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Opinion on remand from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

STANLEY WILSON, Plaintiff and Appellant, v. CABLE NEWS NETWORK, INC., et al., Defendants and Respondents.	B264944 (Los Angeles County Super. Ct. No. BC559720)

APPEAL from an order of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Reversed.

Law Office of Lisa L. Maki, Lisa Maki, Jill McDonell, Jennifer Ostertag; Shegerian & Associates and Carney R. Shegerian for Plaintiff and Appellant.

Mitchell Silberberg & Knupp, Adam Levin, Jolene Konnersman, Aaron M. Wais and Christopher A. Elliott for Defendants and Respondents.

We consider this case again on remand from our Supreme Court. In our original opinion, we held that Wilson's claims against respondents[1] for employment discrimination, retaliation, and defamation did not arise from protected free speech conduct under the anti-SLAPP statute (Code Civ. Proc., § 425.16).[2] (*Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822 [affd. in part and revd. in part] (*Wilson I*).) Our Supreme Court reversed that holding in part, concluding that CNN made a prima facie showing that it terminated Wilson's employment because of plagiarism, which, if true, would be a protected act furthering CNN's editorial control over its presentation of the news. (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 897–898 (*Wilson II*).) The court directed that, on remand, we determine whether Wilson's termination claims "have the requisite minimal merit to proceed." (*Id.* at p. 899.)

We conclude that they do. Contrary to CNN's argument, the First Amendment does not preclude Wilson from showing that CNN's proffered ground for terminating his employment was pretextual and that its real motive was discriminatory. And Wilson has provided sufficient evidence of pretext to meet his burden of a " ' "prima facie factual showing sufficient to sustain a favorable judgment." ' " (*Wilson II, supra,* 7 Cal.5th at p. 891,

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[1] Respondents are Cable News Network, CNN America, Inc., Turner Services, Inc., Turner Broadcasting System, Inc., and Peter Janos, Wilson's former supervisor. We refer to them collectively as CNN.

[2] Subsequent undesignated statutory references are to the Code of Civil Procedure. SLAPP is an acronym for "strategic lawsuit against public participation." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1 (*Briggs*).)

quoting *Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940.)

BACKGROUND

1. Wilson's Complaint

We only briefly summarize Wilson's allegations, which are more fully described in *Wilson I* and *Wilson II*. Wilson's evidence underlying his claims is also discussed in some detail below.

Wilson worked at CNN from 1996 to January 2014, when he was discharged. From 2003 to the time when his employment was terminated Wilson was a "Producer II." He was responsible for producing stories, reports, breaking news, and documentaries. He also wrote stories for CNN.com. During his employment, he was recognized with various journalism honors, including three Emmy awards, and received favorable performance reviews.

Wilson is African-American and Mexican-American. Beginning in 2004, Wilson began to raise concerns about CNN's treatment of African-American employees. He also took a five-week paternity leave in 2013 after the birth of his twins.

In 2014, CNN discharged Wilson after he wrote a story concerning the retirement of Los Angeles County Sheriff Lee Baca. CNN claimed that Wilson plagiarized portions of the story from an article published in The Los Angeles Times. CNN also claimed that it had performed an audit of Wilson's prior work and discovered five other incidents of plagiarism.

Wilson filed suit, alleging claims for discrimination based upon race, age, and association with a disabled person (his wife), and retaliation for his complaints about discrimination. He also asserted a claim for defamation based upon CNN's statements to prospective employers and others about his alleged plagiarism.

In response to Wilson's complaint, CNN filed an anti-SLAPP motion. CNN argued that Wilson's claims arose from CNN's decision to discharge him, which was "in furtherance of its right to determine who should speak on its behalf on matters of public interest." CNN also argued that Wilson's defamation claim arose from protected speech because CNN's challenged statements about Wilson's alleged plagiarism concerned an issue of public interest. (See *Wilson II, supra,* 7 Cal.5th at p. 882.)

The trial court agreed with CNN's arguments and granted CNN's anti-SLAPP motion. This court reversed in *Wilson I,* and our Supreme Court granted review.

2. *Wilson II*

In *Wilson II,* our Supreme Court held that discrimination and retaliation claims do not fall outside the scope of the anti-SLAPP statute merely because they depend upon allegations about a defendant's improper motive for an adverse employment action. (*Wilson II, supra,* 7 Cal.5th at p. 886.) In determining whether employment claims arise from protected free speech activity, a court need not simply accept a plaintiff's allegations that "challenged personnel actions were taken for discriminatory reasons and are therefore unlawful." (*Id.* at p. 887.) Rather, the question in the first stage of anti-SLAPP analysis is "whether a defendant has made out a prima facie case that activity underlying a plaintiff's claims is statutorily protected." (*Id.* at p. 888.) If a defendant shows that conduct supplying a necessary element of the plaintiff's claims is protected under the anti-SLAPP statute, "the defendant's burden at the first step of the anti-SLAPP analysis has been carried, regardless of any alleged motivations that supply other elements of the claim." (*Id.* at p. 892.)

The court then applied that standard to determine which of Wilson's claims arose from conduct protected by section 425.16, subdivision (e). The court rejected CNN's broad argument that, because it is a news organization, "its decisions to hire or fire writers and other content producers categorically qualify as conduct in furtherance of its speech rights." (*Wilson II, supra,* 7 Cal.5th at p. 894.) The court concluded that the "First Amendment does not immunize news organizations from laws of general applicability 'simply because their enforcement . . . has incidental effects on [the press's] ability to gather and report the news.' " (*Ibid.,* quoting *Cohen v. Cowles Media Co.* (1991) 501 U.S. 663, 669.)

However, the court agreed with CNN's more narrow argument that Wilson's claims arose from protected conduct to the extent that they are based on a decision by CNN to discipline Wilson for plagiarism. Such a decision involves a "serious breach of journalistic ethics" that "furthers a news organization's exercise of editorial control." It is therefore protected free speech conduct. (*Wilson II, supra,* 7 Cal.5th at p. 898.) The court concluded that, because the "lone act" that CNN justified as motivated by such a decision was the termination of Wilson's employment, only Wilson's termination claims arose from protected conduct, and not Wilson's other employment claims (such as the denial of promotions). (*Ibid*.)

The court also held that Wilson's defamation claim did not arise from protected conduct, because CNN's challenged statements to third parties about Wilson's alleged plagiarism did not concern an issue of public interest. (*Wilson II, supra,* 7 Cal.5th at p. 901.)

3. The Second Step of the Anti-SLAPP Procedure

In *Wilson II,* our Supreme Court also explained the nature of a plaintiff's burden in the second step of the anti-SLAPP procedure, which is the subject of our analysis on remand. The court described that burden as a "limited one." The court explained that the "plaintiff need not prove her case to the court [citation]; the bar sits lower, at a demonstration of 'minimal merit.' " (*Wilson II, supra,* 7 Cal.5th at p. 891, quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) A reviewing court's inquiry is "limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment." (*Wilson II*, at p. 891.) The court must accept the plaintiff's evidence as true and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. (*Ibid.*)[3]

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[3] Citing *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 118–119 (*Optional Capital*), CNN argues that, in attempting to meet his step two burden, Wilson may not rely on evidence from which conflicting inferences may be drawn. CNN claims that Wilson may rely on an inference only if it is "the only plausible inference that may be drawn from undisputed facts." (*Id.* at p. 118.) CNN is wrong.

CNN correctly recognizes that step two of the anti-SLAPP procedure is like a motion for summary judgment. (See *Briggs, supra,* 19 Cal.4th at p. 1123.) Under that standard, "if the court concludes that the plaintiff's evidence *or inferences* raise a triable issue of material fact, it must conclude its consideration and deny the defendant's motion." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856, italics added.) Thus, a plaintiff can defeat a defendant's motion by relying on a reasonable inference that raises a triable issue of material fact, even if other inferences

DISCUSSION

1. Wilson May Rely Upon Evidence that CNN's Stated Reason for His Discharge Was Pretextual

Each of Wilson's termination claims requires proof that CNN discharged him for "discriminatory or retaliatory reasons." (*Wilson II, supra,* 7 Cal.5th at p. 885.) Ordinarily a plaintiff who claims that he or she was discharged for impermissible reasons may provide such proof by showing that an employer's stated reason for a discharge was pretextual and the real reason was discriminatory.

California has adopted the "three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination," commonly known as the *"McDonnell Douglas* test." (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*), citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.) Under that test, the plaintiff has the initial burden to establish a prima facie case of discrimination. The burden then shifts to the employer to rebut the presumption by producing admissible evidence that its action was taken for a legitimate, nondiscriminatory reason. The plaintiff "must then have the opportunity to attack the employer's proffered reasons as

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could be drawn from the same evidence. While it correctly compares the second step of the anti-SLAPP procedure to a summary judgment motion, CNN misapplies the standard by claiming that *Wilson* must present uncontradicted inferences to support his position. In a summary judgment motion, it is the moving party, not the responding party, that must shoulder that burden. To the extent that *Optional Capital* can be read to support CNN's claim, it is mistaken.

pretexts for discrimination, or to offer any other evidence of discriminatory motive." (*Guz*, at p. 356.)

CNN argues that the third stage of this test does not apply here. CNN relies on our Supreme Court's conclusion in *Wilson II* that CNN "made out a prima facie case" that its decision to discharge Wilson was based on constitutionally protected considerations (i.e., the exercise of editorial control over plagiarized material). (See *Wilson II, supra,* 7 Cal.5th at p. 898.) CNN argues that this conclusion defeats Wilson's termination claims as a matter of law, regardless of any evidence of pretext. CNN claims that, because it had a constitutional right to discharge Wilson for plagiarism, and because it provided "substantial evidence" that it terminated Wilson's employment because he plagiarized, this court should not further "dissect CNN's decision-making process." In effect, CNN argues that, because a jury *could* decide on the evidence that CNN discharged Wilson for plagiarism, this court must accept that proffered reason for CNN's discharge decision as a matter of law.

We reject the argument for several reasons.

A. *The opinion in Wilson II supports considering evidence of pretext to show discriminatory motives*

The court's opinion in *Wilson II* neither held nor suggested that Wilson was precluded from arguing evidence of pretext on remand. Indeed, the court's decision to remand the case for this court to analyze the sufficiency of Wilson's evidence suggests precisely the opposite.

In *Wilson II,* the court simply held that CNN had met its burden under the first step of the anti-SLAPP procedure to provide prima facie evidence that Wilson's claims arose from

protected constitutional activity. (*Wilson II, supra,* 7 Cal.5th at p. 897.) If that holding had been sufficient to dispose of Wilson's termination claims on the merits as a matter of law, there would have been no reason for the court to remand the case to this court for further examination of the evidence.

The court's reasoning in *Wilson II* also does not suggest that evidence of pretext is irrelevant. Contrary to CNN's argument, the court did not make a *finding* "that CNN terminated Wilson for violating its policies against plagiarism." The court merely concluded that CNN had made out a prima facie case that it decided to discharge Wilson for plagiarism. (*Wilson II, supra,* 7 Cal.5th at p. 897.) The court specifically stated that it "need not . . . determine whether Wilson plagiarized, or whether any plagiarism was a true motive for his termination." (*Id.* at p. 897.)

Importantly, the court did not accept CNN's argument that its decision to discharge Wilson was constitutionally protected regardless of the *reasons* for CNN's decision. As mentioned, the court rejected CNN's broad argument that its decisions to "hire or fire writers and other content producers" such as Wilson "categorically qualify as conduct in furtherance of its speech rights." (See *Wilson II, supra,* 7 Cal.5th at p. 894.) Rather, the court based its holding on CNN's narrower argument that focused on its "specific asserted reason for terminating Wilson—his alleged plagiarism." (*Id.* at p. 897.) It follows that, if plagiarism was not actually the reason that CNN discharged Wilson, its decision to do so was not "conduct in furtherance of its speech rights." (*Id.* at p. 894.)

Moreover, the court emphasized that the press enjoys no general immunity from antidiscrimination laws. (See *Wilson II,*

supra, 7 Cal.5th at p. 895 ["[T]he constitutional guarantees of free speech and a free press afford '[t]he publisher of a newspaper . . . no special immunity from the application of general laws' "], quoting *Associated Press v. Labor Board* (1937) 301 U.S. 103, 132 (*Associated Press*).) The court concluded that, "[a]s a general rule, application of laws prohibiting racial and other forms of discrimination will leave the organization with 'the full freedom and liberty' to 'publish the news as it desires it published.' " (*Wilson II*, at p. 896, quoting *Associated Press*, at p. 133.) A plaintiff's opportunity to challenge an employer's proffered reason for an employment decision as pretextual is an established and important part of the framework of antidiscrimination laws in California. (See *Guz, supra,* 24 Cal.4th at p. 356.)

B. *Decisions concerning burdens on the exercise of free speech rights are inapposite*

CNN relies on cases requiring deference to the exercise of free speech rights. But those cases concern governmental burdens on the *actual* exercise of such rights. (See, e.g., *Boy Scouts of America v. Dale* (2000) 530 U.S. 640 [holding that New Jersey's public accommodation law violated the Boy Scouts' First Amendment right of association when applied to require a gay man to be a scout leader]; *Brown v. Entertainment Merchants Assn.* (2011) 564 U.S. 786 (*Brown*) [California statute restricting violent video games failed to pass strict scrutiny test]; *Gates v. Discovery Communications, Inc.* (2004) 34 Cal.4th 679 [invasion of privacy claim for publication of facts about a rehabilitated person's prior crimes barred by the First Amendment]; *DeHavilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845 [First Amendment protected movie against actresses' claims for

false light invasion of privacy and violation of statutory right of publicity].)

CNN also cites *Nelson v. McClatchy Newspapers* (1997) 131 Wn.2d 523 as factually analogous and persuasive authority here. That case does not help CNN's argument. In *McClatchy*, the Washington Supreme Court held that a newspaper's decision to discipline a reporter for violating its policy restricting political activism was protected by the First Amendment, because the policy was designed to uphold the appearance of impartiality. (*Id.* at pp. 543–544.) But the court's opinion *assumed* that the reporter's violation of the newspaper's editorial policy was the reason for the discipline. (See *id.* at pp. 526–529.) The opinion therefore does not provide any persuasive analysis concerning the reach of the First Amendment when a news publisher only pretends to discipline an employee to protect editorial policies and its real reason for the discipline is unlawful discrimination.

In citing these cases, CNN relies on the principle that application of a state law "cannot significantly burden the First Amendment rights that the defendant is seeking to protect." But this assumes that the defendant actually engaged in the constitutionally protected conduct. A decision to discharge an employee because he is Black or too old is not an exercise of the right to punish plagiarism.

The issue here is not whether CNN had the right to terminate Wilson's employment for plagiarism; Wilson concedes that it did. Rather, the issue is whether CNN *actually* made its termination decision on that basis or whether it discharged Wilson for discriminatory or retaliatory reasons. None of the free speech cases that CNN cites holds that courts considering discrimination claims are precluded from examining whether a

proffered, constitutionally protected reason for an employment decision was the real reason for the decision.

C. *Decisions concerning the First Amendment religion clauses are inapposite*

CNN also analogizes to cases concerning employment decisions protected by the religion clauses of the First Amendment. Those cases are not persuasive because they involve concerns about judging the legitimacy of religious beliefs that are not relevant here.

Courts have been reluctant to examine the motives that religious institutions proffer for employment actions when doing so would require making judgments about the legitimacy or sincerity of claimed religious beliefs. In that situation, a court may be required to analyze whether particular religious views are held in good faith or consistent with religious doctrine. That impermissibly injects the court into the function of a religious institution.

For example, in *NLRB v. Catholic Bishop of Chicago* (1979) 440 U.S. 490 (*Catholic Bishop*), the court held that the National Labor Relations Board (Board) did not have jurisdiction over labor practices concerning teachers in religious schools.[4] In concluding that such jurisdiction would raise issues under the First Amendment religion clauses, the court rejected the argument that the Board could avoid excessive entanglement in religious questions "since it will resolve only factual issues such

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[4] CNN relies on federal decisions that cite *Catholic Bishop* and employ similar reasoning. (See E.E.O.C. *v. Mississippi College* (5th Cir. 1980) 626 F.2d 477, 485; *Catholic H.S. Ass'n of Archdiocese of NY v. Culvert* (2d Cir. 1985) 753 F.2d 1161, 1163–1164, 1168; *Little v. Wuerl* (3d Cir. 1991) 929 F.2d 944, 947–949.)

as whether an anti-union animus motivated an employer's action." (*Id.* at p. 502.) The court noted that in opposing charges of unfair labor practices religious schools had responded that their "challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." (*Ibid.*)

Such inquiry is not necessary where, as here, the issue is simply whether an employer actually made a decision for the reason that it claims. *DeMarco v. Holy Cross High School* (2d Cir. 1993) 4 F.3d 166 (*DeMarco*), which CNN also cites, explains the distinction. The court in that case held that the federal Age Discrimination in Employment Act of 1967 (29 U.S.C. §§ 621–634) could be applied constitutionally to the plaintiff's claim that his employment at a Catholic parochial high school was terminated because of his age. The school claimed that it dismissed the plaintiff, a math teacher, because he failed to begin his classes with prayer and failed to attend Mass with his students. (*Id.* at p. 168.)

The court held that the issue of whether the school's proffered reason for terminating the teacher's employment was pretextual could be resolved without impermissibly entangling the court in the religious function of the institution: "[I]n applying the *McDonnell Douglas* test to determine whether an employer's putative purpose is a pretext, a fact-finder need not, and indeed should not, evaluate whether a defendant's stated purpose is unwise or unreasonable. Rather, the inquiry is directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action.

[Citation.] The pretext inquiry thus normally focuses upon factual questions such as whether the asserted reason for the challenged action comports with the defendant's policies and rules, whether the rule applied to the plaintiff has been applied uniformly, and whether the putative non-discriminatory purpose was stated only after the allegation of discrimination." (*DeMarco*, *supra*, 4 F.3d at pp. 170–171.)

Similarly, here, the pretext inquiry focuses on fact issues such as Wilson's relationship with his supervisor; the content of the allegedly plagiarized story; and CNN's treatment of similar conduct by others. The analysis of CNN's pretext claim does not involve any issue of religion; nor does it require any judgment about the reasons for or legitimacy of CNN's policy against plagiarism. It requires only a decision on the factual issue of whether plagiarism was the real reason for Wilson's discharge.

D. *Authority cited in Wilson II supports the appropriateness of pretext evidence here*

In *Wilson II* the court cited *Passaic Daily News v. N.L.R.B.* (D.C. Cir. 1984) 736 F.2d 1543 (*Passaic*) as an example of a case that applied principles articulated by the United States Supreme Court "to distinguish between permissible regulation and unconstitutional interference with a newspaper's editorial judgment." (*Wilson II, supra,* 7 Cal.5th at p. 895.) That case supports the use of pretext evidence here.

In *Passaic*, the court upheld a decision by the Board that a newspaper engaged in an unfair labor practice by demoting and refusing to publish columns by a reporter because of the reporter's participation in union activities. The court concluded that the evidence showed the newspaper's proffered justification for its actions was pretextual. (*Passaic, supra,* 736 F.2d at pp.

1553–1555.) Importantly, the court also rejected the newspaper's argument that the First Amendment "precludes the Board from challenging the [newspaper's] decision and from inquiring into the motives for its decision." (*Id.* at p. 1555.) The court cited the Supreme Court's decision in *Associated Press* for the principle that, if the media employer's "motives were merely pretextual and interfered with an employee's protected activities, the employer was guilty of committing an unfair labor practice." (*Passaic*, at pp. 1555–1556, citing *Associated Press, supra,* 301 U.S. at pp. 131–133.) The court noted that in *Associated Press* "the attempt of the Associated Press to prevent inspection of its motives by invoking the First Amendment was totally unsuccessful." (*Passaic*, at p. 1556.)

Similarly, here, Wilson is not precluded from challenging CNN's motives for its termination decision simply because CNN's proffered reason for the decision involved an employment policy that affected its editorial judgment. We therefore proceed to determine whether Wilson has provided sufficient evidence of pretext to meet his burden under the second step of the anti-SLAPP procedure.

2. Wilson's Evidence of Pretext Shows that His Termination Claims Have the Minimal Merit Necessary to Proceed

A. *The clear and convincing evidence standard does not apply to Wilson's termination claims*

CNN argues that, even if Wilson may rely upon evidence of pretext, the clear and convincing evidence standard applies to Wilson's termination claims rather than the preponderance of the evidence standard typically applied in civil employment actions.

CNN argues that the more exacting standard is necessary because its reasons for terminating Wilson's employment are "rooted in the First Amendment." We disagree for several reasons.

First, as discussed above, CNN's decision to discharge Wilson is not entitled to special deference if it did not actually involve the exercise of free speech rights. CNN's argument that a demanding burden of proof is necessary to protect free speech simply assumes what Wilson's showing of pretext seeks to disprove; i.e., that CNN's decision to discharge Wilson was based on a constitutionally protected editorial decision. CNN's decision to terminate Wilson's employment was not "rooted in the First Amendment," as CNN claims, if CNN's ostensible ground for the termination—plagiarism—was not the real reason for its decision.

It follows that cases concerning laws that actually burden or threaten free speech activity are not persuasive here. As with its argument that courts may not question a media defendant's motives at all, CNN argues here that the clear and convincing evidence standard must apply to proof of pretext based on the principle that laws restricting speech are subject to strict scrutiny. However, as discussed above, that standard applies when the state restriction under review *actually* burdens protected speech. (See, e.g., *Brown, supra,* 564 U.S. at p. 799 ["Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny"].) Proof that an employer actually made an employment decision for discriminatory rather than constitutionally protected reasons does not burden free speech,

whether that proof is judged by the preponderance or the clear and convincing evidence standard.

Second, as mentioned, like any other employer, news publishers are subject to labor laws unless those laws interfere with the publisher's freedom to publish the news or to " 'enforce policies of its own choosing with respect to the editing and rewriting of news for publication.' " (*Wilson II, supra,* 7 Cal.5th at p. 895, quoting *Associated Press, supra,* 301 U.S. at p. 133.) CNN has provided no reason to conclude that the clear and convincing standard is necessary here to protect its editorial policies or judgments.

CNN cites no case applying such a standard to employment claims. CNN cites cases that require clear and convincing evidence of actual malice to prove defamation claims brought by a public figure, but those cases are not analogous. Such cases are based on the concern that, without such a rule, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279.) The actual malice standard is therefore necessary to give " 'breathing space' " to expression that might otherwise be suppressed. (*Hustler Magazine v. Falwell* (1988) 485 U.S. 46, 56.)

There is no such concern for "breathing space" when considering proof of a media employer's reasons for a decision to take adverse action against an employee. A decision to terminate someone's employment because of plagiarism does not directly affect the content of speech; it only indirectly concerns speech by enforcing an employment policy that can affect editorial

judgment. And, the reasons for, and handling of, such an adverse employment action are completely within a media employer's control.

CNN does not provide any reason to believe that a media employer will be deterred from enforcing employment policies that affect its editorial judgment out of concern that an employee could succeed in a false claim of discrimination or retaliation because the employee's burden of proof is too low. Absent such a concern, there is no basis for a heightened burden of proof. Indeed, even in public figure defamation cases, the clear and convincing evidence standard applies only to proof of malice. The normal preponderance standard applies to the element of falsity, because no higher standard is necessary to protect speech. (See *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 82 ["Alnor provides no argument why the element of falsity requires a clear and convincing evidence standard to protect freedom of expression"].)

Third, the " 'default standard of proof in civil cases is the preponderance of the evidence.' " (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 238, citing Evid. Code, § 115.) Neither the Legislature nor our Supreme Court has suggested that a clear and convincing evidence standard should be applied to claims of discrimination or retaliation against a media employer simply because the employment policies at issue might indirectly affect the content of speech. We decline to impose such an exacting standard here.

B. *Wilson has provided sufficient evidence of pretext*

i. *Wilson's declaration*

Wilson's evidence consisted primarily of his own detailed 38-page declaration discussing the relevant events, his own employment history, and CNN's treatment of conduct similar to his alleged plagiarism. The facts set forth in the declaration are sufficient to support an inference of pretext at this stage of the proceedings.

CNN asserts that Wilson cannot rely on his declaration because it is "self-serving" and "largely inadmissible." Labeling Wilson's declaration as self-serving is not a proper argument. The fact that Wilson has an interest in his own success as a party is an issue of credibility that we do not weigh in determining whether he has presented sufficient evidence to defeat CNN's anti-SLAPP motion. Obviously Wilson is not disqualified from testifying simply because he is a party. (See *Zinn v. Ex-Cell-O Corp.* (1957) 148 Cal.App.2d 56, 69 ["While it is true that most of the evidence . . . is what defendants call 'self-serving,' the testimony of an interested party is competent and admissible [citation], and if believed by the trial court, is sufficient to determine the issue"].) In evaluating whether Wilson has "made a prima facie factual showing sufficient to sustain a favorable judgment," we must accept his admissible testimony as true as we would testimony from any other witness. (*Wilson II, supra,* 7 Cal.5th at p. 891.)[5]

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[5] CNN's contention that Wilson may not rely on his own testimony is particularly inappropriate in light of the nature of Wilson's claims and the role of an anti-SLAPP motion. As our

Nor does CNN's vague and unsupported characterization of Wilson's declaration as "largely inadmissible" provide any ground to reject it. The trial court did not rule on CNN's evidentiary objections below, and in its original brief in this court CNN stated that "it assumes, for purposes of this appeal, that all of CNN's objections were overruled such that all of Wilson's evidence opposing the motion was considered, and CNN's anti-SLAPP Motion still was granted." CNN did not argue in its original brief that any specific portion of Wilson's declaration was inadmissible, and it has not presented any such argument in its supplemental brief on remand. Thus, CNN has forfeited any evidentiary objection to Wilson's declaration. (See *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 537–538 [party waived constitutional challenge to punitive damages award by failing to address it in his opening brief].)

Wilson's declaration addressed the following topics, among others.

a. *Wilson's employment record*

Wilson began working at CNN in 1996. He worked on high-profile stories and produced several highly rated

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Supreme Court explained in *Wilson II,* claims of discrimination and retaliation "depend on assertions of motive that are peculiarly within the defendant's knowledge." (*Wilson II, supra,* 7 Cal.5th at p. 891.) This can pose "particular difficulties" for plaintiffs who must demonstrate the merit of their claims in response to an anti-SLAPP motion before the opportunity for any discovery. (*Ibid.*) Thus, in addition to considering permitting discovery in such cases, courts must pay "careful attention to the limited nature of a plaintiff's second-step showing" to "mitigate the burden of anti-SLAPP enforcement on discrimination and retaliation plaintiffs." (*Id.* at p. 892.)

documentaries. He has received more than two dozen journalism awards.

Until the year he was discharged, Wilson's performance was rated as overall satisfactory or above in his evaluations (which he submitted as exhibits to his declaration). Those evaluations included praise concerning his competence and professionalism from several different supervisors.

Not including the CNN entertainment unit, as of January 2014 Wilson was the only African-American news producer in the entire Western Region of CNN, including the Los Angeles Bureau.

b. ***Statements and conduct by Wilson's immediate supervisor Janos***

Peter Janos became Wilson's supervisor in 2004. For his news producing team, Janos rehired and promoted several White men who had previously been fired by CNN. Janos excluded Wilson from that team.

Janos conveyed his preference for his hand-picked team at meetings and social gatherings. When Wilson raised the issue of the need for diversity in meetings and at his reviews, Janos "was dismissive towards any such suggestions and conveyed his deep opposition."

Janos unfairly gave Wilson a written warning in 2005 for allegedly violating CNN's "single-sourcing policy." Wilson had obtained information from a single "excellent" source close to Michael Jackson about Jackson's hospitalization for dehydration during his criminal trial. Wilson told the editor about this information and that it was "not for air," but the editor aired the information anyway. The accuracy of the information was later

confirmed. Janos gave Wilson no opportunity to explain the circumstances of this incident, but simply "wrote [him] up" and threatened to fire him. This was the only warning or reprimand that Wilson received at CNN before 2014.

Wilson took five weeks of paternity leave beginning in September 2013 after his wife gave birth to twins following a high-risk pregnancy. In the summer of 2013, shortly before Wilson took his leave, Janos promoted a younger White man with less experience than Wilson to be a senior producer. That person came from the CNN entertainment unit and had no prior hard news experience.

Wilson requested that he be given a promotion in title to senior producer because he was already doing the work of a senior producer. Janos rejected the request, saying that he "did not have a senior position" for Wilson.

After his return from paternity leave, Wilson noticed that the newly promoted White senior producer was receiving high-profile field assignments and that Wilson was receiving inferior assignments such as "in-house packaging and fill-in work." Wilson spoke with Janos about his concern about what this meant for Wilson's future. Janos said that he needed Wilson to "step up [his] work load and keep up with 'younger blood' " like the recently promoted younger White producer.

c. *Denial of promotions*

In addition to requesting the senior producer title that Janos declined to give him, Wilson unsuccessfully applied for eight other promotions within CNN between 2005 and 2013. His applications were not confidential. Wilson expected that the persons responsible for the hiring decisions would contact Janos. Wilson himself talked to Janos about one of the opportunities—as

White House producer—and asked for Janos's endorsement. Janos declined. The job was offered to a younger White candidate with less experience.

d. *Wilson's complaints*

In 2004 Wilson complained in writing to the news room supervisor that journalists of color were relegated to minor roles in the coverage of major breaking news. On four different occasions from 2007 to 2010 Wilson also complained to the CNN senior vice-president of human resources, Tim Goodly, that "African-American men outside of Atlanta, Washington, D.C., and New York were not being promoted and that African-American producers and photographers were not being treated fairly" based upon the merits of their work and experience. Wilson told Goodly that Janos "played an important role in the discrimination against African-American men" in Los Angeles, Chicago, and San Francisco. Wilson also told Goodly that Wilson was concerned that Janos viewed his age and compensation package as a liability.

e. *Circumstance of Wilson's discharge*

On January 7, 2014, Wilson attended a press conference concerning the retirement of Sheriff Lee Baca before writing the article on that topic that led to his discharge. Wilson lost an outline that he wrote following the press conference. He therefore wrote the article from his recollection, and verified information in the draft article against other sources. Those sources included press releases by the United States Department of Justice and the Los Angeles County Sheriff's Department. Wilson also referred to a prior story written by a CNN reporter and an on-line story by The Los Angeles Times.

Wilson verified the information included in The Los Angeles Times article with independent sources, such as the press releases. However, he accidentally submitted his draft article before he had included references to the press releases that he had used to verify the facts in his draft.

Wilson's draft included several sentences that were very similar or identical to sentences in The Los Angeles Times article. The identical information concerned public reactions to the retirement announcement, which Wilson witnessed himself at the press conference he attended, as well as some background facts from Baca's career, including his reelection campaign, an ongoing United States Department of Justice investigation, and the length of Baca's career.

After a copy editor expressed her concern about the similarity in these passages and told Wilson she had notified Janos, Wilson repeatedly tried to contact Janos, who refused to talk with him. When Wilson succeeded in speaking with Janos the following day, he told Janos that CNN.com wire editors "routinely insert previously published materials without attribution into articles" after the author submits them. Janos "angrily interrupted, accused [Wilson] of plagiarism and warned 'there are going to be consequences.' "

Janos participated in a meeting with Wilson and a human resources manager, Dina Zaki, on January 9, 2014, in which they informed Wilson that CNN would be conducting an audit of his work. Janos also participated in a meeting with Wilson and Zaki on January 28, 2014, in which they informed Wilson that his employment had been terminated because he had "violated company policy."

CNN did not disclose the results of the audit to Wilson before his discharge, and Wilson did not have an opportunity to respond to CNN's allegations of plagiarism with respect to those articles. After later learning which articles CNN had identified as containing plagiarized material, in late 2014 Wilson checked CNN on-line. He discovered that all of the five identified articles remained on the CNN Web site.

The five identified articles contained sentences that were identical or very similar to sentences in other sources. However, three of the five articles had co-authors. In addition, one cannot tell from the articles themselves what content was added by copy editors rather than originally written by the reporter(s).

Wilson was replaced by a 37-year-old White employee with less experience.

f. ***Differential treatment and selective enforcement of CNN's plagiarism policy***

In his declaration, Wilson testified, "In my experience with copy editors at CNN, my copy editors had re-written portions of my stories using background information similar to other published news reports without attribution and had moved them to digital publication without inquiring or even notifying me first. In other instances, stories were updated with information that matched published material without my knowledge."

Wilson's declaration identified several stories published by other authors that CNN had published, including articles by a current CNN vice-president. Those stories contained passages similar to the content of other publications without any attribution to those sources.

Wilson's declaration also quoted a CNN statement concerning the high-profile columnist Fareed Zakaria, who was formerly the editor-at-large for Time magazine and also hosts a program on CNN. Zakaria admitted in 2012 that he "made a terrible mistake" concerning paragraphs in a Time column that bore "close similarities" to paragraphs in an essay in The New Yorker. CNN stated that, "[i]n 2012, we conducted an extensive review of [Zakaria's] original reporting for CNN, and beyond the initial incident for which he was suspended and apologized for, found nothing that violated our standards. In the years since we have found nothing that gives us cause for concern." Zakaria still works at CNN.

ii. ***Inferences of pretext***

From this evidence, a fact finder could reasonably infer that:

(1) Wilson's immediate supervisor, who was involved in Wilson's discharge, had previously shown a preference for younger White employees, had unfairly disciplined Wilson, and had expressed hostility to Wilson's concerns about greater diversity in the workplace.

(2) Despite a good employment record, Wilson was repeatedly denied promotion in favor of White candidates.

(3) Copy editors and other writers regularly engaged in the same conduct as Wilson without consequences.

(4) Another CNN columnist who had admitted using material similar to another published article was permitted to continue his employment with CNN.

(5) CNN took no steps to remove from its Web site the five articles that it accused Wilson of plagiarizing.

(6) CNN replaced Wilson with a younger White man with less experience.

(7) Prior to his discharge, Wilson had repeatedly complained about the lack of diversity among CNN news reporters.

Moreover, as we previously observed in *Wilson I,* the conduct leading to Wilson's discharge "did not consist of large-scale copying of another's unique work embodying original research, but merely using a few of the same or similar phrases or sentences regarding accurate background information." (*Wilson I, supra,* 6 Cal.App.5th at p. 839.)

A discrimination plaintiff may show that an employer's stated reason for an employment decision was pretextual by providing evidence that " ' "the proffered reason had no basis in fact, the proffered reason did not actually motivate the discharge, or, the proffered reason was insufficient to motivate discharge." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 594, quoting *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 224.) A fact finder may find a proffered reason to be pretextual based upon " ' "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" ' " in the stated grounds that make them " ' " 'unworthy of credence.' " ' " (*Soria,* at p. 594, quoting *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.) The identity of the person making the termination decision and the employee's job performance before the decision are relevant factors. (*California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1023.) So is the employer's disparate treatment of other persons who do not share the same protected characteristics.

(*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 992.)

Crediting Wilson's declaration, as we must, Wilson provided evidence that one of the persons involved in the termination decision had expressed hostility toward him and discriminated against him in the past; other employees who had engaged in similar conduct had not been disciplined, or had at least kept their employment; and at least one of CNN's proffered grounds for Wilson's discharge—the five articles CNN identified following its audit—lacked credibility in light of CNN's failure to take any steps to remove those articles from its Web site. This evidence is sufficient at this stage of the proceedings to support an inference that the stated ground for CNN's termination decision was pretextual.

iii. *CNN's arguments*

CNN offers very little to oppose this inference. CNN's original brief in this court barely addressed the evidence, arguing instead that the First Amendment precluded a fact finder from "pars[ing] through the evidence" to "determine whether a news organization was motivated by principles of journalistic ethics or a protected factor."

CNN did claim that Wilson "never disputed that he engaged in plagiarism." However, Wilson expressly denied engaging in plagiarism in his declaration, along with presenting the detailed explanation of the circumstances of his discharge discussed above.

Similarly, in its supplemental brief on remand, CNN argues that Wilson admitted that his Los Angeles Times story contained " 'inserted passages from another source,' which was 'solely my fault and I made a mistake.' " However, Wilson

testified in his declaration that he made this statement in a letter predating his discharge at the urging of Zaki. Moreover, Wilson's admission of a mistake is different from admitting intentional plagiarism. That is particularly true here, where Wilson testified that he submitted a draft story prematurely before noting the sources on which he had relied.

Most importantly, even if Wilson did copy sentences from other sources without attribution, he provided evidence that others had engaged in the same conduct without receiving similar discipline. CNN attempts to dismiss this evidence in its supplemental brief by arguing that "the fact that CNN may have disciplined another employee in a different way under different circumstances does not prove that CNN terminated Wilson for discriminatory reasons." However, Wilson is not required to prove his case at this point. The evidence that CNN treated Wilson differently than others who had engaged in the same conduct, and applied its anti-plagiarism policy selectively to replace him with a younger White employee, is sufficient to create an inference of pretext.

We do not, of course, express any view as to whether Wilson will ultimately be able to prove his case following discovery and in light of all the facts. We hold only that, crediting Wilson's testimony, he has presented evidence supporting a prima facie case of discrimination and retaliation that is sufficient to warrant denial of CNN's anti-SLAPP motion.

DISPOSITION

The trial court's order granting CNN's anti-SLAPP motion is reversed. Wilson is entitled to his costs on appeal.

NOT TO BE PUBLISHED.

LUI, J.*

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

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* Presiding Justice of the Court of Appeal, Second Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.