

S280773

Case No.:

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF INGLEWOOD, et al.

Defendants and Appellants,

v.

WANDA M. BROWN

Plaintiff and Respondent

Second Appellate District, Division 1, Case No. B320658
On Appeal from the Superior Court for the State of California,
County of Los Angeles, Case No. 21STCV30604, Hon. Deirdre Hill

PETITION FOR REVIEW

ENGSTROM, LIPSCOMB & LACK

Walter J. Lack, Esq. (State Bar No. 57550)

wlack@elllaw.com

Richard P. Kinnan, Esq. (State Bar No. 123170)

rkinnan@elllaw.com

Christopher A. Kanne, Esq. (State Bar No. 289531)

ckanne@elllaw.com

10100 Santa Monica Blvd., Suite 1200

Los Angeles, CA 90067

Tel: (310) 552-3800

**Attorneys for Plaintiff and Respondent
Wanda M. Brown**

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PETITION FOR REVIEW

Petitioner Wanda M. Brown petitions this Court for review following the decision of the Court of Appeal, Second Appellate District, filed in that court on May 31, 2023. A copy of the decision of the Court of Appeal is attached hereto as Attachment “A”.

STATEMENT OF THE ISSUES

The Court is respectfully requested to grant this Petition for Review so as to decide and settle two important issues of California employment law:

Issue One: Whether elected officials are employees for purposes of whistleblower protection under Labor Code section 1102.5(b).

Issue Two: Whether Labor Code section 1102.5(b) allows for individual or personal liability against the City personnel who engaged in the illegal retaliation.

In late 2019 and early 2020, the long-time Treasurer of the City of Inglewood, Wanda Brown, reported to the City her concerns about certain financial transactions of the City of Inglewood, including her concern that there had been an illegal misappropriation of City funds by the City’s Mayor, James T. Butts Jr. Following this complaint, Ms. Brown was suddenly stripped of nearly all her duties, denied access to the City’s financial records, and, had her salary cut by eighty-three percent (83%). Ms. Brown contends that the City’s actions were in retaliation for her reporting what she believed to be a crime committed by the City’s Mayor.

Ms. Brown filed a Complaint for Damages in the Los Angeles Superior Court alleging a violation of California’s Whistleblower Protection Law, Labor Code section 1102.5(b). The trial court permitted Ms. Brown’s 1102.5(b) claim to proceed. The appellate court, however, found that elected officials like Ms. Brown are not employees for purposes of bringing a whistleblower claim under Labor Code 1102.5(b). (Attached as Exhibit A is the appellate court Opinion dated May 31, 2023). No California case has addressed the issue. **This Court needs to decide and settle the important question of law whether elected officials are employees for purposes of whistleblower protection under Labor Code section 1102.5(b).** It’s truly unfair that just because you are an elected official you have to suffer workplace retaliation without any legal recourse. There’s simply no sense or justice in that. A ruling by this Court is necessary to settle this important legal issue.

The appellate court’s statement that the language of the statute clearly omits elected officials as “employees” entitled to protection under 1102.5(b) simply muddies the water on this undecided issue. While the statute does not specifically list elected officials in the definition of “employees,” it does state that “‘employee’ includes, *but is not limited to*, any individual employed by...any...city....” (Emphasis added.) Thus, the so-called list is clearly not exhaustive, and the failure to mention elected officials does not plainly mean that they were intended to be excluded from the statute’s protection. The court in *Bennett vs. Rancho California Water District* (2019) 35 Cal. App. 5th 908, 927, stated that whether someone is an “employee” for purposes of section 1102.5(b)

must be determined by applying the common law definition of “employee.” In any event, the appellate court’s Opinion leaves this important issue undecided for future cases.

A closely related issue is **whether Labor Code section 1102.5(b) allows for individual or personal liability against the City personnel who engaged in the illegal retaliation.** A 2014 amendment to Labor Code 1102.5(b) specifically added individual liability language to this statute: “An employer, *or any person acting on behalf of the employer*, shall not retaliate against an employee for disclosing information...the employee has reasonable cause to believe [is] a violation of state or federal [law]....” (Emphasis added). Despite the express language of the statute, the appellate court found that the statute does not permit individual or personal liability for the retaliatory conduct. No California case has addressed the issue. **This Court needs to decide and settle the important question of law whether individuals can be personally liable for their retaliatory actions in the workplace.**

The appellate court’s Opinion leaves these important issues undecided in California jurisprudence in terms of resolving future cases with similar, recurrent fact patterns. The Court is respectfully requested to grant this Petition for Review so as to decide and settle important issues of employment law.

STATEMENT OF OPERATIVE FACTS

In 1987, Ms. Brown was first elected as Treasurer for the City of Inglewood. In November 2020 Ms. Brown was elected to her ninth consecutive four-year term as City Treasurer. Ms. Brown has been the Treasurer of the City of Inglewood for thirty-three

years and counting. (*See* Declaration of Wanda Brown “Brown Decl.” ¶ 1, 2 AA 457, 458).

Ms. Brown is a paid employee of the City of Inglewood and has been since 1987. Ms. Brown receives annual W-2 tax form Statements from her employer the City of Inglewood. These W-2 tax forms identify her as the employee, and the City of Inglewood as the employer. The W-2 tax forms she receives from the City of Inglewood identify her wages, along with the federal and state taxes withheld from her wages, as well as a Medicare tax withholding. The W-2 tax form identifies the employer’s tax identification number along with her Social Security number. (Brown Decl. ¶ 2, 2 AA 458, referencing and attaching a true and correct copy of her 2020 W-2 tax form from the City of Inglewood as Exhibit 1).

Further evidence of Ms. Brown’s employee status with the City of Inglewood is found in her bi-weekly pay stub receipt from the City of Inglewood, which identifies Regular Earnings, along with various deductions and employee benefits such as health benefits (including dental, vision, and mental health, retirement benefits, and a deduction for “**WORKERS COMP[ENSATION]**.” (Brown Decl. ¶ 3, 2 AA 458, referencing and attaching as Exhibit 2 is a true and correct copy of her Pay Stub report from the City of Inglewood).

The City of Inglewood fully controls every aspect of Ms. Brown’s work activity, including her access to the City’s financial records, access to her office computer that she uses to perform her work, access to her work e-mail, as well as controlling what job duties she is assigned, and, the City employer controls the wages she is paid for her work.

And, the City of Inglewood strictly controls Ms. Brown's time to speak at City Council meetings. (Brown Decl. ¶ 4, 2 AA 458).

An example of the City's plenary power over Ms. Brown is found in the City's denial of Ms. Brown's access to her work office and to City Hall, despite her providing the City the required negative Covid test (which the City acknowledged receipt of in an email). (Brown Decl. ¶ 5, 2 AA 458-459, referencing and attaching as Exhibit 3 a true and correct copy of the City's November 25, 2020 acknowledgment of her negative Covid test).

During her tenure as City Treasurer, Ms. Brown's principal duty was to invest City funds prudently, and to that end over her many years as the City Treasurer she has invested and reinvested more than \$400,000,000 of municipal funds, and been directly responsible for generating over \$90,000,000 in gross interest investment income for the City of Inglewood. (Her standard practice was to invest City funds in blocks of one to three million dollars.) (Brown Decl. ¶ 6, 2 AA 459).

Ms. Brown managed portfolios in excess of \$200,000,000. Ms. Brown prepared the first comprehensive Investment Policy for the City and its entities. (Brown Decl. ¶ 6, 2 AA 459).

Ms. Brown also served as the General Auditor and was a member of the Bond Issuance and Bond Refinance Committee. (Brown Decl. ¶ 6, 2 AA 459).

In March 2018, at an official City Council meeting Inglewood's Mayor and City Council honored Ms. Brown for her 31 years of outstanding service as the City's Treasurer. During the ceremony, defendant Mayor BUTTS stated that Treasurer Brown's

investment work on behalf of the City has been very commendable: Mayor BUTTS stated that Ms. Brown is the “alpha and omega” of investing City funds and explained how Ms. Brown saw the decline and resurgence of the City. (Brown Decl. ¶ 9, 2 AA 459).

United States Congresswoman Maxine Waters attended the Council meeting where Ms. Brown was being honored and offered her own personal congratulations to Ms. Brown for her outstanding service as Treasurer for the City of Inglewood. (Brown Decl. ¶ 9, 2 AA 459).

In addition to investing City funds, Ms. Brown’s Treasurer duties included signing for payment of proper City warrants, serving as a Member of the City Investment Committee and Claims Review Committee, Permit and License Committee, representing the City in Small Claims Court, reviewing the City’s bank reconciliation system, attending all Inglewood Parking Authority meetings, and working with the City Administrator, Finance Department, and other management personnel in connection with the approval for release of bond proceeds for projects approved by the City Council, and various matters related to improving the efficiency of the City and its entities. She attended all City Council meetings as part of her job duties. She was also the General Auditor. (Brown Decl. ¶ 7, 2 AA 459).

As set by the defendant Mayor BUTTS and the City Council, Ms. Brown’s salary was \$8,355.27 per month. (Brown Decl. ¶ 8, 2 AA 459).

In a separate Memoranda to the City of Inglewood, its City Attorney, Mayor BUTTS and the City Council dated November 25, 2019 and January 28, 2020, Ms.

Brown raised important concerns she had about certain financial transactions of the City of Inglewood. (Brown Decl. ¶ 10, 2 AA 460). These concerns included an improper overpayment of \$77,418.26 to a City contractor (Pinner Construction) signed off by defendant Mayor BUTTS himself (where for the first time in City history the Mayor had himself appointed as an authorized City representative for payment of bond proceeds), an action Ms. Brown believed was an illegal misappropriation of City Bond Funds in violation of California Penal Code section 424(a)(1), which makes it a felony offense for a public officer without authority to misappropriate public moneys for personal use, or for the use of another. (Brown Decl. ¶ 10, 2 AA 460). In her 2021 First Amended Complaint Ms. Brown alleged that she reported to the City of Inglewood' Mayor and its City Council that she had discovered facts, "indicating that defendant Butts (and his Council) were mishandling the City's finances, including an improper payment of nearly one hundred thousand dollars to a City Contractor, Pinner Construction, which payment had been signed off by Mayor Butts himself (a highly unusual transaction)." (1 AA 23, ¶16). In her Second Amended Complaint, Ms. Brown specifically alleged that, "Mayor Butts personally issued a \$77,418.26 payment to a City Contractor knowing that such payment was an improper and illegal overpayment which amounted to a misappropriation of City Bond monies in violation of California Penal Code section 424(a)(1)...." (2 AA 588, ¶ 12).

Unfortunately, Ms. Brown's concerns were completely ignored by the City of Inglewood, the City Attorney, Mayor BUTTS and his Council. Rather than properly addressing the issue with Ms. Brown, defendant Mayor BUTTS simply denied any

improper appropriation or overpayment to the subject contractor, and accused the Treasurer/Ms. Brown of giving misleading financial information. (Prior to defendant Mayor Butt's unfounded criticism of Ms. Brown, she had never had a complaint lodged against her as the Treasurer of the City of Inglewood.) (Brown Decl. ¶12, 2 AA 460).

The City of Inglewood, the Mayor, and his Council then set about to silence, punish and retaliate against Ms. Brown for reporting what she reasonably believed was an illegal misappropriation of City monies by systematically reducing her job duties and ability to function as Treasurer: During the year 2020, they (1) established as new Investment Committee and did not notify or invite the her to participate in the Committee's meetings; (2) reduced her once multi-million dollar investment authority to just \$50,000; (3) took away her seat at Council Meetings and denied her access to Council; (4) deactivated her computer and restricted her access to the Bank of America CASH PRO INVESTMENT program needed to execute investments; (5) locked her and her staff out of City Hall and her offices despite providing the necessary negative Covid test; (6) issued an Order that the Treasurer not be given access to the City's financial records; (7) reduced her salary by 83% from \$8,355.27 a month to just \$1,404 per month; (8) removed her as a member of the Claims Review and License and Permit Committee; (9) removed her from the Bond Issuance Committee; (10) removed her as General Auditor; and, (11) eliminated her duties as the person responsible for approving all Requests for vendor payment contracts from Bond Proceeds. (Brown Decl. ¶ 13, 2 AA 460-461).

The conduct described above is evidence that defendant City of Inglewood,

defendant Mayor BUTTS, and the defendant Council Members intentionally sought to cause Ms. Brown severe emotional distress in retaliation for her exercising her right to report to the City and its attorneys something she reasonably believed amounted to an illegal misappropriation of City monies.

ARGUMENT

I. PLAINTIFF IS AN EMPLOYEE ENTITLED TO PROTECTION FROM RETALIATION UNDER CALIFORNIA LABOR CODE SECTION 1102.5(b)

It is undisputed that both the Internal Revenue Service (“IRS”) and California’s Workers’ Compensation Act classify state and local elected officials as employees. It is reasonable and sensible for California courts to similarly classify elected officials as employees. As it stands, however, California case law simply states that for purposes of Labor Code section 1102.5, whether someone is an employee entitled to protection against retaliation in the workplace is determined by applying the common law definition of employee. *Bennett vs Rancho California Water Dist.* (2019) 35 Cal. App. 5th 904, 924. The Court in *Ayala vs Antelope Valley Newspaper, Inc.* (2014) 59 Cal. 4th 522, 531, stated that a critical factor in determining employee status is whether the alleged employer “retains all necessary control” and “has the right to control the manner and means of accomplishing the result desired.”

Here, employer control is clearly evidenced by the very retaliatory actions set forth in Plaintiff’s Court filings. The City of Inglewood and its officials literally

controlled and restricted every aspect of Ms. Brown’s job duties and responsibilities, including limiting and restricting her principal duty to invest City monies, limiting her access to City financial records, limiting her access to her computer and e-mail, limiting her access to financial investment computer software necessary to do her job, limiting access to her very office, removing her from various committees, removing her seat at Council meetings, withdrawal of her title and duties as General Auditor, and, drastically reducing her monthly/annual salary. (Brown Decl. ¶13, 2 AA 460-461). Notably, Appellants actually concede that Plaintiff Brown is, and at all relevant times was an employee of the City of Inglewood where they unconditionally argue that her Intentional Infliction of Emotional Distress tort claim is barred by the Workers’ Compensation Exclusive Remedy doctrine (which bars *employee* access to Court claims and remedies outside the confines of the California Workers’ Compensation Act). (AOP pp. 53-54).

II. LABOR CODE SECTION 1102.5 CLAIMS SHOULD BE ALLOWED AGAINST NON-EMPLOYER INDIVIDUAL DEFENDANTS

It is undisputed that California Courts have not ruled on the issue of individual liability for non-employer defendants in Labor Code 1102.5 retaliation cases. See, *Bales vs City of El Dorado* (E.D. Cal 2018 No. 2:18-cv-01714 JAM-DB) 2018 WL 4558235 at *3 (“no California court has addressed the issue of individual liability since the amendment to the language [in 2014]). Petitioner Plaintiff contends that individual liability is prescribed by the Code language as amended in 2014, and, should be endorsed by this Court as a strong deterrent against retaliatory conduct against well-meaning

employees by company officers, managers, and supervisors.

Labor Code section 1102.5 was amended in 2014 to add the following language to subsections (a) through (d): “An employer, **or any person acting on behalf of the employer.**” (Emphasis added.) Specifically, subsection (b) which is relevant to this case, states, in pertinent part, as follows:

An employer, or any person acting on behalf of the employer shall not retaliate against an employee for disclosing information...to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, ...if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.”

As stated by the court in *Tam v. InVentiv Health Consulting Inc.* (C.D. Cal. Oct. 24, 2019) 2019 WL 5485654, at *3, there is a split of authority among federal district courts on the issue of individual liability under Labor Code 1102.5. The court in *Tam* noted that the only district court cases which found no individual liability were decided on Rule 12(b)(6), but in cases which confront the issue upon a Motion for Remand courts have consistently ruled in favor of a finding of individual liability. In addition to *Tam*, the United States District Court for the Central District of California has uniformly ruled in Plaintiff’s

CERTIFICATE OF APPELLATE COUNSEL

PURSUANT TO RULE 8.504(D(1)) OF THE CALIFORNIA RULES OF COURT

I, Richard P. Kinnan, appointed counsel for Plaintiff/Respondent, certify pursuant to Rule 8.504(d)(1) of the California Rules of Court, that I prepared this Opening Brief on behalf of my client Plaintiff/Respondent, Wanda M. Brown, and that the word count for this opening brief is 3,681, which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

/S/ Richard P. Kinnan

Richard P. Kinnan

Attorneys for Plaintiff and

Respondent Wanda Brown

EXHIBIT A

FILED

Jun 30, 2023

EVA McCLINTOCK, Clerk

JLozano Deputy Clerk

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WANDA M. BROWN,

Plaintiff and Respondent,

v.

CITY OF INGLEWOOD et al.,

Defendants and Appellants.

B320658

(Los Angeles County
Super. Ct. No. 21STCV30604)

CERTIFICATION AND
ORDER FOR PARTIAL
PUBLICATION; ORDER
MODIFYING OPINION
(NO CHANGE IN JUDGMENT)

THE COURT:

A. Certification and Order For Partial Publication

The opinion in the above-entitled matter filed on May 31, 2023 was not certified for publication in the Official Reports. For good cause and pursuant to California Rules of Court, rule 8.1110, the opinion is certified for publication with the exception of the Facts and Proceedings Below, part C, and the Discussion, parts B and C.2.

B. *Order Modifying the Opinion*

The opinion is also modified as follows:

1. On page 3, the last three sentences of the introductory paragraph are deleted and replaced with the following sentences:

For reasons we discuss below, in the unpublished portion of the opinion, we hold that the retaliation-based claims against the individual defendants arise from protected activity under the anti-SLAPP statute, and that the court should have stricken the retaliation-based IIED claim based on the second step of the anti-SLAPP analysis. In the published portion of the opinion, we conclude the court should have stricken the section 1102.5 retaliation claim as well, because an elected official is not an “employee” for the purposes of that statute. In all other respects, we affirm the court’s ruling on the anti-SLAPP motion.

2. On page 3, in the first paragraph of the Facts and Proceedings Below, part A, the following sentence, “She alleged that, as a result of her reporting these concerns, defendants took various adverse actions against her, including reducing her duties and authority as treasurer, reducing her salary by 83 percent, taking away her seat at the council meetings, and temporarily locking her and her staff out of their offices.” is replaced with the following sentence:

She alleged that, as a result of her reporting these concerns, defendants took various adverse actions against her, including reducing her duties and authority as treasurer, reducing her salary by 83 percent, taking away her seat on the dais at council meetings, and temporarily locking her and her staff out of their offices.

3. On page 9, after the citation (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1056) the following sentence is inserted:

We agree.

4. On page 14, the paragraph under part C is deleted and replaced with the following paragraph:

Because we conclude above that Brown’s retaliation-based claims against the individual defendants arise from protected activity, we proceed to analyze these claims under the second step of the anti-SLAPP analysis. In this step, we consider whether Brown has “ “ ‘demonstrate[d] that [the retaliation-based claims against the individual defendants] [are] both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.’ ” ” ” (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 791.)

5. In the Disposition on page 18, the words “NOT TO BE PUBLISHED” are replaced with the words TO BE PARTIALLY PUBLISHED.

These modifications do not constitute a change in the judgment.


ROTHSCHILD, P. J.


BENDIX, J.


WEINGART, J.

Filed 5/31/23 Brown v. City of Inglewood CA2/1

NOT TO BE PUBLISHED IN THE 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

SECOND APPELLATE DISTRICT

DIVISION ONE

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Plaintiff and Respondent,

v.

CITY OF INGLEWOOD et al.,

Defendants and Appellants.

B320658

(Los Angeles County
Super. Ct. No. 21STCV30604)

APPEAL from an order of the Superior Court of Los Angeles County, Deirdre H. Hill, Judge. Affirmed in part and reversed in part.

Engstrom, Lipscomb & Lack, Walter J. Lack, Richard P. Kinnan and Christopher A. Kanne for Defendants and Appellants.

Miller Barondess, Mira Hashmall and Colin H. Rolfs for Plaintiff and Respondent.

Respondent Wanda Brown has served as the elected treasurer for appellant, the City of Inglewood (the City), since 1987. Brown sued the City and several members of the Inglewood City Council¹ (the council), alleging that after she reported concerns about financial improprieties, the City and the individual defendants defamed and retaliated against her. She alleged causes of action for (1) defamation; (2) violation of Labor Code section 1102.5, subdivisions (b) and (c),² which prohibit retaliation against an employee based on the employee reporting or refusing to participate in what the employee reasonably believes to be illegal activity by the employer (the section 1102.5 retaliation claim); and (3) intentional infliction of emotional distress (IIED), based both on the alleged retaliation and the alleged defamation. The City and the individual defendants filed a joint special motion to strike the complaint as a strategic lawsuit against public participation, or SLAPP, under the anti-SLAPP statute (Code Civ. Proc., § 425.16). The court granted the motion in part, but denied it as to the section 1102.5 retaliation claim and the retaliation-based IIED claim against all defendants. Defendants appeal, arguing the court incorrectly denied the anti-SLAPP motion as to the retaliation-based claims against the individual defendants. For reasons we discuss below, we hold that the retaliation-based claims against the individual defendants arise from protected conduct under the anti-SLAPP statute, and that the court should have stricken these claims.

¹ Specifically, respondents Mayor James T. Butts, Jr., Alex Padilla, George Dotson, Eloy Morales, and Ralph Franklin (collectively, the individual defendants).

² Unless otherwise indicated, all unspecified statutory references are to the Labor Code.

In all other respects, we affirm the court's ruling on the anti-SLAPP motion.

FACTS AND PROCEEDINGS BELOW

A. *Brown's Lawsuit Against Defendants*

In her first amended complaint (the FAC), Brown alleged she had "reported to [individual defendants] that she had discovered facts indicating that [individual defendants] were mishandling the City's finances, including an improper payment of nearly [\$100,000] to a City [c]ontractor," and "improperly fail[ing] to accurately report to the public the true financial health of the City." She alleged that, as a result of her reporting these concerns, defendants took various adverse actions against her, including reducing her duties and authority as treasurer, reducing her salary by 83 percent, taking away her seat at the council meetings, and temporarily locking her and her staff out of their offices. Brown further alleged that, at a council meeting, one of the individual defendants, Mayor Butts, offered a "defamatory pretextual reason for taking away [Brown's] duties and reducing her salary," namely that she "[did] not know the procedure for handling bad debts, [and that] he had no choice but to reduce her duties and her salary."

B. *Defendants' Anti-SLAPP Motion and Related Evidence*

Defendants filed a motion to strike all causes of action in the FAC under the anti-SLAPP statute. The anti-SLAPP statute is "designed to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern. [Citations.] To that end, the statute authorizes a special motion to strike a claim '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.’ (§ 425.16, subd. (b)(1).)” (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 883–884.) Such acts are referred to in anti-SLAPP parlance as “protected activity.” (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*).)

“Litigation of an anti-SLAPP motion involves a two-step process. First, ‘the moving defendant bears the burden of establishing that the challenged allegations or claims “aris[e] from” protected activity in which the defendant has engaged.’ [Citation.] Second, for each claim that does arise from protected activity, the plaintiff must show the claim has ‘at least “minimal merit.” ’ [Citation.] If the plaintiff cannot make this showing, the court will strike the claim.” (*Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1009 (*Bonni*).)

Defendants’ motion argued the FAC alleged claims arising from conduct that falls into two of the statutorily enumerated categories of protected activity: “any written or oral statement[s] 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” (§ 425.16, subd. (e)(2)), and “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).) Specifically, the motion argued that each of Brown’s claims arose from voting and other legislative actions of the individual defendants and statements they made at the council meetings

in connection therewith. Defendants' motion further argued that, for various reasons, Brown could not demonstrate that her claims had minimal merit, including that the claims were barred by government discretionary act immunity, that section 1102.5 does not permit individual liability, and that Brown was neither an "employee" for purposes of section 1102.5, nor had she reported conduct that she reasonably suspected to be illegal, both of which are required under section 1102.5.

1. ***Evidence in support of and opposition to the anti-SLAPP motion***

Defendants primarily supported their anti-SLAPP motion with the following evidence: (1) excerpts from the City charter and Municipal Code; (2) City ordinances and a City policy adopted by a vote of the individual defendants that, collectively, reduced Brown's salary, investment authority, and duties, as alleged in the FAC; (3) excerpts of transcripts from various council meetings, including excerpts reflecting council votes passing the relevant ordinances and policy;³ and (4) declarations.

³ At Brown's request, the court took judicial notice of the first two categories of documents listed above, but declined to take judicial notice of the council meeting transcripts. On appeal, defendants contend this ruling was in error, and Brown raises no argument to the contrary. We need not resolve this issue, however, because regardless of whether the court erred in partially denying the request for judicial notice, the transcripts were attached to a declaration in support of the motion, and the anti-SLAPP statute expressly requires that, in its anti-SLAPP analysis, the court "shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2).)

Under the City charter, the council is the City's legislative body, and all powers of the City are vested in and exercised by the council, which consists of the mayor and four council members. The City treasurer is not a member of the council. Council meetings are open to the public. The council has the authority to "establish rules and regulations for the conduct of its proceedings" and the mayor is "responsible for maintaining the order and decorum of meetings." The mayor, council members, clerk, and treasurer are all publicly elected. The council has the authority to fix the compensation of any City officer except the mayor and council members.

In fall 2022, the council passed two ordinances included in the documents supporting the anti-SLAPP motion. First, in September 2022, it passed Ordinance No. 20-16 regarding "Assignment of City Duties" that, inter alia, transferred general auditor responsibilities once held by the treasurer to the City clerk, reduced the maximum amount of funds the treasurer was permitted to manage to \$50,000, and adopted a revised investment policy.⁴ In October 2022, it passed a second ordinance, "Salary Ordinance for Fiscal Year 2020–2021," which adjusted the salaries of a number of positions, including the treasurer's salary, which it reduced by over 80 percent as compared to the previous year.

Declarations from defendant Mayor Butts and the City's manager, Artie Fields, addressed allegations in the FAC that Butts had denied Brown a seat on the dais during council meetings and that the individual defendants had blocked Brown's access to her office. Butts's declaration stated that

⁴ The defendants also submitted the policy itself in support of the anti-SLAPP motion.

the City treasurer “is not a member of the . . . council and so has no standing to sit on the dais during meetings of the . . . council,” but that “a previous mayor had decided to let the treasurer have a seat on the dais during meetings, and [Butts] [had initially] continued that practice.” (Capitalization omitted.) Butts continued that, in early 2020, Brown “began to disrupt meetings of the . . . council” and in July 2020 Butts “exercised [his] discretion as chair of the council and revoked the privilege of the treasurer to be seated at the dais during meetings of the . . . council.” (Capitalization omitted.)

The Fields declaration stated that, in October 2020, “Brown’s proximity badge was deactivated because she had failed to present a negative COVID-19 test confirmation to the [C]ity, as required” and, as a result, Brown was locked out of her office at City Hall. Fields declared “[t]his same action was taken as to all personnel that did not provide a negative test confirmation. . . . Brown’s proximity badge was reactivated once she provided a negative test confirmation.”

The transcripts from council meetings reflect the votes by the individual defendants adopting the ordinances and policy noted above, Butts’s allegedly defamatory statements, and Brown’s statements criticizing the council and Butts.

In opposing the defendants’ anti-SLAPP motion, Brown submitted, inter alia, a declaration and supporting exhibits in an effort to establish her status as an “employee” for purposes of section 1102.5. Specifically, Brown offered W-2 federal tax forms she had received from the City, which identify her as an “[e]mployee[]” and her biweekly pay stub, which identifies various employee benefits such as health benefits and

reflects a deduction from her regular earnings for “workers[] comp[ensation].” (Boldface and capitalization omitted.)

2. Court’s ruling on anti-SLAPP motion

The court granted the defendants’ anti-SLAPP motion with respect to the defamation claim and the defamation-based portion of the IIED claim. The court denied the motion as to the section 1102.5 retaliation claim and retaliation-based portion of the IIED claim, finding these claims did not arise from “protected activity.” The trial court explained, “[T]he individual defendants’ conduct in their decision making or voting is not the gravamen of the [retaliation] claim.” The trial court concluded that, instead, “the activities upon which the claim rests, which are adverse actions, are the reduction in her salary and duties and being locked out of her office and computer.”

Defendants timely appealed the court’s partial denial of their anti-SLAPP motion.

C. Additional Procedural History

Defendants also filed a demurrer to the FAC, which the court heard on the same day as the anti-SLAPP motion. The trial court sustained defendants’ demurrer with leave to amend as to the claims that remained in litigation following the court’s anti-SLAPP ruling (section 1102.5 retaliation claim and retaliation-based IIED claim). In so ruling, the court concluded that the FAC did not sufficiently allege that Brown had “disclosed to a person with authority over her or to an employee with authority to investigate a concern that certain illegal activity had occurred, and that she had a reasonable belief that Mayor Butts[] violated [the] law,” a necessary element of Brown’s section 1102.5 claim. The court further concluded that the remaining retaliation-based

IIED claim was derivative of the retaliation claim and failed for similar reasons, in addition to being barred because the Workers' Compensation Act (§ 3200 et seq.) provides the exclusive remedy for any such injury.⁵ (See § 3601, subd. (a) [workers' compensation is "the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment"].)

Following the demurrer ruling, Brown voluntarily dismissed (without prejudice) defendants Dotson, Padilla, Franklin, and Morales and filed a second amended complaint asserting her claims under section 1102.5 and for retaliation-based IIED against the City and Butts.

DISCUSSION

Defendants argue that the trial court reversibly erred in denying their anti-SLAPP motion as to the retaliation-based causes of action against the individual defendants. Our review is de novo. (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1056.)

A. *Anti-SLAPP Analytical Framework*

In the first step in the anti-SLAPP analysis, the moving defendant bears the burden of "identify[ing] what acts each

⁵ The court also addressed arguments, likewise raised on appeal in connection with the second prong of the anti-SLAPP analysis, that the retaliation-based claims were barred by discretionary act immunity under Government Code section 820.2 and government act immunity under Government Code section 821. Finally, the court noted that the case law was unclear as to whether section 1102.5 provided a basis for imposing liability on an individual, nonemployer defendant.

challenged claim rests on and to show how those acts are protected under a statutorily defined category of protected activity.” (*Bonni, supra*, 11 Cal.5th at p. 1009.) If the court determines that relief is sought “based on allegations arising from activity protected by the statute, the second step is reached” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396 (*Baral*)), and “the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated.” (*Ibid.*) This step involves a “summary-judgment-like procedure.” (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) If the plaintiff fails to make the requisite showing to support the claim, “the claim is stricken.” (*Baral, supra*, at p. 396.)

B. *The Retaliation-Based Claims Against the Individual Defendants Arise from Protected Activity (Anti-SLAPP Analysis Step One)*

1. *Identifying protected activity*

We agree that the individual defendants’ votes adopting two ordinances and a policy that, collectively, required the allegedly retaliatory reduction in Brown’s salary, authority and duties, are protected activity. The California Supreme Court held in *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409 that, because “votes taken after a public hearing qualify as acts in furtherance of constitutionally protected activity” (*id.* at p. 427, italics omitted), “*elected officials* may assert the protection of [the anti-SLAPP statute] when sued over how they voted.” (*Ibid.*, italics added; *id.* at pp. 422–423 [in lawsuit against individual council members, “the council members’ votes, as well as statements made in the course of their deliberations at the city council meeting where the votes were taken, qualify as ‘any

written or oral statement or writing made before a legislative . . . proceeding.’ (§ 425.16, subd. (e)(1).)”].) Brown, however, argues that we should recharacterize this activity as the individual defendants effectively reducing her salary, authorities and duties. But the individual defendants have no legal ability to change the scope of Brown’s salary, authority, or duties; they can only vote on ordinances and policies on these topics. After the council passes an ordinance or adopts a policy, the acts implementing the ordinance or policy—for example, actually paying the treasurer less or permitting her to invest less money—are acts of the City, not of the individual council members. Thus, under *Vasquez*, the individual defendants’ involvement in the reduction of Brown’s salary, authority, and duties consisted solely of the protected act of voting at council meetings.

The case on which Brown primarily relies in arguing to the contrary, *Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352 (*Whitehall*), is inapposite, because it addresses an anti-SLAPP motion to strike claims against a public entity, not claims against individual public officials. In *Whitehall*, the court concluded that a retaliation claim against *the County* based on *the County’s* allegedly retaliatory act of placing an employee on leave did not arise from protected activity, even though the County supervisor’s investigation that preceded the leave was protected activity. (*Id.* at p. 362.) The court in *Whitehall* explained that the “act of placing plaintiff on administrative leave, with the intention of firing her, did not arise from *the County’s* protected activity. . . . Had plaintiff sued the specific supervisors who conducted the investigation on behalf of the County, a clear case of a SLAPP suit would have been established. But plaintiff challenged the retaliatory

employment decision, not the process that led up to that point. *The County's* act of placing plaintiff on administrative leave, with the intention of terminating her employment, was not an exercise of its petitioning or free speech rights.” (*Ibid.*, italics added.) Because the only portion of the anti-SLAPP ruling at issue on appeal involves claims against the individual defendants, not the City, *Whitehall* is of no assistance to Brown.

Thus, the individual defendants' role in reducing Brown's salary and job duties was protected activity.

2. “*Arising from*” analysis

We further conclude that the retaliation-based claims against the individual defendants arise from the individual defendants' protected voting activity, as opposed to that activity “merely provid[ing] context” for those claims. (*Baral, supra*, 1 Cal.5th at p. 394.) To determine whether a claim arises from protected activity, we consider whether the protected activity is necessary to satisfy any of the elements of the claim. (*Park, supra*, 2 Cal.5th at p. 1063.) One element of Brown's section 1102.5 claim is that defendants took an “ ‘adverse employment action” ’ ” against her as retaliation for her reporting concerns about financial improprieties. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69 [reciting elements of section 1102.5 claim]; see § 1102.5, subs. (b) & (c).) Brown alleges that the same allegedly retaliatory adverse actions also satisfy the “ ‘extreme and outrageous conduct” ’ ” element of her IIED claim. (*Unterberger v. Red Bull North America, Inc.* (2008) 162 Cal.App.4th 414, 423 (*Unterberger*).) Through the retaliation-based claims against the individual defendants, Brown alleges such adverse action and extreme and outrageous conduct primarily consisted of the City's reduction in her salary,

duties, and authority, something the individual defendants only engaged in via protected voting activity.

Brown also alleges the individual defendants engaged in retaliatory adverse actions and “extreme and outrageous conduct” by removing Brown from the dais at council meetings, such that even if the individual defendants’ voting conduct is protected activity, she need not rely on it to satisfy these elements of her claims. But removal from the dais cannot alone satisfy these elements of Brown’s claims, because it is not sufficiently material (see *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1036 [defining an adverse employment action for purposes of a retaliation claim under the California Fair Employment and Housing Act (the FEHA) as requiring that the adverse action “materially affect[] the terms and conditions of employment”]),⁶ and it is not an action “ “so extreme as to exceed all bounds of that usually tolerated in a civilized community.” ’ ” (*Unterberger, supra*, 162 Cal.App.4th at p. 423.) Thus, Brown must rely on the protected voting activity of the individual defendants discussed above to satisfy these elements of her retaliation-based claims against the individual defendants, meaning the claims arise

⁶ Although this definition was developed in the context of FEHA retaliation, courts apply it in the context of section 1102.5 claims as well. (See *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 357 [applying FEHA definition of adverse employment action to a section 1102.5 claim, and noting that “[m]inor or relatively trivial adverse actions . . . that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee . . . are not actionable”].)

from protected activity.⁷ (*Park, supra*, 2 Cal.5th at p. 1063.) Accordingly, we analyze these claims under the second step of the anti-SLAPP framework.

C. *Legal Sufficiency of Retaliation-Based Claims Against Individual Defendants (Anti-SLAPP Analysis Step Two)*

In the second step of the anti-SLAPP analysis, we consider whether Brown has “ “ ‘demonstrate[d] that [the retaliation-based claims against the individual defendants] [are] both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.’ ” ” ” (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 791.)

1. *Section 1102.5 retaliation claim against individual defendants*

Defendants argue that the section 1102.5 retaliation claim is not legally sufficient, because Brown is not an “employee” for the purposes of that statute. We agree.

Brown alleges the individual defendants violated subdivisions (b) and (c) of section 1102.5. By their own terms, these sections protect only “employee[s]” from certain types of retaliation by “[a]n employer, or any person acting on behalf of the employer.” (§ 1102.5, subs. (b) & (c).) Section 1106 addresses the definition of the term “employee” in this context: “For purposes of Section[] 1102.5 [and other enumerated

⁷ Because the removal of Brown from the dais was not sufficiently material, we need not and do not consider whether, as defendants argue, removing Brown from the dais was protected activity as well.

sections] ‘employee’ includes, but is not limited to, any individual employed by . . . any . . . city.” (§ 1106.) Notably, the Legislature did not reference elected officials as falling within the scope of the term “employee” for the purposes of section 1102.5. Yet when the Legislature intended to include elected officials within the scope of the term “employee” elsewhere in the code—namely, in defining the term for purposes of workers’ compensation—the Legislature expressly defined the term “‘[e]mployee’ . . . [to] include . . . [¶] . . . [¶] . . . [a]ll elected . . . paid public officers.” (§ 3351, subd. (b) [section of Workers’ Compensation Act providing: “‘Employee’ means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes . . . [¶] . . . [¶] . . . [a]ll elected and appointed paid public officers”].) The plain language of these statutes thus unambiguously includes “elected officials” in the definition of “employee” for purposes of workers’ compensation, but not within the definition of “employee” for purposes of section 1102.5. Because the plain language of a statute is the best indication of the Legislature’s intent (see *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977 (*Wilcox*)), this language reflects the Legislature’s decision to provide elected officials the benefits of the Workers’ Compensation Act, but to deny them the protections of section 1102.5.

Brown argues that “[i]t is reasonable and sensible for California courts to . . . classify elected officials as employees [under section 1102.5],” just as the California Legislature did in the context of workers’ compensation and the Internal Revenue Service does for purposes of federal tax law. (See 26 U.S.C. § 3401(c) [defining “employee” under the Internal Revenue

Code to include “an officer, employee, or elected official”].) This argument flies in the face of basic maxims of statutory interpretation, because it asks us to interlineate section 1106 with words that the Legislature chose *not* to include—words which, based on section 3351, the Legislature is clearly capable of employing. (See *Blankenship v. Allstate Ins. Co.* (2010) 186 Cal.App.4th 87, 94 [“the Legislature’s omission of a term in a list of terms indicates the Legislature did not intend to include the omitted term”].)

Brown also urges us to look to case law defining “employee” for the purposes of section 1102.5, specifically cases incorporating the “common law definition of employee” for this purpose. (*Bennett v. Rancho California Water Dist.* (2019) 35 Cal.App.5th 908, 927.) We need not resort to judicial interpretations of the definition the Legislature provided when that definition is clear and unambiguous. (See *Wilcox, supra*, 21 Cal.4th at p. 977 [plain, unambiguous language of a statute is the best indicator of legislative intent in statutory interpretation].) Accordingly, Brown’s section 1102.5 retaliation claim against the individual defendants fails the second prong of the anti-SLAPP analysis, and the court erred in denying the anti-SLAPP motion as to that claim.

2. *Retaliation-based IIED claim against the individual defendants*

Brown’s IIED claim against the individual defendants fails as a matter of law, because it is “‘subsumed under the exclusive remedy provisions of workers’ compensation.’” (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 902.) As noted above, unlike the definition of “employee” for purposes of section 1102.5, the definition of “employee” for purposes of

workers' compensation includes "[a]ll elected . . . paid public officers." (§ 3351, subd. (b).) Where, as here, purportedly wrongful conduct occurred at the worksite in the normal course, "workers' compensation is plaintiffs' exclusive remedy for any injury that may have resulted." (*Miklosy, supra*, at p. 902.) Because we conclude the retaliation-based IIED claim against the individual defendants is not viable on this basis, we need not reach the other bases raised by the parties.

DISPOSITION

The court's order on defendants' anti-SLAPP motion is reversed to the extent it denies the motion as to Brown's section 1102.5 retaliation claim against the individual defendants and Brown's retaliation-based IIED claim against the individual defendants. In all other respects, the order regarding the anti-SLAPP motion is affirmed.

The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

BENDIX, J.

WEINGART, J.

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA,

COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 10100 Santa Monica Blvd., Suite 1200, Los Angeles, CA 90067 and my email address is mflecher@elllaw.com. On June 30, 2023, I caused to be served true copies of the following document(s) described below on the interested parties in this action as through the authorized Court provider: <https://tf3.truefiling.com>:

PETITION FOR REVIEW

(SEE ATTACHED SERVICE LIST)

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 30, 2023, at Los Angeles, California.

/s/ Merlene Fletcher

Merlene Fletcher

SERVICE LIST

City of Inglewood, et al. v. Wanda M. Brown
Court of Appeal Case No. B320658

MILLER BARONDESS, LLP
Mira Hashmall
mhashmall@millerbarondess.com
Colin H. Rolfs
crofs@millerbarondess.com
1999 Avenue of the Stars, Suite 1000
Los Angeles, California 90067
Telephone: (310) 552-4400

Attorneys for Defendants and
Appellants CITY OF INGLEWOOD,
MAYOR JAMES T. BUTTS, JR.,
ALEX PADILLA, GEORGE
DOTSON, ELOY MORALES, AND
RALPH FRANKLIN

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Law Firm