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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

KYLE HUNTER, Plaintiff and Respondent, v. CBS BROADCASTING, INC., Appellant and Defendant.	B258668 (Los Angeles County Super. Ct. No. BC480825)

APPEAL from an order of the Superior Court of Los Angeles County, Yvette Palazuelos, Judge. Reversed.

Allred, Maroko & Goldberg, Gloria Allred, Michael Maroko and John S. West, for Respondent and Plaintiff.

Mayer Brown and Keri E. Borders, for Appellant and Defendant.

Kyle Hunter filed a discrimination action alleging that CBS Broadcasting refused to hire him as a weather newscaster because of his gender and age. CBS filed a motion to strike the complaint pursuant to Code of Civil Procedure section 425.16 arguing that its selection of a weather newscaster qualified as an act in furtherance of its free speech rights. The trial court initially denied the motion, concluding that Hunter's claims did not arise from protected activity. In *Hunter v. CBS Broadcasting, Inc*. (2013) 221 Cal.App.4th 1510, we reversed the trial court's order, and remanded with directions to consider whether Hunter had demonstrated a probability of prevailing on the merits of his claims. On remand, the trial court concluded Hunter had made such a showing and again denied the motion. We reverse the order, concluding that Hunter failed to present evidence that would permit a reasonable trier of fact to infer CBS's stated reason for its hiring decision was a pretext for illegal discrimination.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Summary of Hunter's Complaint*

On March 15, 2012, plaintiff Kyle Hunter filed an employment discrimination complaint alleging that two local CBS television stations—KCAL and KCBS—had "repeatedly shunned [him] for numerous on-air broadcasting positions . . . due to . . . his gender and his age." The complaint alleged that in 2010, KCBS chose not to renew the contract of its then-weather anchor Johnny Mountain, which was "part of [a] plan to turn prime time weather broadcasting over to younger attractive females."

Although Hunter expressed interest in "filling [Mountain's] vacancy," KCBS did not contact him for an interview or "otherwise show any interest in his candidacy." KCBS eventually hired Jackie Johnson, a "young attractive female" who had previously served as the weather anchor on KCAL's primetime newscast, to replace Mountain. After learning that Johnson had been hired to replace Mountain at KCBS, Hunter notified KCAL he would like to be considered for Johnson's former anchor position. KCAL, however, told Hunter "there was not 'an opening for [him] now.'" KCAL eventually hired Evelyn Taft, another "young attractive female," to replace Johnson. Hunter alleged

that Taft's "age and gender were key considerations in the hiring decision." He also alleged he was "far more qualified[] and . . . experienced" to serve as a weather anchor than either Johnson or Taft.

The complaint asserted two causes of action against CBS for violation of the California Fair Employment and Housing Act (Gov. Code, § 12900 *et seq*. (FEHA)). The first claim alleged KCBS and KCAL had "adopted a policy of filling vacant prime time on air weather broadcast positions with attractive females, and of refusing to hire males to permanently fill those positions." The second claim alleged that KCBS and KCAL had "adopted a policy of filling vacant prime time on air weather broadcast positions with individuals under the age of 40, [and] of refusing to hire individuals over 40 to permanently fill those positions." The complaint asserted that CBS's "[gender] and age based polic[ies], and [its] resulting employment decisions, violated the prohibition against gender [and age] discrimination contained in [] Government Code [section] 12940."

B. CBS's Motion to Strike the Complaint Pursuant to Code of Civil Procedure Section 425.16

1. Summary of CBS's motion to strike and supporting evidence

On May 29, 2012, CBS filed a special motion to strike Hunter's complaint pursuant to Code of Civil Procedure section 425.16.[1] CBS contended that Hunter's claims were based on its selection of on-air weather reporters, and that such conduct qualified as protected activity within the meaning of section 425.16, subdivision (e). It further contended that Hunter could not demonstrate a reasonable probability of prevailing on his claims because the evidence showed CBS's news director had rejected Hunter based on his belief that Hunter lacked the talent and skill to be an on-air weather broadcaster in the highly-competitive Los Angeles market.

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[1] Unless otherwise noted, all further statutory citations are to the Code of Civil Procedure.

In support of its motion, CBS submitted a declaration from Scott Diener, the vice president and news director of KCBS2 and KCAL9 (referred to as "the Duopoly"), which were "television stations owned and operated in Los Angeles by CBS." Diener explained that KCBS "broadcast[] programming provided by the CBS Television Network," which included "local news" shows; KCAL was an "independent station with programming targeted to the local audience consisting primarily of local sports broadcast . . . and local news." Collectively, the Duopoly's two stations made up the "nation's largest local television news operation."

In his role as news director, Diener was responsible for the "overall coverage and content of news, weather and sports . . . and the recruiting and hiring . . . staff members." Diener asserted that the Duopoly's weather anchors were "local celebrities" who had a significant impact on local newscast ratings. Because of their "importance" to the success of a local news broadcast, the Duopoly required that its weather anchors "not only be knowledgeable and reliable with respect to the weather forecasts, but also . . . likeable and inviting to the public."

Diener stated that when making a hiring decision for an on-air weather position, he normally reviewed the applicant's "resume and demo reel." If Diener believed an applicant was "sufficiently talented," he would then "interview [the applicant] and have [him or her] audition," which would include a "mock weather segment in the studio with other members of the news team." Diener asserted that the three primary qualifications he considered when evaluating "an on-air [weather] position" were: "(1) meteorology background and experience; (2) on-air presence; and (3) chemistry with other members of the news team." Diener also explained that given the size of the Los Angeles market and its close affiliation with the entertainment industry, on-air news positions in the local area were "highly coveted," attracted "the top talent from all over the country" and "required an individual of special skill."

Shortly after Diener was named the Duopoly's news director in January of 2010, he received an email from Hunter stating that he would like to be "considered for any available weather anchor positions," including "fill-in work." Based on his review of

Hunter's "demo reel," Diener "did not believe [Hunter] had the talent, skill or on-air presence to be an on-air weather broadcaster in the Los Angeles market." Diener felt Hunter's "presentation was not polished," that his "on-air persona was hokey and over the top" and that his "ability was [not] of the level that was expected of an on-air weather broadcaster in Los Angeles."

Over the next several months, Hunter sent Diener dozens of additional emails "with requests for employment, brochures, links to his demo reels, invitations to lunch and dinner or just to meet with him 'for 10 minutes.'" In addition to these emails, Hunter called Diener "on numerous occasions attempting to solicit employment," and mailed him several copies of self-promotional materials. Although Diener initially attempted to "politely" inform Hunter that the Duopoly did not have any work available for him, Diener later became more direct, telling Hunter that the station was "looking at and had received demo and tapes from candidates who were stronger than he was."

Diener also stated that he had informed other CBS employees about Hunter's behavior. The employees told Diener that based on their prior interactions with Hunter, who had previously worked at KCBS as an intern and weather producer, they felt Hunter had not been well liked, "was not considered a team player" and that "bringing him back to the Duopoly would not be well received."

Diener also described how the Duopoly had selected Jackie Johnson and Evelyn Taft to serve as the primetime weather anchors at KCBS and KCAL. Diener stated that Johnny Mountain, the former primetime weather anchor on KCBS, left his position in March of 2010. The Duopoly then made an "internal[]" decision to "promote Johnson from her primetime [weather anchor] position at KCAL, which she had held since September 2004, to replace [Mountain] in the primetime position at KCBS." Diener explained that Johnson "was already familiar to Los Angeles viewers as the popular primetime weather anchor at KCAL."

After promoting Johnson to KCBS, the Duopoly was left with an opening for an on-air weather broadcaster. When the Duopoly began searching for a candidate, it had not yet decided whether the new hire would be placed in the primetime KCAL

anchor position that Johnson had vacated, or whether an existing member of the Duopoly's weather team would be used to fill the position. Diener received "dozens of submissions" for the opening and spoke with numerous "contacts in the industry about . . . potential candidates." Based on his review of the applicants, Diener narrowed the field to eight candidates—five men and three women. Hunter was not one of the eight candidates. Diener selected two finalists from the eight candidate pool: Evelyn Taft, a female under the age of 40, and Jim Castillo, a male over the age of 40. Taft had a degree from the University of Southern California, where she majored in broadcast journalism. From 2006 to 2008, Taft had worked as a weather and news anchor at local stations in Santa Maria, California and Salinas, California. From 2008 to 2010, Taft was a "weather anchor for KRON in San Francisco, which was the sixth largest news market in the country." Diener explained that Taft had served as the weather anchor on KRON's seven hour morning telecast, which was "the longest morning news show in the country."

Taft and Castillo both auditioned for the position by conducting "a mock weather broadcast with the other members of the news team. The purpose behind the [audition] [wa]s . . . to get a sense of the individual in the studio [and] also . . . see the candidate's chemistry with the other members of the news team." After reviewing Taft's audition and meeting her in person, Diener recommended that CBS hire Taft and assign her to the primetime KCAL slot Johnson had vacated. Shortly after hiring Taft, CBS assigned a current member of the Duopoly's weather team, Josh Rubenstein, a male over the age of 40, to serve as the weather anchor on KCBS's morning show. Diener also hired Richard Fields, another male over the age of 40, to serve as a "weekend and fill-in weather anchor." Following the hires of Taft and Fields, the Duopoly had a total of five "on-air weather anchors" comprised of three males over the age of 40 (Rubenstein, Fields and Kaj Goldberg) and two females under the age of 40 (Johnson and Taft).

Diener asserted that he had not considered the gender or age of Johnson, Taft, Hunter or any other candidate in making his hiring decisions. Diener emphasized that he hired Taft because he concluded she was superior "to all of the other candidates in terms

of qualifications and on-air presence. In addition, [Diener] felt [Taft] would have the most chemistry with the other members of the primetime news team." Diener also asserted that he never "considered Hunter . . . for the position for which Taft was eventually hired to fill or any [other] on-air weather position at the Duopoly." Diener confirmed his decision regarding Hunter was not based on Hunter's age or gender, but rather on Diener's evaluation of Hunter's "on-air presence and presentation." Diener further noted that while that he had formulated this opinion based on his review of Hunter's "demo reel," his initial opinions regarding Hunter's nonsuitability for an on-air position at the Duopoly were later "confirmed" by Hunter's conduct in attempting to solicit work and the negative input Diener had received from other CBS employees.

2. Hunter's opposition and supporting evidence

In his opposition to the motion to strike, Hunter argued that the court should deny CBS's motion to strike because the "gravamen" of his claims "was discrimination rather than free speech." Hunter also argued that even if section 425.16 applied to his claims, he had demonstrated a reasonable probability of prevailing on the merits of his claims. Hunter contended that the evidence provided in support of his opposition showed that: (1) the Duopoly's only two primetime weather anchors (Johnson and Taft) were both "blond, attractive, buxom" females under the age of 40"; (2) Hunter was qualified to serve as a primetime weather anchor in the Los Angeles market, and was arguably "more qualified" than either Johnson or Taft; (3) CBS had selected Johnson and Taft over other male candidates over the age of 40 who were "as or more qualified than [Johnson or Taft] by virtue of experience and training"; (4) CBS had admitted it used "subjective" factors when deciding who to hire for its on-air anchor positions; and (5) CBS did not post job notices regarding its KCBS or KCAL weather anchor openings.[2] Hunter contended that,

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[2] Hunter also argued that his evidence showed he had conversations with two current CBS weather anchors who indicated that the Duopoly was looking for a female candidate to fill the KCAL weather anchor position and was only interviewing female candidates. The trial court, however, sustained hearsay objections to the evidence offered in support of these allegations. Because Hunter has not challenged the court's

considered together, such evidence was sufficient to support an inference that CBS had not hired him for either of the primetime anchor positions because of his age and gender.

In support of his opposition, Hunter provided a declaration asserting that he had "been involved in weather broadcasting in one form or another" since 1985. Hunter's declaration contained a detailed work history listing numerous weather-related positions, including: morning weather anchor at WDEF CBS in Chattanooga, Tennessee (1985-1987); weather intern at KCBS Los Angeles (2004); weekend and weekday fill-in primetime "on-air Meteorologist" at KEYT ABC in Santa Barbara, California (2005); weather producer for KCBS's prime time weather anchor Johnny Mountain (2005-2006); weekend and fill-in primetime "on-air Meteorologist" at KMIR NBC in Palm Springs, California (2006-2008); chief meteorologist at FOX5 in San Diego, California (2008-2010). Hunter explained that although his duties at FOX5 San Diego had initially included serving as the primetime weather anchor, he "voluntarily relinquished" this duty in 2009 to serve as a "fill-in weather anchor." Hunter's declaration also listed his educational background and various meteorology-related awards and certifications he had received in the past.

Hunter asserted he was generally "well-liked by [his] co-workers and well-regarded in [his] profession." In support, he provided written statements from several "professional colleagues" attesting to his positive attitude, friendly personality and skills as a weather broadcaster.

Hunter also described the steps he had taken to obtain a weather anchor position at KCBS and KCAL. In February or March of 2010, Hunter learned that Johnny Mountain was leaving KCBS because his contract had not been renewed. At that time, Hunter "resolved to be hired to fill the vacancy created by [Mountain's] departure from KCBS, and anticipated that if [Mountain] were to be replaced by another broadcaster from the [Duopoly], that there would be another opening at KCAL." Hunter began "contacting CBS management for an interview or audition," which included providing "his resume

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evidentiary ruling, we will not consider this evidence, or any argument predicated on this evidence.

and broadcast samples to Scott Diener." The Duopoly, however, never responded to his inquiries.

In April of 2010, Hunter learned KCBS had selected Jackie Johnson to fill Mountain's vacancy. Hunter described Johnson as a "very attractive, blond, buxom woman who was 31 when she obtained the job." Hunter also provided several CBS promotional photographs of Johnson that "illustrated her appearance." Although Hunter closely monitored television station employment openings, he never saw a job posting for Mountain's vacancy.

After learning of Johnson's hire, Hunter began contacting Diener and other "members of KCAL management for an interview or audition for the opening created by [Johnson's] move to . . . KCBS." Hunter sent an email to Steven Maudlin, the President and General Manager of KCBS/KCAL regarding his "interest in a position at CBS." Maudlin, however, informed Hunter that CBS did not currently have "an opening for him." Soon thereafter, Hunter learned KCAL hired Evelyn Taft to fill the position, who Hunter described as a "very attractive female" who was 25 years old at the time she was hired. Hunter provided several images of Taft he had obtained from CBS's promotional materials.

In approximately October of 2010, Hunter learned that Henry DiCarlo was leaving KCBS, creating a new "opening for a morning and afternoon meteorologist position." Hunter contacted KCBS regarding the position, but was not granted an interview.

Hunter's declaration stated that he had reviewed the qualifications of four other male candidates over the age of 40 who he knew to have applied for the KCBS and KCAL weather anchor positions: Jim Castillo, Josh Rubenstein, Henry DiCarlo and Kaj Goldberg. Hunter included attachments from various websites setting forth each of the candidates' biographies. Hunter contended that based on his "knowledge and experience," he "knew" each of the men was "qualified to be a prime-time weather broadcaster for KCBS and KCAL," but had nonetheless been "passed over" in favor of Johnson and Taft.

Hunter also challenged the veracity of certain statements in Diener's declaration. Hunter alleged, for example, that Diener had repeatedly assured Hunter he would "consider" Hunter for work if something "c[ame] up." Hunter also asserted that, contrary to the suggestions in Diener's declaration, he had been well-liked by his colleagues during his previous employment at KCBS.

3. Trial court rulings

The trial court initially denied CBS's motion to strike "on the grounds that [CBS] ha[d] not shown that its hiring decisions regarding weather anchors constitute[d] conduct in furtherance of [CBS's] right of free speech in connection with a public issue." In *Hunter*, 221 Cal.App.4th 1510, we reversed the court's order, concluding that CBS's decisions regarding "whom to hire as [its] on-air weather anchors" did qualify as an act in furtherance of the right to free speech within the meaning of section 425.16, subdivision (e)(4). (*Id*. at p. 1521.) We remanded the matter to the trial court with directions "to determine in the first instance whether Hunter demonstrated a reasonable probability of prevailing on the merits of his causes of action." (*Id.* at p. 1527.)

On remand, CBS argued that the trial court was required to assess the merits of Hunter's FEHA claims by applying the three-part burden shifting framework set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*).[3] For the purposes of its motion to strike, CBS did not dispute whether Hunter could establish a prima facie case of discrimination, as required under the first step of the *McDonnell Douglas* test. CBS argued, however, that Hunter had failed to demonstrate a probability of prevailing on the third step of the test, which required him to produce specific, substantial evidence that would permit a reasonable trier of fact to conclude the nondiscriminatory reason CBS had offered for its hiring decision was a pretext for

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3 "Under the three-part test developed in [*McDonnell Douglas*], '(1) [t]he complainant must establish a prima facie case of discrimination; (2) the employer must offer a legitimate reason for his actions; (3) the complainant must prove that this reason was a pretext to mask an illegal motive.' [Citation.]" (*Morgan v. Regents of University of Cal.* (2000) 88 Cal.App.4th 52, 68 (*Morgan*).)

intentional discrimination. CBS contended Hunter had provided no evidence refuting Diener's assertion that he chose not to hire Hunter because he did not believe Hunter had the on-air presence or presentation skills expected of a weather anchor in the Los Angeles market. CBS also argued that the undisputed evidence showed Diener had considered numerous male candidates other than Hunter for Taft's position, and that after hiring Taft, Diener hired a second on-air weather anchor who was male and over the age of 40. CBS contended such evidence confirmed Hunter was not rejected because of his gender or age.

Alternatively, CBS argued that the court need not even consider Hunter's evidence because the First Amendment provided a complete defense to his FEHA claims. In support, CBS cited *Claybrooks v. ABC Broadcasting Cos*. (M.D. Tenn. 2012) 898 F.Supp.2d 986 (*Claybrooks*), in which two African-Americans had filed a federal civil rights action alleging that they had not been cast in a reality television show because of their race. The district court dismissed the claims, concluding that the defendants' "casting decisions" were "part and parcel of the creative process behind [the] television program[,] . . . thereby meriting First Amendment protection against the application of [federal] anti-discrimination statutes to that process." (*Id*. at p. 993.) CBS argued the same reasoning applied in this case, asserting that the First Amendment provided a complete defense to Hunter's FEHA claims because "the decision to include a particular speaker in a news broadcast directly impacts that the content and message of that news broadcast."

In opposition, Hunter argued that to demonstrate a probability of prevailing on the merits of his claims, he was only required to introduce some evidence that suggested CBS had acted with a discriminatory motive. Hunter contended that the fact CBS had selected two young female candidates over several qualified male candidates (including himself), combined with the other information set forth in his declaration, was sufficient to raise an inference of discrimination. Hunter also argued the court should not consider CBS's First Amendment defense because CBS had failed to raise the argument in the original trial court proceedings on the motion to strike. Hunter further contended that

even if CBS had not forfeited the First Amendment defense, *Claybrooks* had no precedential value and conflicted with California law.

The trial court denied the special motion to strike, concluding that Hunter had demonstrated a probability of prevailing on the merits of his claims. On CBS's newly-raised First Amendment defense, the trial court explained that *Claybrooks* was of limited "persuasive value" because it involved "an alleged violation of 42 U.S.C. § 1981(a), and did not deal with anti-SLAPP or FEHA." The court also noted that our decision in *Hunter, supra,* 221 Cal.App.4th 1510, had held that section 425.16 does not prohibit a plaintiff from pursuing a discrimination claim based on conduct in furtherance of the right to free speech "'if he or she is able to present the "minimal" evidence necessary to demonstrate a reasonable probability of prevailing on the merits.'" The trial court concluded this language effectively rejected *Claybrooks's* holding that the First Amendment immunizes casting decisions from statutory employment discrimination claims.[4]

The court then addressed whether Hunter had made a sufficient evidentiary showing in support of his FEHA claims. Before reviewing the parties' evidence, the court considered "what 'showing' was necessary to establish a probability of prevailing in a FEHA case." The court explained that while CBS contended Hunter had to introduce evidence that Diener's proffered reason for his hiring decision was a pretext for discrimination, Hunter had effectively argued that he need only introduce evidence sufficient to establish a prima facie case of discrimination under the first step of the *McDonnell Douglas* framework.

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[4] Contrary to the trial court's suggestion, our holding in *Hunter, supra,* 221 Cal.App.4th 1510, has no relevance to the First Amendment defense at issue in *Claybrooks, supra,* 898 F.Supp.2d 986. The sole issue we considered in *Hunter* was whether CBS made a threshold showing that Hunter's discrimination claims arise from protected activity within the meaning of section 425.16. Whether the First Amendment provides a valid defense to Hunter's discrimination claim is an issue that relates to the merits prong of the anti-SLAPP analysis, which we did not address in *Hunter*.

Although the court noted the parties had presented no "direct authority" on the issue, it concluded that a plaintiff pursuing a FEHA claim that is subject to section 425.16 need only demonstrate a probability of satisfying the first step in the *McDonnell Douglas* framework. The court explained that requiring Hunter to "meet the higher burden of showing [CBS's] proffered reasons were merely pretexts" was inconsistent with the "minimal" evidentiary burden imposed under the second prong of the anti-SLAPP analysis. The court further explained that this "conclusion . . . ma[d]e sense given that an anti-SLAPP has a short time frame and there is a stay of discovery."

The court next considered whether Hunter had produced sufficient evidence to establish each of the four elements necessary to prove a prima facie case of discrimination: (1) plaintiff was a member of a protected class; (2) he applied for a position for which he was qualified; (3) he was not hired for the position; and (4) some other circumstance suggests discriminatory motive. (See *Guz v. Bechtel Nat. Inc*. (2000) 24 Cal.4th 317, 355 (*Guz*).) The court found there was "no dispute" regarding the first and third elements, explaining that Hunter's discrimination claims were predicated on personal characteristics (age and gender) that were "protected" under FEHA, and that CBS admitted Hunter was never considered for a primetime anchor position. The court also found the information in Hunter's declaration was sufficient to support a finding that he was "at least qualified for the [on-air weather anchor] position." In support, the court noted that Hunter had an educational background in broadcast meteorology and had previously served as a weather anchor on several local newscasts. Finally, the court concluded Hunter had made a prima facie showing of "discriminatory motive" by providing "some evidence that other more experienced men over the age 40 were passed over or replaced in favor of younger women. For instance, [Johnny] Mountain, the previous KCBS anchor, was an older male who was not retained and [Hunter] claims that other men who worked for [the Duopoly] were also passed over."

In assessing CBS's evidence, the court explained that the information set forth in Diener's declaration, including the reasons he had provided in support of his hiring decisions, related "only . . . to the [second step in the *McDonnell Douglas*] burden

shifting analysis." The court concluded that while this information might be relevant to a summary judgment motion, it was not relevant to determining whether Hunter had demonstrated a probability of prevailing on the merits within the meaning of section 425.16.

DISCUSSION

"Section 425.16, 'commonly referred to as the anti-SLAPP statute' [citation][5] is intended 'to provide for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' [Citation.] The section authorizes the filing of a special motion that requires a court to strike claims brought 'against a person 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 . . . unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' (§ 425.16, subd. (b)(1).)

"Section 425.16 '"requires that a court engage in a two-step process when determining whether a defendant's anti-SLAPP motion should be granted."' [Citation.] '"First the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . [¶] If the defendant makes this showing, the court proceeds to the second step of the anti-SLAPP analysis. [Citation.] In the second step, the court decides whether the plaintiff has demonstrated a reasonable probability of prevailing at trial on the merits of its challenged causes of action. [Citations.]' [Citation.]" (*Hunter, supra,* 221 Cal.App.4th at p. 1519.)

In *Hunter, supra,* 221 Cal.App.4th 1510, we held that CBS had made a threshold showing that Hunter's discrimination claims arise from protected activity. In this appeal, we address the second step of the anti-SLAPP analysis, determining whether the trial court properly concluded that Hunter demonstrated a reasonable probability of prevailing

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5 The acronym "SLAPP" stands for "strategic lawsuits against public participation." (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 312 (*Sierra.*)

on his claims. We "review de novo the question of whether the plaintiff has established a reasonable probability of prevailing." (*Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1299.)

1. Summary of the anti-SLAPP statute's merits prong

The merits prong of the anti-SLAPP statute is """intended to establish a summary-judgment-like procedure available at an early stage of litigation [for claims] that pose[] a potential chilling effect on speech-related activities."""" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714 (*Taus*).) "To demonstrate a probability of prevailing on the merits, the plaintiff must . . . present a prima facie showing of facts that, if believed by the trier of fact, would support a judgment in the plaintiff's favor. [Citations.] The plaintiff's showing of facts must consist of evidence that would be admissible at trial. [Citation.]" (*Hall v. Time Warner, Inc*. (2007) 153 Cal.App.4th 1337, 1346.)

Although the "'court considers the . . . evidentiary submissions of both parties' [citation], [it] 'does not weigh the credibility or comparative probative strength of [the] competing evidence.' [Citation.]" (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1289.) """[T]he court's responsibility is to accept as true the evidence favorable to the plaintiff. . . ." [Citation.] "[T]he defendant's evidence is considered with a view toward whether it defeats the plaintiff's showing as a matter of law, such as by establishing a defense or the absence of a necessary element." [Citation.]' [Citation.]" (*Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App.4th 892, 909.)

2. The trial court erred in concluding that Hunter was not required to produce evidence demonstrating that CBS's nondiscriminatory reason for its hiring decision was a pretext for intentional discrimination

Preliminarily, we review the trial court's conclusion that to satisfy the merits prong of the anti-SLAPP statute, a plaintiff alleging a discrimination claim that is subject to the three-part *McDonnell Douglas* test need only demonstrate a probability that he or she can establish a prima facie case of discrimination. Under the trial court's analysis, if the plaintiff is able to make such a showing, the section 425.16 motion must be denied

even when defendant has articulated a nondiscriminatory reason for the challenged employment action. CBS disagrees with the court's analysis, arguing that when a defendant has proffered a nondiscriminatory reason for its actions, the plaintiff must produce substantial evidence that the defendant's stated reasons are untrue or pretextual, or that the employer otherwise acted with a discriminatory animus.

a. Summary of the McDonnell Douglas framework

The parties agree that Hunter's FEHA claims, which allege that CBS refused to hire him because of his age and gender (see Gov. Code, § 12940, subd. (a)), are subject to the three-step "burden-shifting test that was established by the United States Supreme Court for trials of employment discrimination claims in *McDonnell Douglas* [, *supra*,] 411 U.S. 792." (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 861 (*Serri*); see also *Guz, supra,* 24 Cal.4th at p. 354 ["California has adopted the three-stage burden-shifting test established by [*McDonnell Douglas*] for trying claims of discrimination . . . based on a theory of disparate treatment"].) "This test 'reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.' [Citation.]" (*Serri, supra,* 226 Cal.App.4th at p. 861.)

"At trial, under the first step of the *McDonnell Douglas* framework, the plaintiff may raise a presumption of discrimination by presenting a 'prima facie case,' the components of which vary depending upon the nature of the claim, but typically require evidence that '"(1) [the plaintiff] was a member of a protected class, (2) [the plaintiff] was qualified for the position he [or she] sought . . ., (3) [the plaintiff] suffered an adverse employment action, such as . . . denial of an available job, and (4) some other circumstance [that] suggests discriminatory motive."' [Citations.] 'A satisfactory showing to this effect gives rise to a presumption of discrimination which, if unanswered by the employer, is mandatory – it requires judgment for the plaintiff.' [Citations.]

However, under the second step of the test, 'the employer may dispel the presumption merely by articulating a legitimate, nondiscriminatory reason for the challenged action. [Citation.] At that point the presumption disappears." [Citation.] Under the third step of the test, the 'plaintiff must . . . have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive.' [Citation.]

"The *McDonnell Douglas* framework is modified in the summary judgment context. In a summary judgment motion in 'an employment discrimination case, the employer, as the moving party, has the initial burden to present admissible evidence showing either that one or more elements of plaintiff's prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory factors.' [Citation.] . . . [¶] . . . [¶] If the employer meets its initial burden, the burden shifts to the employee to 'demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory animus, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action.' [Citation.]

"'. . . [A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory.' [Citation.]" (*Serri, supra*, 226 Cal.App.4th at pp. 861-862.)

b. The trial court erred in concluding that a plaintiff need only present a prima facie case of discrimination to demonstrate a probability of prevailing on a discrimination claim

The trial court's conclusion that the plaintiff need only introduce evidence that is sufficient to support a prima facie case of discrimination conflicts with *Decambre v. Rady Children's Hospital-San Diego* (2015) 235 Cal.App.4th 1 (*Decambre*), which applied the standard *McDonnell Douglas* burden-shifting rules to assess whether a plaintiff had satisfied its evidentiary burden under the merits prong of section 425.16. The plaintiff in *Decambre* filed FEHA claims alleging that a hospital had terminated her employment

based on her race and gender. The court found that the claims arose from protected activity, requiring the plaintiff to demonstrate a probability of prevailing on her claims. The court further concluded that to satisfy her evidentiary burden under section 425.16, the plaintiff had to do more than merely establish a prima facie case of discrimination. Rather, as in the summary judgment context, the plaintiff was required to provide substantial evidence that "the defendants' asserted rationale for the decision not to renew her contract was pretextual." (*Id*. at p. 23.)

We agree. Our Supreme Court has repeatedly held that the Legislature intended the merits prong of section 425.16 to operate as a "summary-judgment-like procedure." (*Taus, supra,* 40 Cal.4th at p. 714; see also *Delfino, supra,* 35 Cal.4th at p. 192.) Requiring a showing on the third prong effectuates this intent by assessing the merits of a discrimination claim that arises from protected activity under the same burden- shifting rules that apply to a discrimination claim in the context of summary judgment. In contrast, the trial court's approach here applied a substantially different set of rules under the merits prong of the anti-SLAPP statute, assessing only whether the plaintiff has introduced sufficient evidence to satisfy the first step of the *McDonnell Douglas* framework.

The trial court's approach also conflicts with the well-established rule that the merits prong of section 425.16 requires a plaintiff to introduce evidence that, if believed by the trier of fact, would be sufficient to support a judgment in his or her favor. (See *Taus, supra,* 40 Cal.4th at pp. 713-714; *Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1451.) Under the *McDonnell Douglas* framework, a plaintiff's satisfactory showing of a prima facie case of discrimination is not sufficient to support a judgment if the defendant has articulated a nondiscriminatory reason for the challenged employment action. Rather, a plaintiff's establishment of a prima facie case merely gives rise to a presumption of discrimination that the defendant may "dispel . . . by articulating a legitimate, nondiscriminatory reason for the challenged action. [Citation.]" (*Serri, supra,* 226 Cal.App.4th at p. 861.) Thus, once the defendant has provided a nondiscriminatory reason for the challenged action, the plaintiff can no longer rely on his

or her "bare prima facie showing," but rather must "produce 'substantial responsive evidence' demonstrating . . . pretext or discriminatory animus on the part of the employer. [Citations.]." (*Id.* at p. 862.)

The trial court's ruling appears to have been predicated on concerns that requiring a plaintiff to come forward with evidence of pretext in response to section 425.16 motion would be inherently unfair given that the filing of such a motion operates as an automatic stay "on all discovery proceedings in the action . . . . until notice of entry of the order ruling on the motion." (§ 425.16, subd. (g).) Implicit in the trial court's ruling is an acknowledgment that obtaining proof of pretext or discriminatory animus may be exceedingly difficult without the benefit of discovery, especially in cases alleging discrimination in the hiring process.

Section 425.16, subdivision (g), however, contemplates that focused discovery might be necessary in some cases: "The court, on noticed motion and for good cause shown, may order that specified discovery be conducted . . . ." "[C]ase law has interpreted good cause in this context to require a showing that the specified discovery is necessary for the plaintiff to oppose the motion and is tailored to that end. [Citations.]" (*Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1125.) Hunter never filed a motion seeking discovery related to the issue of pretext. (Cf. *Lafayette Morehouse, Inc. v. Chronicle Publishing Co*. (1995) 37 Cal.App.4th 855, 868 [discovery proper under § 425.16, subd. (g) where plaintiff makes reasonable showing that a "defendant or witness possesses evidence needed . . . to establish a [probability of prevailing on the claim]"].) Instead, he relied solely on his own declaration. Although the declaration identified several male applicants who were allegedly aware of CBS's discriminatory practices, or were otherwise discriminated against on the basis of their age and gender, Hunter provided no evidence from any of these third-party witnesses. Thus, while section 425.16 did place certain limitations on Hunter's ability to gather evidence to oppose the motion, the record demonstrates he chose not to pursue any of the avenues that were available to him.

3. Hunter failed to demonstrate a probability of prevailing on the merits

Having determined how the *McDonnell Douglas* framework is to be applied in the context of a merits prong analysis under section 425.16, we next consider whether Hunter introduced sufficient evidence to demonstrate a reasonable probability of prevailing on the merits of his FEHA claims. For the purposes of its motion to strike, CBS does not dispute that Hunter provided sufficient evidence to establish a prima facie case of discrimination.[6] Hunter, in turn, does not dispute that Diener's declaration sets forth a nondiscriminatory reason for CBS's hiring decision. Accordingly, we need only determine whether Hunter satisfied his burden under the third prong of the *McDonnell Douglas* test, which required Hunter to produce evidence that CBS's nondiscriminatory reason was "'"'untrue or pretextual, or evidence [CBS] acted with a discriminatory animus, . . . such that a reasonable trier of fact could conclude [CBS] engaged in intentional discrimination.'"' [Citations.]" (*Batarse v. Service Employees Intern. Union Local 1000* (2012) 209 Cal.App.4th 820, 834; *Guz, supra*, 24 Cal.4th at p. 356.)

"Circumstantial evidence of '"pretense" must be "specific" and "substantial" in order to [support a rational inference that] the employer intended to discriminate' on an improper basis." (*Morgan, supra*, 88 Cal.App.4th at p. 69.) "It is not sufficient for an employee to . . . simply deny the credibility of the employer's witnesses or to speculate as to discriminatory motive." (*Serri, supra*, 226 Cal.App.4th at p. 862.) "'"Rather, the [plaintiff] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the [defendant's] proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,' [citation] and hence infer 'that the employer did not act for the [the asserted] non-discriminatory reasons.'"' [Citation.]" (*Decambre, supra*, 235 Cal.App.4th at pp. 23-24.)

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6 In its trial court memorandum, CBS clarified that while it did not believe Hunter would ultimately be able to prove even a prima facie case of discrimination, it was nonetheless willing to "assume" he had made such a showing "for the purpose of [the motion to strike] motion only."

Diener's declaration states that he did not "consider [Hunter] . . . for . . . any on-air position at the Duopoly" because, based on his review of Hunter's demo reel, he did not believe Hunter had the "talent, skill or on-air presence to be an on-air weather broadcaster in the Los Angeles market." In response, Hunter contends the following circumstantial evidence is sufficient to support a "rational inference that intentional discrimination . . . was the true cause of [CBS']s action" (*Guz, supra*, 24 Cal.4th at p. 361): (1) the Duopoly hired young women to fill both of its prime time weather anchor positions; (2) Hunter was arguably "more qualified than both of the . . . female [hires] in terms of years on the air, weather-related education, broadcast experience in major markets, range of weather related experiences"; (3) CBS "passed over" four other male candidates who Hunter believed to be "as or more qualified than Johnson or Taft by virtue of their experience and training"; (4) CBS admitted that it used "subjective" criteria in selecting its prime time weather anchors; (5) CBS produced no evidence that it publicly advertised either of the primetime anchor positions.

"Consider[ed] as a whole," and treated for the purposes of this analysis as true, Hunter's evidence is insufficient to permit a rational inference that CBS's "innocent explanation for its actions" was pretext for intentional discrimination, or that CBS otherwise acted with discriminatory animus. (*Guz, supra*, 24 Cal.4th at p. 361.) Preliminarily, we note that none of Hunter's evidence directly refutes the reason Diener articulated in support of CBS's decision not to hire Hunter, which related to Diener's evaluation of Hunter's on-air presence and presentation skills. More specifically, Hunter has provided no evidence suggesting that Diener or any other CBS employee involved in the hiring decision did in fact believe Hunter's on-air presence or presentation skills were strong enough to warrant consideration for an on-air weather broadcaster position in the Los Angeles market.[7]

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[7] The only argument in the respondent's brief that directly references Diener's proffered reason for the hiring decision consists of a single sentence stating: "[Hunter's] evidence suggests that Diener's declaration contains [a] false assertion[] regarding the reason[] why [Hunter] was not selected. . . . Diener claims that [Hunter's] presentation

Moreover, none of the evidence Hunter cites is sufficient to demonstrate that the nondiscriminatory reason CBS provided in support of its hiring decision is so weak, implausible or incoherent that a trier of fact could rationally infer that illegal discrimination was its true motive. (See *Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1195.) First, given their respective qualifications, the fact that CBS hired two younger women to serve as its primetime weather anchors does not support a rational inference of pretext or discriminatory animus. As explained in Diener's declaration, Jackie Johnson and Evelyn Taft both had substantial experience serving as full-time weekday weather anchors in cities with large television markets. Prior to her promotion to the KCBS primetime weather anchor position, Johnson had spent five-and-a-half years serving as the primetime weather anchor at the Duopoly's other station (KCAL). According to Diener, CBS made an internal decision to promote Johnson to KCBS because she had been popular among viewers in the Los Angeles market, which is the second largest market in the country. Before being hired to fill the KCAL weather anchor vacancy left by Johnson, Evelyn Taft had approximately five years of experience serving as an on-air news anchor in three different California markets. During the three years immediately preceding her hire at KCAL, Taft had served as the weather anchor on KRON San Francisco's seven hour morning newscast, which was "the longest morning show in the country." Diener's declaration explained that San Francisco was the sixth largest market in the country, and that Taft had several competing offers at the time she signed with CBS. Hunter has provided no evidence disputing that these prior experiences qualified Johnson and Taft for the positions into which they were hired.

Hunter's second category of evidence, which consists of statements regarding his own weather broadcasting training and experience, is likewise insufficient to support a

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was 'hokey and over the top.' . . . [Hunter], however, won the Radio Television News Association Golden Mike award in 2009 for 'best weather segment.'" Hunter has provided no further information regarding the "Golden Mike award." The fact that Hunter won an industry award for a weather segment that Diener may or may not have seen does not refute Diener's statement that he personally found Hunter's presentation to be "hokey and over the top."

rational inference of pretext or discriminatory animus. Hunter's subjective belief that his training and experience as a weather anchor made him "as or more qualified" than Johnson or Taft for a position in the Los Angeles market does not permit an inference of discriminatory intent. (See *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 816 ["[a]n employee's subjective personal judgments of his or her competence alone do not raise a genuine issue of material fact"].) Moreover, the nondiscriminatory reason that CBS provided for not hiring Hunter was not related to his lack of prior training and experience as a weather broadcaster, but rather was based on Diener's evaluation of Hunter's on-air presence and presentation skills. Simply put, the fact that Hunter had spent many years working in the weather broadcast field does not undermine Diener's assertion that he did not believe Hunter had sufficient talent to serve as a weather anchor in the Los Angeles market. Hunter's evidence also shows he had substantially less experience serving as a full-time daily weather anchor than either of the women who CBS hired for its primetime anchor positions. According to his declaration, Hunter's post-college work experience included only one year of service as a daily weather anchor. His other on-air positions were limited to weekend and weekday "fill-in" weather anchor positions in Santa Barbara, Palms Springs and San Diego.

Hunter also argues that an inference of discrimination arises from the fact that CBS "passed over" four other qualified male applicants over the age of 40. However, Hunter provides no explanation why CBS's decision not to hire these other male candidates is relevant to proving that CBS relied on Hunter's gender or age in rejecting his own candidacy. Presumably, Hunter is contending that this evidence establishes a pattern of refusing to hire older male candidates to serve as primetime weather anchors, thereby demonstrating CBS's decision not to hire him was likewise predicated on these prohibited factors. Our Supreme Court has admonished, however, that "numerical favoritism . . . within an extremely small employee pool" is generally not sufficient to support an inference of intentional discrimination because "the sample [i]s too minuscule to demonstrate a statistically reliable discriminatory pattern." (*Guz, supra,* 24 Cal.4th at p. 367.) In this case, the total number of applicants within the pool that Hunter relies

on— six applicants for two slots (seven applicants if Hunter is included)—is too small to raise an inference of discriminatory animus. (See *id*. at pp. 167-168 [statistical pool of six employees too small to raise an inference of discriminatory animus; citing with approval cases holding that sample sizes ranging from 28 to 51 employees is too small to raise inference of discrimination].)

Moreover, Hunter's implied assertion that CBS chose not to hire any of these four male candidates for a primetime anchor position because of their age and gender is wholly speculative. Hunter has provided no affidavits or declarations from any of the four candidates, nor has he provided any information regarding what occurred during each candidates' application process. Instead, Hunter's declaration asserts only that he was "aware" each candidate applied for the KCBS and KCAL primetime weather anchor positions, and that based on his own "knowledge and experience," he "knows" they were each qualified for the positions. Although Hunter apparently believes CBS declined to hire any of the four men because of their gender and age, the record demonstrates his opinions are based entirely on speculation, rather than actual evidence.[8] (See *King v. United Parcel Service, Inc*. (2007) 152 Cal.App.4th 426, 433 ["plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations"].)

Hunter also ignores evidence regarding CBS's conduct toward other male weather anchors that militates against an inference his own hiring decision was based on gender or age. Diener's declaration explains that after reviewing numerous applications for KCAL's weather anchor position, he narrowed the field to eight candidates, five of whom were men and three of whom were women. Diener then selected two finalists for the

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8 Hunter also implies that a trier of fact could conclude that KCBS's former primetime weather anchor Johnny Mountain, a male over the age of 40, was forced out of his position due to his gender and age. However, the only evidence Hunter has provided regarding the circumstances of Mountain's departure from CBS is a statement in his declaration asserting that Mountain told him his contract was not renewed. Because Hunter has provided no evidence regarding why CBS did not renew the contract, it would be wholly speculative to conclude the decision was motivated by discriminatory animus.

position, one of whom was Jim Castillo, a male over the age of 40. Shortly after choosing Taft to fill the KCAL weather anchor position, Diener appointed Josh Rubenstein, another male over the age of 40, to serve as the morning weather anchor for KCBS. He also hired Rich Fields, another male over the age of 40, to serve as a weekend and fill-in anchor. Diener's declaration makes clear that CBS never contacted or even considered Hunter for any of these positions. The fact that CBS considered male applicants other than Hunter for the KCAL primetime anchor position, and then placed two males over the age of 40 other than Hunter into on-air weather positions, supports Diener's assertion that he did not reject Hunter because of his gender or age, but rather because he did not believe Hunter had the requisite on-air skills to succeed in the Los Angeles market.

The remaining categories of evidence that Hunter cites—CBS's reliance on subjective criteria and its failure to post job notices regarding the weather anchor openings—are also insufficient to raise an inference of intentional discrimination. Diener's declaration states that CBS used subjective factors in selecting its weather anchors, including "on-air presence" and "chemistry with other members of the news team." Citing language from *Hicks v. KNTV Television, Inc*. (2008) 160 Cal.App.4th 994, Hunter contends that "[s]ubjective evaluations may lend themselves to discriminatory abuse and should, therefore, be closely scrutinized." (*Id*. at p. 1005.) However, Hunter overlooks other language in *Hicks* explaining that the use of subjective hiring criteria is generally insufficient to support an inference of pretext or discriminatory intent, especially in the context of newscasters: "The fact that [defendant's employment decision] was based upon subjective criteria does not, by itself, demonstrate pretext. It is true, as plaintiff maintains, that subjective evaluations may lend themselves to discriminatory abuse and should, therefore, be closely scrutinized. [Citation.] But there is nothing inherently suspect in the use of subjective criteria. '"Indeed, subjective evaluations of a job candidate are often critical to the decision making process, and if anything, are becoming more so in our increasingly service-oriented economy. . . . Subjective criteria could be even more important in evaluating a television news anchor

who represents the employer to the entire television audience. It is certainly possible that a station could use an objection to the anchor's style or personality as a pretext for unlawful racial discrimination. But absent some evidence that the station made its decisions based upon race, the mere use of subjective criteria does not permit us to second guess the employer's business judgment. [Citation.]" (*Ibid*.) We agree with *Hicks's* conclusion that in the absence of other evidence showing discriminatory motive, CBS's use of subjective criteria in hiring its newscasters does not support an inference of discrimination.

Finally, Hunter repeatedly asserts that CBS's failure to publicly advertise its weather anchor openings at KCBS and KCAL "is evidence of discriminatory intent." The only authority he cites in support of this assertion is *Ferdinand-Davenport v. Children's Guild* (D. Md. 2010) 742 F.Supp.2d 772. In that case, however, the district court merely concluded that the plaintiff's allegation that the employer had failed to interview candidates and failed to notify the plaintiff of a job opening despite her repeated inquiries were relevant factors in assessing whether she had properly pleaded a prima facie case of discrimination under the first prong of the *McDonnell Douglas* test. There is no suggestion in *Ferdinand-Davenport* that an employer's failure to publicly advertise a job opening is sufficient to raise an inference of pretext.

In sum, Hunter's evidence shows nothing more than that CBS hired two women who had substantial prior experience serving as weekday weather anchors in large markets, and that several male candidates over the age of 40 with relevant broadcasting experience had applied for those positions. Moreover, CBS provided undisputed evidence that it interviewed, promoted and hired several other male weather anchors over the age of 40. Considered as a whole, such evidence is insufficient to support a rational inference that Diener's nondiscriminatory reason for not hiring Hunter was pretext for

intentional discrimination. Accordingly, Hunter has failed to demonstrate a probability of prevailing on the merits of his FEHA claims.[9]

DISPOSITION

The trial court's order denying appellant's motion to strike pursuant to section 425.16 is reversed. On remand, the trial court shall enter a new order granting the motion to strike and enter a judgment in appellant's favor. Appellant shall recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.

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[9] Because we conclude Hunter's evidence was insufficient to demonstrate a probability of prevailing on the merits, we need not consider CBS's alternative argument that the First Amendment provides a complete defense to Hunter's FEHA claims.