercise caution when bringing anti-SLAPP motions unless they are sued for their *own* speech activities. When the plaintiff's claims arise solely from the First Amendment speech activities of others—even if the speech is directed at the governmental entity itself—the special motion to strike should remain on the shelf.

Henne is also noteworthy for what it does not decide. Interestingly, the Court refused to address two issues that were decided by the Court of Appeals below and squarely presented for review: (1) whether a governmental entity is a "person" entitled to seek relief under the statute, and (2) whether a plaintiff can sidestep a special motion to strike by simply amending its complaint to remove the challenged claims. Unfortunately, the Washington Supreme Court is not likely to revisit these issues in the near future.

More generally, this case is important because it was the Washington Supreme Court's first opportunity to examine and interpret Washington's anti-SLAPP statute. At least three other anti-SLAPP cases are currently pending before the Washington Supreme Court. K&L Gates is monitoring these cases and will provide additional commentary on noteworthy developments.

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