

## Sessoms v. Bet Networks

Superior Court of California, County of Los Angeles

April 16, 2014, Decided; April 17, 2014, Filed

Case No.: BC517318

### Reporter

2014 Cal. Super. LEXIS 177

BRANDON SESSOMS, Plaintiff, vs. BET NETWORKS, INC., et al., Defendants.

### Core Terms

---

alleges, decisions, Defendants', creative, Broadcasting, appearance, style, television, protected activity, wardrobe, casting, adverse employment action, cause of action, special motion, probability, parties, argues, entertainment, gender, hiring, merits, fails, public interest, discriminatory, outrageous, opposing, Rights, discrimination claim, emotional distress, free speech

**Judges:** [\*1] YVETTE M. PALAZUELOS, JUDGE OF THE SUPERIOR COURT.

**Opinion by:** YVETTE M. PALAZUELOS

### Opinion

---

#### RULINGS/ORDERS

Defendants Black Entertainment Television LLC and Viacom, Inc.'s Special Motion to Strike is GRANTED. The Complaint is STRICKEN.

I.

#### INTRODUCTION

Plaintiff Brandon Sessoms ("Plaintiff") commenced action against Defendant Black Entertainment Television, LLC, erroneously sued as "BET Networks, Inc." ("BET"), and Viacom, Inc. ("Viacom"). Plaintiff's complaint alleges causes of action for:• (1) discrimination based on gender identity/gender expression; (2) discrimination based on sexual orientation; (3) violation of Unruh Civil Rights Act; (4) breach of contract; (5) wrongful termination in violation of public policy; and (6) intentional infliction of emotional distress. Plaintiff alleges that he is an openly gay TV and

internet personality, advice columnist and entrepreneur, and that Plaintiff identifies as transgender.

Plaintiff alleges that BET offered him a job as Style Stage Correspondent for the 2013 BET Awards 106 and Park Pre-Show, and that he was not told that there would be appearance restrictions based on gender expression. Complaint ¶¶14-15. Plaintiff alleges that Defendants knew about his personality [\*2] and style before hiring him, and that during the preparation for the event, BET producers met with Plaintiff and saw his appearance. Plaintiff further alleges that he wore an outfit that the producer had already approved. Complaint ¶¶16-19. Plaintiff alleges that after the first segment, "B. Scott was literally yanked backstage and told that he 'wasn't acceptable.' B. Scott was told to mute the makeup, pull back his hair and he was forced to remove his clothing and take off his heels; thereby completely changing his gender identity and expression. They forced him to change into solely men's clothing, different from the androgynous style of dress he's used to, which he was uncomfortable with." Complaint ¶21.

Defendants bring a special motion to strike the complaint. Defendants argue that the complaint arises from protected activity under the anti-SLAPP law, as it is based upon creative decisions made by BET in connection with a nationally shown telecast. Defendants argue that the action has no probability of success on the merits. They argue that the First amendment and the California Constitution bar Plaintiff's discrimination claims, as the only conduct at issue was Defendant's decision to ask Plaintiff [\*3] to appear in a particular costume, look, or style. They further argue that: 1) the discrimination claims fail on the merits; 2) the fifth claim for wrongful termination fails with the FEHA claims; 3) the first, second, and fifth claims fail because Plaintiff did not have an employment relationship with Defendant; 4) the third claim fails as a matter of law, since it does not apply to workplace discrimination; 5) the claim for intentional infliction of emotional distress fails because Plaintiff cannot show extreme or outrageous conduct.

In opposition, Plaintiff argues that the motion is untimely, and is intended to delay the action. Plaintiff argues that

Defendants misconstrue the allegations in dispute, and fail to understand the issue of transgender discrimination. Plaintiff argues that Defendants fail to accurately present the complaint's alleged adverse employment actions. Plaintiff argues that Plaintiff has a likelihood of prevailing, due to evidence of Defendants' discriminatory intent showing mere pretext.

Defendants argue that the court should consider the motion. They argue that there is no basis in case law for a distinction between creative control over who performs an expressive [\*4] activity, and creative control over the selected performer's costuming and appearance within the expressive activity. They further argue that Plaintiff's argument that Defendants' motives for requiring the changes in Plaintiff's wardrobe and engaging a co-host were pretexts for Defendants' discriminatory intent is legally irrelevant.

## II.

### DISCUSSION

#### A. Applicable Law

In a motion to strike under CCP §425.16, the court engages in a two-part analysis: (1) the court decides whether defendant has made a threshold showing that the challenged cause of action arises from a protected activity; and (2) if such a showing has been made, the burden then shifts to plaintiff to demonstrate a probability of prevailing on the merits of his or her claims. Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal.4th 53. The purpose of this statute is to respond to lawsuits that chill citizens from exercising their political rights to free speech and activities.

##### 1. Timing

Special motions to strike may be filed within .60 days of the service of the complaint, "or, in the Court's discretion, at any later time upon terms it deems proper." CCP §425.16; DuPont Merck Pharmaceutical Co. v. Sup. Ct. (2000) 78 Cal.App.4th 562, 565. A successful motion to change venue may restart the 60-day period. South Sutter, LLC v. LJ

Sutter Partners, L.P. (2011) 193 Cal.App.4th 634, 656. Defendants filed the instant motion on February 14, 2014. Plaintiff filed [\*5] the complaint on August 7, 2013, and served the complaint on August 8, 2013. Plaintiff thus argues that the court should not consider the motion, given the late filing.

However, Defendants argue that a crucial case - Hunter v. CBS Broadcasting Inc. (2013) 221 Cal.App.4th 1510 - was certified for publication on December 11, 2013. They argue that Hunter made clear that employment discrimination claims under FEHA are subject to special motions to strike. Defendants further argue that there is no prejudice to Plaintiff, as no trial date has been set and the case remains in the early stages. Defendants also argue that Plaintiff has repeatedly indicated intent to file an amended complaint, to add a cause of action for defamation. Sussman Decl. SS11, 12, 14, 19, and 36. Defendants argue that an amended complaint would give them an automatic right to file a new special motion to strike. For these reasons, the court will exercise its discretion to consider the special motion to strike at this time.

##### 2. Arising From Prong

A defendant has the initial burdening of showing a cause of action arises from a protected activity. CCP §425.16(e) <sup>1</sup>. Martinez v. Metabolife Inter. Ins. (2003) 113 Cal.App.4th 181, 186; Fox Searchlight Pictures Inc. v. Paladino (2001) 89 Cal.App.4th 294, 304. The protected right to petition includes filing litigation, seeking administrative action and communications in anticipation of [\*6] such proceedings. Miller v. Filter (2007) 150 Cal.App.4th 652, 665. Specifically, courts decide whether moving parties have made a prima facie showing that the attacked claims arise from a protected activity, including defendants' right of petition, or free speech, under a constitution, in connection with issues of public interest. Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal.4th 260, 278; Paulus v. Bob Lynch Ford, Inc. (2006) 139 Cal.App.4th 659, 671; Equilon Ent., supra, 29 Cal.4th at 67; Gov. Gray Davis Committee v. Amer. Taxpayers Alliance (2002) 102 Cal.App.4th 449, 458-59; Weil & Brown, Cal. Prac. Guide: Civ. Pro Before Trial (The Rutter Group 2006) ¶7:244.1; CCP §425.16(e).

<sup>1</sup> Section 425.16(e) provides:

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement 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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the [\*7] constitutional right of free speech in connection with a public issue or an issue of public interest.

In determining whether the burden has been satisfied, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." Brill Media Co., LLC v. TCW Group, Inc. (2005) 132 Cal.App.4th 324, 329 [overruled on other grounds]. Moving parties can satisfy their burden by showing (1) statements made before legislative, executive or judicial proceedings, or made in connection with matters being considered in such proceedings, or (2) statements made in a public forum, or other conduct in furtherance of the exercise of the constitutional rights of petition or free speech, in connection with issues of public interest. CCP §425.16(e); Equilon Ent., supra, 29 Cal.4th at 66. The motion must be supported by declarations stating facts upon which the liability or defense is based. CCP §425.16(b).

In determining the first step of a special motion to strike, judges are not limited to considering pleadings, but also may consider the moving and opposing parties' filed evidence to ascertain the conduct or communications upon which liability is allegedly based. City of Cotati v. Cashman (2002) 29 Cal.4th 69, 79; Brill Media Co., LLC v. TCW Group, Inc. (2005) 132 Cal.App.4th 324, 339; Navellier v. Sletten (2002) 29 Cal.4th 82, 89 ("In deciding whether the initial 'arising from' requirement is met, a court considers 'the pleadings, [\*8] and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" [Emphasis added]; Salma v. Capon (2008) 161 Cal.App.4th 1275, 1286 (activity was "only vaguely described in the cross-complaint," and the Court looked to the description of the activities in moving party's declaration to determine whether protected); Weil & Brown, Cal. Practice Guide: Civ. Pro. Before Trial (The Rutter Group 2011) ¶7:992.

A public interest involves more than mere curiosity, a broad and amorphous interest, or private information communicated to a large number of people, and instead concerns a substantial number of people, some closeness between the statements and the public interest, and a focus upon the communications as being the interest and not upon a private controversy. McGarry v. Univ. Of San Diego (2007) 154 Cal.App.4th 97, 110. "Consumer information ..., at least when it affects a large number of persons, also generally is viewed as information concerning a matter of public interest." Wilbanks v. Wolk (2004) 121 Cal.App.4th 883, 898. The statements were also made in a public forum. Barrett v. Rosenthal (2006) 40 Cal.4th 33, 41 n.4 ("Web sites accessible to the public ... are 'public forums' for purposes of the anti-SLAPP statute.")

### 3. Probability of Success on the Merits

If moving parties successfully have shifted the burden, then opposing parties must demonstrate [\*9] a probability of prevailing on the merits of the complaint. Equilon Ent., supra, 29 Cal.4th at 67; Matson v. Dvorak (1995) 40 Cal.App.4th 539, 548; §425.16(b) (1). To establish such a probability, a plaintiff must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts, which, if credited by the trier of fact, is sufficient to sustain a favorable judgment. Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal.App.4th 1424, 1435; Navellier v. Sletten (2002) 29 Cal.4th 82, 88; Gilbert v. Sykes (2007) 147 Cal.App.4th 13, 31 (complaint must not be vulnerable to a successful demurrer). Hence, the evaluation includes reviews of the pleadings and moving and opposing declarations. Equilon Ent., supra, 29 Cal.4th at 67; CCP §425.16(b) (2). "The prima facie showing of merit must be made with evidence that is admissible at trial." Salma v. Capon (2008) 161 Cal.App.4th 1275, 1289.

"The plaintiff need only establish that his or her claim has 'minimal merit'...to avoid being stricken as a SLAPP." Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal.4th 260, 291. Further, a plaintiff need not address all alleged theories in order to show that a cause of action has some merit. A.F. Brown Electrical Contractor, Inc. v. Rhino Elec. Supply, Inc. (2006) 137 Cal.App.4th 1118, 1124. The opposing parties' burden as to an anti-SLAPP motion is like that of a party opposing a motion for summary judgment. See, e.g., DaimlerChrysler Motors Co. v. Lew Williams, Inc. (2006) 142 Cal.App.4th 344, 352.

### B. The Complaint Arises from Protected Activity

Defendants argue that the complaint arises from protected activity under the anti-SLAPP law, as it is based upon creative decisions made by BET in connection with a nationally shown telecast. Hunter v. CBS Broadcasting Inc. (2013) 221 Cal.App.4th 1510. In Hunter, the plaintiff [\*10] was a male weather anchor who sued a broadcasting company for discrimination under FEHA, alleging that defendant failed to hire him due to his gender and age. The trial court denied defendant's special motion to strike, finding that the claims did not arise from defendant's hiring decision, but rather from defendant's discriminatory employment practices. Id. at 1514. The Court of Appeal reversed:

Our courts have previously recognized that '[r]eporting the news' (Lieberman v. KCOP Television, Inc. (2003) 110 Cal.App.4th 156, 164[(KCOP)]) and "creat[ing] ... a television show" both qualify as "exercis[e] of free speech" (Tamkin v. CBS Broadcasting, Inc. (2011) 193

Cal.App.4th 133, 143; see KCOP, supra, 110 Cal.App.4th at p. 164). CBS's selections of its KCBS and KCAL weather anchors, which were essentially casting decisions regarding who was to report the news on a local television newscast, 'helped advance or assist' both forms of First Amendment expression. The conduct therefore qualifies as a form of protected activity.

Hunter v. CBS Broadcasting Inc. (2013), 221 Cal.App.4th 1510, 1521.

Defendants argue that the instant action is an even stronger example of protected activity than that found in Hunter. In Hunter, the plaintiff claimed that the defendant failed to hire him for allegedly discriminatory reasons. In this action, Defendant clearly hired Plaintiff, but Plaintiff bases the complaint on Defendants' creative decisions about on-air wardrobe and presentation. Courts have [\*11] found such decisions to fall within the anti-SLAPP statute. Defendants point, for example, to Tamkin v. CBS Broadcasting, Inc. (2011) 193 Cal.App.4th 133, in which the Court held that defendants' decision to use plaintiffs' names and personal characteristics in the synopses for a television show fell within the orbit of the anti-SLAPP statute. The Tamkin Court held that "defendants demonstrated that their challenged conduct was in furtherance of the creative process of developing and broadcasting CSI." Id. at 144.

In the complaint, Plaintiff alleges that BET offered Plaintiff a job as "Style Stage Correspondent for the 2013 BET Awards 106 and Park Pre-Show," and that Plaintiff was not told that there would be appearance restrictions based on gender expression. Complaint ¶S14-15. Plaintiff alleges that Defendants knew about Plaintiff's personality and style before the hiring, and that during the preparation for the event, BET producers met with Plaintiff and saw Plaintiff's appearance. Plaintiff further alleges that he wore an outfit that producer had already approved. Complaint ¶S16-19. Plaintiff alleges that after the first segment:

B. Scott was literally yanked backstage and told that he 'wasn't acceptable.' B. Scott was told to mute the makeup, pull [\*12] back his hair and he was forced to remove his clothing and take off his heels; thereby completely changing his gender identity and expression. They forced him to change into solely men's clothing, different from the androgynous style of dress he's used to, which he was uncomfortable with.

Complaint ¶21. The complaint further alleges that Defendant replaced Plaintiff with Adrienne Bailon, and that "a sponsor

corporation's representative approached B. Scott and informed him that someone on-site from BET had made the decision to pull B. Scott from his duties on account of his transgendered appearance." Complaint ¶22-23. The complaint additionally alleges that:

[A]pparently realizing the error of the situation, the sponsor corporation's representative made a few phone calls and B. Scott was added back at the very end of the show in a diminished capacity as co-host alongside Adrienne Bailon. He was added back to the show only after a complete change in his wardrobe and appearance.

Complaint ¶25. Plaintiff argues that while Defendants had a First Amendment right to choose whom they cast for the broadcast, their comments and decisions that form the basis for the claims at issue do not constitute protected activity. Plaintiff [\*13] argues that Defendants have not stated a believable protected expression of speech.

However, Plaintiff's arguments are unpersuasive. Plaintiff's claims arise from Defendants' decisions regarding Plaintiff's on-air wardrobe, appearance, and whether Plaintiff would host individually, with another individual, or not at all. The holding in Hunter extends to the instant action. In that case, the Court found that Defendant's decision to hire weather anchors with certain attributes was a form of protected activity. Similarly, Defendants in this case allegedly exerted control about the appearance of individuals appearing on-air. The argument is stronger with respect to the instant action, as Defendants were directing decisions about Plaintiff's on-air appearance after already hiring Plaintiff. In Tamkin, for example, the Court held that the defendants' use of the plaintiffs' names and personal characteristics "was in furtherance of the creative process of developing and broadcasting" the show in question. Id. at 144. Similarly, Defendants' decisions with respect to the instant complaint were part of the creative process of developing and broadcasting the show in question. Thus, Defendants have met their [\*14] burden of showing that the claims arise from protected activity. C. Plaintiff Has Not Shown a Probability of Prevailing on the Merits

#### 1. Discrimination Claims

Plaintiff argues that "Defendants as much as admit that Plaintiff has made out her prima facie cases for discrimination, instead relying on their fact-defying First Amendment defense." Plaintiff argues that there is substantial evidence of discriminatory intent, which demonstrates that any supposed legitimate business reason is mere pretext.

Defendants asserting the affirmative defense of the First Amendment have the burden to show that expressive



activities "merit First Amendment protection." U.S. Western Falun Dafa Ass'n v. Chinese Chamber of Commerce (2008) 163 Cal.App.4th 590, 599. Substantial case authority supports the position that the First Amendment protects the creative process on entertainment programs such as the one at issue. In Lyle v. Warner Brothers Television Productions (2006) 38 Cal.4th 264, 295-297, the Court held that "[t]he First Amendment protects creativity." The Court found that the television show "Friends" "was entertainment, but entertainment is fully entitled to First Amendment protection . . ." and that ". . . [l]awsuits like this one, directed at restricting the creative process in a workplace whose very business is speech related, present a clear and present danger to fundamental free speech rights."

Defendants also point to Hurley v. Irish-American Gay (1995) 515 U.S. 557, in which the U.S. Supreme Court addressed whether [\*15] a state public accommodations law required organizers of the South Boston St. Patrick's Day parade to include a group formed for the purpose of marching in the parade to show members' pride in their Irish heritage as openly gay, lesbian, and bisexual individuals. *Id.* at 561. The Court held that "[t]he issue in this case is whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey. We hold that such a mandate violates the First Amendment." *Id.* at 559. The Court further held that that "[t]he parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id.* at 574-575. In addition, the Court held that "[w]hen the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent [\*16] beneficiaries of the law choose to alter it with messages of their own." *Id.* at 578.

Defendants thus present support for the position that the claims at issue in the instant case are protected by the First Amendment. Like the parade organizers in Hurley, Defendants chose to shape the message that emerged from their event. Plaintiff's allegations center on Defendants' alleged decisions to appear in a certain style and dress, which fall within Defendants' First Amendment right to expressive activity.

Defendants further point to Claybrooks v. ABC, Inc. (2012) 898 F.Supp.2d 986, 999 (M.D. Tenn.), in which a United

States District Court relied on Hurley, and dismissed the plaintiffs' claims that the defendants intentionally racially discriminated through their casting decisions on the television programs "The Bachelor and The Bachelorette." The Court found that:

[C]asting decisions are a necessary component of any entertainment show's creative content. The producers of a television program, a movie, or a play could not effectuate their creative vision, as embodied in the end product marketed to the public, without signing cast members. The plaintiffs seek to drive an artificial wedge between casting decisions and the end product, which itself is indisputably protected as speech by the First Amendment. Thus, regulating [\*17] the casting process necessarily regulates the end product. In this respect, casting and the resulting work of entertainment are inseparable and must both be protected to ensure that the producers' freedom of speech is not abridged.

In the instant case, Defendants cast Plaintiff, and thus the issue is not the initial decision to cast or not cast. However, the same logic applies, as Defendants allegedly made decisions about the creative vision of the television program. If casting decisions are protected speech, then logic dictates that decisions about wardrobe, style, and whether to appear with or without a co-host, also fall within the protection of the First Amendment as these decisions impact "the end product marketed to the public."

Plaintiff failed to offer any evidence to support the contention that the First Amendment does not bar the discrimination claims and thus cannot show a probability of success on the merits. The complaint alleges that "other presenters received remuneration in the form of being provided budgets and wardrobe for their presentation, while this equal compensation was denied to B. Scott on the basis of his status within protected classifications." Complaint ¶38. However, Plaintiff provides [\*18] no further evidence of such discrimination, and Plaintiff's declaration in support of the opposition to the instant motion fails to address such alleged discrimination. The evidence Plaintiff puts forth consists of the allegations regarding wardrobe, style, and hosting.

Furthermore, Defendants argue that Plaintiff fails to demonstrate an adverse employment action within the meaning of FEHA. The elements of a cause of action for discrimination under the Fair Employment and Housing Act ("FEHA") are: (1) plaintiff was a member of a protected

class;<sup>2</sup> (2) was qualified for the position sought, or was performing competently in the position held; (3) suffered an adverse employment action (e.g., termination, demotion, or denial of employment); and (4) some other circumstance suggests discriminatory motive. Guz v. Bechtel Nat. Inc. (2000) 24 Cal.4th 317, 355 ("The specific elements of a prima facie case may vary depending on the particular facts."); Jones v. R.J. Donovan Correctional Facility (2007) 152 Cal.App.4th 1367, 1379; Cucuzza v. City of Santa Clara (2002) 104 Cal.App.4th 1031, 1038.

In determining whether there was an adverse employment action to show discrimination or [\*19] retaliation, courts look at the totality of circumstances and not just at each isolated act. Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1055 ("we need not and do not decide whether each alleged retaliatory act constitutes an adverse employment action in and of itself."). See also Horsford v. Board Of Trustees Of California State Etc. (2005) 132 Cal.App.4th 359, 374; Taylor v. City of Los Angeles Dept. of Water and Power (2006) 144 Cal.App.4th 1216, 1231, disapproved on other grounds by Jones v. The Lodge at Torrey Pines Partnership (2008) 42 Cal.4th 1158, 1174. A lateral transfer can constitute an adverse employment action as to retaliation claims, where the employment actions are reasonably likely to adversely and materially affect job performance or opportunities for advancement in one's career, and the test must be interpreted liberally with a reasonable appreciation of workplace realities. Patten v. Grant Joint Union High School Dist. (2005) 134 Cal.App.4th 1378, 1389-90. Lateral transfers, suspensions, assignments without training, and a series of subtle discriminatory acts may constitute an adverse employment action in support of a claim of discrimination. Horsford v. Board Of Trustees Of California State Etc. (2005) 132 Cal.App.4th 359, 374. A transfer to a less-preferred position alone does not constitute an adverse employment action, where the employee receives equivalent pay, benefits and promotional opportunities, and experiences no hostile environment. Malais v. L. A. City Fire Dept. (2007) 150 Cal.App.4th 350, 357-58.

Plaintiff alleges that Defendants restricted Plaintiff in terms of wardrobe and style, and that they pulled Plaintiff from the show, only placing Plaintiff back on "after a complete [\*20] change in wardrobe and appearance." Complaint ¶S25, 29. Defendants argue that once Plaintiff agreed to comply with Defendants' wardrobe and style requirements, they allowed Plaintiff back on the broadcast, and thus that there was no adverse employment action. Plaintiff failed to present

evidence to demonstrate the existence of an adverse employment action under FEHA.

## 2. Unruh Act

California Civil Code §51 (The Unruh Civil Rights Act) prohibits discrimination by business establishments based on certain characteristics, including race. In Re Cox (1970) 3 Cal.3d 205, 216. The Unruh Act states in pertinent part that "all persons are free and equal, and no matter what sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

The essential factual elements of a cause of action for the violation of the Unruh Civil Rights Act are: (1) defendant denied, aided or incited a denial of, discriminated or made a distinction that denied full and equal accommodations, advantages, facilities, privileges, or services to plaintiff; (2) that [\*21] a motivating reason for defendant's conduct was its perception of plaintiff's sex, race, color, religion, ancestry, national origin, disability, medical condition, or other actionable characteristic; (3) that plaintiff was harmed; and (4) that defendant's conduct was a substantial factor in causing plaintiff's harm. CACI 3020; Belton v. Comcast Cable Holdings, LLC (2007) 151 Cal.App.4th 1224, 1238 (intentional discrimination required, and not an adverse impact).

The Unruh Civil Rights Act does not apply in the employment context. Alcorn v. Anbro Engineering, Inc. (1970) 2 Cal.3d 493, 500 (finding that legislature intended to "exclude the subject of discrimination in employment" from the Unruh Civil Rights Act). It further appears that the claims of an independent contractor would not be covered by the UCRA. "[T]here is no indication that the Legislature intended to broaden the scope of section 51 to include discriminations other than those made by a 'business establishment' in the course of furnishing goods, services or facilities to its clients, patrons or customers." Alcorn, supra, 2 Cal.3d at 500. "[S]ubsequent precedents have explained that the Act does not cover 'the employer-employee relationship.'" Alch v. Superior Court (2004) 122 Cal.App.4th 339, 391. As stated in Alch, the focus is not on the specific titles and legal exactness; instead, the inquiry concerns whether a relationship is comparable to an employer-employee [\*22] relationship or to a relationship

<sup>2</sup> Govt. Code §12940(a) prohibits discrimination on the basis of "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation."

between a business establishment and its "clients, patrons or customers." *Id.* at 393, n. 56. See also Strother v. Southern California Permanente Medical Group (9th Cir. 1996) 79 F.3d 859.

Plaintiff fails to present any evidence to show a probability of success on the merits with respect to this cause of action.

### 3. Breach of Contract

The elements of a cause of action for breach of contract are: (1) Existence of contract; (2) plaintiffs' performance or excuse for nonperformance; (3) defendants' breach (or anticipatory breach); and (4) resulting damage. Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co (2004) 116 Cal.App.4th 1375, 1391 n.6; Ersa Grae Corp. v. Fluor Corp. (1991) 1 Cal.App.4th 613, 625 (addressing anticipatory breach). Contract terms may be alleged generally according to legal intentment. Construction Protective Services, Inc. v. TIG Specialty Ins. Co. (2002) 29 Cal.4th 189, 198-199; Weil & Brown, Civ. Pro. Before Trial (The Rutter Group 2008) S 6:132. Pleading contracts by legal effects involves alleging the relevant terms in substance. McKell v. Washington Mutual, Inc. (2006) 142 Cal.App.4th 1457, 1489 [abrogated in part on other grounds].

Here, the complaint simply alleges that the parties entered into an implied contract, which Defendants breached. Complaint ¶¶62-69. However, the complaint fails to allege further details about the implied contract. In addition, Plaintiff fails to present any evidence regarding the contract.

### 4. Wrongful Termination in Violation of Public Policy

The elements of a claim for wrongful termination in violation [\*23] of public policy are: (1) plaintiff's employment was actually terminated; (2) in violation of a policy that is: (a) delineated in either constitutional or statutory provisions; (b) public in the sense that it inures to the benefit of the public; (c) well established at the time of the discharge; and (d) substantial and fundamental; and (3) damages. Barbee v. Household Automotive Finance Corp. (2003) 113 Cal.App.4th 525, 533; Holmes v. General Dynamics Corp. (1993) 17 Cal.App.4th 1418, 1426; Kelly v. Methodist Hospital (2000) 22 Cal.4th 1108, 1112 (referencing damages from wrongful termination); Garamendi v. Golden Eagle Ins. Co. (2005) 128 Cal.App.4th 452, 472 (addressing added elements of constructive discharge); Turner v. Anheuser-Busch (1994) 7 Cal.4th 1238, 1251 (holding that constructive discharge is not a separate cause of action, but must be associated with a breach of contract or tort involving wrongful discharge);

Steele v. Youthful Offender Parole Bd. (2008) 162 Cal.App.4th 1241, 1253 (addressing elements of constructive discharge).

The complaint alleges that Defendants violated public policies against discrimination. Complaint S72. Defendants argue that Plaintiff fails to show a violation of constitutional or statutory provisions, as Plaintiff fails to show a probability of success on the FEHA claims. Defendants further argue that Plaintiff fails to show termination or constructive discharge. Plaintiff fails to present evidence with respect to these elements.

### 5. Intentional Infliction of Emotional Distress

The elements of a cause of action for the intentional [\*24] infliction of emotional distress are: (1) outrageous conduct by defendant; (2) intentional or reckless causing emotional distress; (3) severe emotional distress; and (4) causation. Nally v. Grace Community Church (1988) 47 Cal.3d 278, 300; Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc. (2005) 129 Cal.App.4th 1228, 1259. See also Cross v. Bonded Adjustment Bureau (1996) 48 Cal.App.4th 266, 283 (outrageous conduct is a fact question where reasonable minds may differ); Alcorn v. Anbro Eng., Inc. (1970) 2 Cal.3d 493, 499 (fact question); Terice v. Blue Cross of California (1989) 209 Cal.App.3d 878, 883 ("court may determine in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery."); Miller v. National Broadcasting Co. (1986) 187 Cal.App.3d 1463, 1487 (outrageous conduct is measured by the standard of the reasonable person, and not by that of a sensitive, or callous, person).

The complaint alleges that the conduct was extreme and outrageous, but fails to provide facts to support that finding. Complaint ¶76. Plaintiff alleged that Defendants asked Plaintiff to make wardrobe and style changes, and removed Plaintiff from the broadcast for a period of time. Plaintiff alleges that Defendants' actions completely changed Plaintiff's "gender identity and expression." Complaint ¶21. However, Plaintiff has not demonstrated outrageous and extreme behavior.

## III.

### CONCLUSION

Based upon the foregoing, the court orders that:

1) Defendants Black Entertainment Television LLC and Viacom, Inc.'s Special Motion to [\*25] Strike is GRANTED.

2) The Complaint is STRICKEN.

/s/ [Signature]

MOVING PARTY TO GIVE NOTICE TO ALL PARTIES.

YVETTE M. PALAZUELOS

IT IS SO ORDERED.

JUDGE OF THE SUPERIOR COURT

DATED: April 16, 2014