

# California FEHA Forecast: Evidence of Pretext Required in Anti-SLAPP Case Against TV Stations

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By [Danielle Ochs](#)

On January 19, 2016, a California Court of Appeal issued an unpublished decision in *Hunter v. CBS Broadcasting, Inc.* The case was brought by Kyle Hunter, who filed an employment discrimination complaint, claiming that two local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.” He asserted that CBS’s failure to hire him was part of “[a] plan to turn prime time weather broadcasting over to younger attractive females” in violation of the California Fair Employment and Housing Act (FEHA).



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to hire him was part of “[a] plan to turn prime time weather broadcasting over to younger attractive females” in violation of the California Fair Employment and Housing Act (FEHA).

CBS filed a special motion to strike Hunter’s complaint pursuant to California’s Code of Civil Procedure (CCCP) section 425.16, commonly referred to as California’s “anti-SLAPP” statute. CBS argued on appeal that “whom to hire as [its] on-air weather anchors” qualified as an act in furtherance of its right to free speech within the meaning of CCCP section 425.16(e) (4), and therefore constituted “protected activity” under the statute. Finding that such conduct was “speech” and that CBS had satisfied the “protected activity” prong of the two-part anti-SLAPP analysis, the Court of Appeal remanded the case to the trial court to consider the second step of the analysis—whether the plaintiff demonstrated a reasonable probability of prevailing at trial on the merits of his challenged causes of action.

On remand, the trial court denied CBS’s special motion to strike, concluding that Hunter had demonstrated a probability of prevailing on the merits of his claims. The trial court concluded that a plaintiff pursuing a FEHA claim subject to CCCP section 425.16 need only demonstrate a probability of satisfying the first step in the McDonnell Douglas framework—a *prima facie* case of discrimination—and did not need to overcome the defendant’s showing of legitimate, nondiscriminatory reasons by demonstrating pretext. The case was sent back to the Court of Appeal, which reversed the trial court’s ruling, holding that a plaintiff pursuing a FEHA claim subject to CCCP section 425.16 must satisfy all three steps of the McDonnell Douglas framework, including demonstrating that the defendant’s legitimate, nondiscriminatory reasons for the adverse employment action were actually pretext for discrimination.

In reaching the determination that Hunter could not rebut CBS’s legitimate, nondiscriminatory reasons for not hiring him (which included evidence that CBS believed Hunter lacked the talent and skill to be an on-air weather broadcaster in the highly competitive Los Angeles market), the Court of Appeal invoked the often-cited standard required to show pretext to avoid summary judgment on a FEHA claim. In this regard, the court cited a 2000 Court of Appeal case, stating that “[c]ircumstantial 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.” The court reaffirmed that,

“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.’”

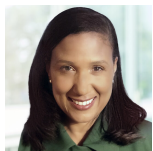
The court noted that none of Hunter’s evidence directly refuted the reasons supporting CBS’s decision not to hire him, which related to its evaluation of his on-air presence and presentation skills. Hunter did not provide any evidence suggesting that any CBS employee did, in fact, believe that Hunter’s on-air presence or presentation skills were strong enough to warrant consideration, and Hunter’s own subjective beliefs about

his abilities were insufficient evidence of discriminatory intent. Hunter also failed to present evidence challenging the qualifications of the woman who was hired. Further, the statistical pool was too small to establish a pattern based on CBS's decision not to hire the other male candidates who had applied for the positions, many of whom progressed much farther in the hiring process than Hunter did. Finally, the court held that the mere use of subjective criteria to evaluate candidates and the failure to publicly advertise available positions were not in themselves evidence of discriminatory motive.

### **Key Takeaways**

Although unpublished, this case should remind employers of the importance of documenting the legitimate, nondiscriminatory reasons for their employment decisions. Doing so minimizes a future plaintiff's ability to baselessly argue that an employer's decision was pretextual and increases the probability of prevailing on anti-SLAPP motions and subsequent motions for summary judgment.

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