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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

HOLLY ANN HALLSTROM, Plaintiff and Appellant, v. BOB BARKER et al., Defendants and Respondents.	B165008 (Los Angeles County Super. Ct. No. BC140407)

APPEAL from a judgment of the Superior Court of Los Angeles County. George H. Wu, Judge. Affirmed in part; reversed in part.

Nick A. Alden for Plaintiff and Appellant.

Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, Patricia L. Glaser and Sean Riley for Defendants and Respondents Bob Barker, TPIR, LLC, Jeremy Shamos, Roger Dobkowitz and Jonathan Goodson.

Sidley Austin Brown & Wood, Jeffrey A. Berman, James M. Harris and Sonya S. Brenner for Defendants and Respondents Mark Goodson Productions, L.P., Price Productions, Inc.

After being fired from her role as a model on a television game show plaintiff brought this action against defendants for violation of the Fair Employment and Housing Act (FEHA), breach of contract, defamation, violation of the Labor Code, abuse of process and infliction of emotional distress. The issues in this case revolve around plaintiff's claims defendants trimmed her from the show because she had a disability which caused her to gain weight or in retaliation for her refusal to back the show's host when another model sued him for sexual harassment.

FACTS AND PROCEEDINGS BELOW

For 19 years Holly Hallstrom appeared as a model on the television game show "The Price Is Right." Her employment on the show ended in 1995. The parties dispute whether Hallstrom resigned or was terminated but defendants conceded the issue of termination for purposes of their motion for summary adjudication.

According to Hallstrom, the events leading up to her termination were triggered when another of the show's models, Dian Parkinson, brought a FEHA action for sexual harassment against the host and executive producer, Bob Barker, and Hallstrom refused to "rally to [Barker's] defense." In retaliation, Barker and others affiliated with the show attempted to force her to resign citing as their reason the fact she had recently gained weight and was too fat to model swimsuits. Hallstrom admitted she had gained some weight in the months prior to her termination as the result of taking a prescription medication to treat her hormone imbalance. She denied this weight gain adversely affected her ability to perform as a model on the show. When Hallstrom rejected defendants' retirement offer they fired her.

After she was fired, Hallstrom gave interviews on television shows and in newspapers stating Barker and the show's producers forced her off the show because she had gained weight.

Hallstrom's television appearances and interviews caused Barker and the show's production company, TPIR, LLC, to bring a defamation action against her. The complaint alleged Hallstrom's statements to the media claiming defendants forced her off the show were false and made with malice.

Hallstrom cross-complained against Barker, TPIR, its predecessor Mark Goodson Productions (MGP) and other related individuals (hereafter "defendants"). She stated "[i]n the spring of 1995, [she] gained weight because of prescription medication [she] was taking. [Defendants] criticized and harassed [her] because of her weight gain, and attempted to force [her] to resign her employment." She further stated that although she lost the weight during the summer hiatus of "The Price Is Right," defendants terminated her nevertheless and hired a younger model to replace her. Hallstrom alleged her termination violated the FEHA's prohibitions against discrimination based on disability, age and sex as well as an implied contract she would not be fired from the show without good cause. She also alleged causes of action for defamation, violation of the Labor Code, abuse of process and intentional infliction of emotional distress.

Defendants filed a petition to compel arbitration of all causes of action except the FEHA discrimination claims. They argued Hallstrom was a member of the American Federation of Television and Radio Artists (AFTRA) and the terms of her employment were governed by the AFTRA National Code of Fair Practice for Network Television Broadcasting ("AFTRA agreement"), which contains an arbitration provision. The trial court denied the motion to compel. It found the non-contract causes of action were not arbitrable and the contract cause of action, although arbitrable, should be stayed pending the outcome of the non-arbitrable claims. We affirmed the trial court's order in an unpublished opinion.[1]

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[1] *Barker v. Hallstrom* (Dec. 21, 1998, B107908) [nonpub. opn.].

Defendants subsequently moved for summary adjudication on the causes of action not subject to arbitration. The trial court granted the motion and ordered the parties to arbitration on the breach of contract cause of action.[2] Barker and TPIR dismissed their defamation action against Hallstrom.

Four months later Hallstrom moved to amend her cross-complaint to allege defendants terminated her in violation of public policy because she refused to aid Barker in defending the FEHA action brought by former model Parkinson. The trial court denied this motion.

In the arbitration proceeding the arbitrator dismissed Hallstrom's contract claim as untimely because she had not initiated arbitration within 12 months from the time the claim arose as required by the AFTRA agreement. The trial court granted defendants' petition to confirm the award.

This appeal timely followed the entry of judgment for defendants.

We reverse the trial court's rulings (1) granting defendants' motion for summary adjudication on Hallstrom's causes of action for disability and age discrimination, defamation and violation of Labor Code section 1050; (2) denying her motion to amend her complaint to allege wrongful discharge in violation of public policy (retaliation for opposing sexual harassment); and (3) sustaining defendants' demurrer to her cause of action for infliction of emotional distress. We affirm the trial court's rulings (1) granting defendants' motion for summary adjudication on Hallstrom's causes of action for sex discrimination and abuse of process, and (2) confirming the arbitration award for defendants on Hallstrom's cause of action for breach of contract.

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[2] The trial court earlier sustained a demurrer to the cause of action for infliction of emotional distress on the ground the claim was barred by the Workers Compensation Act. We reverse that ruling. See Part VII, *post*.

DISCUSSION

I. TRIABLE ISSUES OF FACT EXIST AS TO HALLSTROM'S CLAIM OF DISABILITY DISCRIMINATION.

Hallstrom's first cause of action, labeled "medical condition discrimination," alleges in relevant part: "During the Spring of 1995, Hallstrom was required to take prescription medication for a hormonal condition. This medication caused Hallstrom to gain weight. Hallstrom requested a reasonable accommodation from [defendants] to allow her to lose the extra weight during a regular vacation period while the show was on hiatus during the summer of 1995. [Defendants] . . . refused that accommodation. Although Hallstrom lost the extra weight prior to the resumption of the taping of the show, she was nevertheless terminated due to her perceived weight problem. The [FEHA] prohibits discrimination in employment on the basis of a medical condition." Hallstrom asserts she lost the extra weight by discontinuing the medication prescribed for her hormone condition. She ceased taking the medication, she says, after Barker told her to "do whatever it takes" to lose the weight.

In California, employment discrimination is unlawful whether based on a "medical condition" or on a "physical disability."[3] These are separate forms of discrimination; each with its own statutory definition.

At the time Hallstrom was terminated from her employment a "medical condition" for FEHA purposes was limited to "any health impairment related to or associated with a diagnosis of cancer[.]"[4] The much broader category of "physical disability" was then and is now defined by a two prong test. A "physical disability" includes, but is not limited to, "any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (A) Affects one or more . . . body systems [including

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[3] Government Code section 12940, subdivision (a).

[4] Government Code section 12926, former subdivision (f), (Stats. 1993, ch. 1214, § 5).

the reproductive system] (B) Limits an individual's ability to participate in major life activities."[5]

In their motion for summary adjudication, defendants argued Hallstrom could not prevail on a cause of action for discrimination based on a "medical condition." She never contended her hormone imbalance was "related to or associated with a diagnosis of cancer" and, in fact, made judicial admissions to the contrary. We agree with defendants and the trial court. Hallstrom cannot maintain an action for discrimination based on "medical condition."

Anticipating Hallstrom would claim her first cause of action was actually for discrimination based on "disability," not "medical condition," defendants explained why this argument too must fail. Hallstrom did not allege disability discrimination in the claim she filed with the Department of Fair Employment and Housing (DFEH). Therefore she cannot base a civil complaint on violation of the FEHA.[6] Furthermore, a modest gain in weight is not a "disability" protected by the FEHA. Finally, even if Hallstrom could establish a prima facie case of disability discrimination the uncontradicted evidence shows defendants had a legitimate, nondiscriminatory reason for terminating her employment.

We find defendants' arguments unconvincing as to the claim of disability discrimination. For the reasons explained below we conclude triable issues of fact exist as to whether Hallstrom suffered from a disability and whether defendants terminated her because of such disability.

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[5] Government Code section 12926, former subdivision (k), (Stats. 1993, ch. 1214, § 5.)

[6] *Rojo v. Kliger* (1990) 52 Cal.3d 65, 83 (exhaustion of DFEH administrative remedies is a prerequisite to a civil action based on a violation of the FEHA.)

A. Hallstrom's Claim Of Disability Discrimination Is Not Barred For Failing To Exhaust The DFEH Administrative Remedy.

Defendants contend Hallstrom cannot sue on a claim of disability discrimination because she never mentioned the word "disability" in her DFEH claim form and did not check the box on the form marked "physical disability" to indicate she claimed discrimination for that reason.[7] Instead she checked the boxes for discrimination based on "sex," "age" and "medical condition." Furthermore, in the narrative explaining the basis of her claim Hallstrom consistently stated she was discriminated against because of her "medical condition."[8]

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[7] In a related action Hallstrom sued her original attorney for malpractice for failing to allege disability discrimination in her claim filed with the DFEH. The trial court sustained the attorney's demurrer on the ground the action was barred by the one-year statute of limitations on malpractice claims. We affirmed in an unpublished opinion. (*Hallstrom v. Feldman* (2003) B159016 [unpub. opn.] 2003 WL 21744094.) Defendants contend *Feldman* held Hallstrom's failure to exhaust her administrative remedy with respect to a disability claim precluded her from later asserting it as part of the present civil action against Barker. *Feldman* does not contain such a holding. When an appeal arises from the sustaining of a demurrer we are required to assume the truth of the complaint's *allegation* Feldman's negligence barred Hallstrom from asserting a disability discrimination claim in the present litigation against Barker. (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 746.) We did not decide the exhaustion issue on the merits.

[8] Hallstrom stated: "I was frequently harassed, discriminated against, and confronted in an embarrassing manner by Bob Barker and other agents of my employer because of my medical condition. I requested a reasonable accommodation to allow me to lose the weight during a regular vacation period (a hiatus in taping) because of my medical condition, and was refused that accommodation. . . . I believe I have been harassed, discriminated against and terminated based upon my medical condition, my age, and my sex, because of the perception that as a female I would continue to have such a medical condition."

Hallstrom's failure to check the "physical disability" box on the DFEH complaint form is not determinative.[9]

In deciding whether a plaintiff in a civil action has exhausted her DFEH administrative remedy California courts have followed the lead of the federal courts in Title VII cases by liberally interpreting the plaintiff's DFEH claim. Violations not specifically mentioned in a DFEH claim can be included in a civil complaint if they reasonably would have been discovered in the agency's investigation of the charged violations or if they are "like or related" to those specified in the DFEH claim form.[10] We conclude Hallstrom's civil action for disability discrimination meets both these tests.

In her DFEH claim form Hallstrom explained she "experienced a weight gain due to prescribed hormonal medication which [she] was required to take due to a medical condition." Her employers told her to "lose weight or risk termination of [her] employment." She requested "a reasonable accommodation to allow [her] to lose the weight during a regular vacation period." Although she lost the weight prior to the resumption of the show, she "was nevertheless terminated due to [her] perceived 'weight problem.'"

Hallstrom's claim clearly links her medical condition (hormonal imbalance) to discrimination based on an alleged disability (weight). Furthermore, Hallstrom's reference to "reasonable accommodation" suggests she is pleading disability discrimination because the duty to afford reasonable accommodation only applies to those with physical or mental disabilities, not those with "medical conditions."[11] When the claim is read in context it is obvious Hallstrom is using the term "medical condition"

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[9] Compare *Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal.App.4th 846, 859 [plaintiff's failure to check the "national origin" box on the DFEH form was a "technical defect" which did not preclude his action under the FEHA for discrimination based on "race" because "race" and "national origin" are "reasonably related"].

[10] *Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 381; *Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3d 1057, 1065; *Sanchez v. Standard Brands, Inc.* (5th Cir. 1970) 431 F.2d 455, 466.

[11] Government Code section 12940, subdivision (m).

not only to refer to her hormonal imbalance but also to refer to her weight gain brought on by the medication she took for the hormonal imbalance. We believe DFEH investigators would interpret this claim as one for discrimination based on weight or, if not, an investigation of the claim would quickly reveal this to be its substance.

The present case is similar in this respect to *Baker v. Children's Hospital*. In *Baker*, the court reversed a summary judgment for defendant and allowed the plaintiff to pursue a civil action under the FEHA for harassment, biased evaluations, and denial of pay raises and promotions due to his race and in retaliation for pursuing an internal grievance even though his DFEH claim only alleged racial discrimination in the terms of his employment.[12] The court held the civil complaint's "allegations of harassment and differential treatment encompass the allegations of discrimination in [plaintiff's] DFEH complaint."[13] Moreover, the court stated, "it is reasonable that an investigation of the allegations in the original DFEH complaint would lead to the investigation of subsequent discriminatory acts undertaken by respondents in retaliation for appellant's filing an internal grievance."[14]

The Legislature has directed the provisions of the FEHA "shall be construed liberally for the accomplishment of [its] purposes[.]"[15] It would be inconsistent with the remedial purpose of the FEHA to impose technical pleading requirements on lay persons who often file their DFEH complaints without the aid of an attorney and in the throes of emotional distress from their employers' unlawful conduct.[16] A lay person could very easily equate having a "disability" with having a "medical condition" not realizing

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[12] *Baker, supra*, 209 Cal.App.3d at pages 1060-1061.

[13] *Baker, supra*, 209 Cal.App.3d at page 1065.

[14] *Baker, supra*, 209 Cal.App.3d at page 1065.

[15] Government Code section 12993, subdivision (a).

[16] See *Loe v. Heckler* (D.C. Cir. 1985) 768 F.2d 409, 417 [construing Title VII exhaustion requirement]; and see *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1290 [the DFEH complaint "is not intended as a limiting device"].

"medical condition" is a term of art under the FEHA and covers only limited conditions involving cancer and, more recently, genetic characteristics.[17]

As a separate and independent ground for rejecting defendants' exhaustion argument we note "disability discrimination can form the basis of a common law wrongful discharge claim."[18] Exhaustion of the FEHA administrative remedy is not required before a plaintiff may bring a common law wrongful discharge claim.[19]

The fact the complaint purported to plead a statutory cause of action under the FEHA does not prevent us from treating it as alleging a common law cause of action.

It is well settled the issues to be addressed on a defendant's motion for summary judgment or summary adjudication are framed by the plaintiff's complaint.[20] This means the plaintiff, in opposing the motion, cannot present a moving target by creating issues outside the complaint.[21] On the other hand, the defendant must show "that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial."[22] In ruling on the motion the affidavits of the moving party are strictly construed and those of the opposing party are liberally construed.[23]

In the present case the allegations of the complaint, like the allegations of the DFEH claim, can reasonably be read as alleging disability discrimination. Furthermore, there is no prejudice to defendants in reading it this way because, as previously noted,

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[17] Government Code section 12926, subdivision (h).

[18] *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1161.

[19] *Rojo v. Kliger, supra,* 52 Cal.3d at page 88.

[20] *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1343.

[21] *Tsemetzin v. Coast Federal Savings & Loan Assn., supra,* 57 Cal.App.4th at page 1342.

[22] *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 840; citation and internal quotation marks omitted.

[23] *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 148.

defendants anticipated Hallstrom would attempt to treat her claim as one for disability discrimination and directed their motion for summary adjudication to that claim.

B. Triable Issues Of Fact Exist As To Whether Hallstrom's Weight Gain Qualified As A Disability Under The FEHA.

In *Cassista v. Community Foods, Inc.* a woman standing five feet four inches and weighing over three hundred pounds applied for a job in a health food store.[24] After being rejected three times she sued the store for employment discrimination under the FEHA claiming she was denied employment on the basis of a physical disability: "'too much weight.'"[25] At the conclusion of plaintiff's evidence the defendant moved for a nonsuit arguing the plaintiff failed to provide evidence from which the jury could conclude she was disabled within the meaning of the FEHA. The trial court denied the motion for nonsuit but ultimately the jury returned a unanimous verdict in the defendant's favor. Our Supreme Court upheld the judgment for defendant on the ground the trial court should have granted the motion for nonsuit because plaintiff failed to present any evidence her weight was a physical disability under the FEHA or that the defendant perceived it as such.[26] The court held "weight unrelated to a physiological, systemic disorder" does not "constitute[] a handicap or disability." In other words, stating the test affirmatively, "an individual who asserts a violation of the FEHA on the basis of his or her weight must adduce evidence of a physiological, systemic basis for the condition."[27]

Hallstrom has shown she can meet this requirement. She submitted evidence her weight gain resulted from the prescribed medication she took to control her hormonal imbalance. Unlike the plaintiff in *Cassista,* Hallstrom's weight was not a "'self-imposed condition resulting from [her] voluntary action or inaction'" nor the result of

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[24] *Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1053.

[25] *Cassista*, *supra*, 5 Cal.4th at page 1054.

[26] *Cassista*, *supra*, 5 Cal.4th at page 1066.

[27] *Cassista*, *supra*, 5 Cal.4th at page 1065.

"'environmental, cultural [or] economic characteristics[.]'"[28] In the present case it is undisputed Hallstrom's hormonal condition is the result of a hysterectomy she had in 1972. Furthermore, medical opinion exists linking hormonal imbalance itself to ovulation disorders and infertility.[29] Thus a triable issue exists as to whether Hallstrom's weight gain was related to a "physiological . . . disorder [or] condition" affecting her "reproductive"[30] system thereby meeting the first prong of the test for a "physical disability" under the FEHA.

To satisfy the second prong of the physical disability test Hallstrom's physiological disorder or condition must "limit[] [her] ability to participate in major life activities."[31] At the time Hallstrom was terminated the DFEH regulations defined "major life activities" to include "functions such as . . . working" and provided "[p]rimary attention is to be given to those life activities that affect employability, or otherwise present a barrier to employment or advancement."[32]

Defendants contend Hallstrom cannot satisfy the limitation prong because she insists she did not have a "weight problem." On the contrary, she claims she could perform her role on the show just as she always did and she only lost weight because Barker told her to do so. Furthermore, prior to the time she was fired she had stopped taking the medication which caused her weight gain. And, finally, she admitted in her deposition her hormone imbalance did not prevent her from obtaining a full time job elsewhere.

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[28] *Cassista*, *supra*, 5 Cal.4th at page 1064, citations omitted.

[29] Connolly, Constitutional Issues Raised By States' Exclusion Of Fertility Drugs From Medicaid Coverage In Light Of Mandated Coverage Of Viagra (2001) 54 Vanderbilt L. Rev. 451**,** 461, footnote 53; Gilbert, Infertility And The ADA: Health Insurance Coverage For Infertility Treatment 63 Def. Couns. J. 42, 42.

[30] Government Code section 12926, subdivision (k)(1)(A).

[31] Government Code section 12926, subdivision (k)(1)(B) (Stats. 1993, ch. 1214, § 5.)

[32] California Administrative Code, title 2, section 7293.6, subdivision (e)(2)(a).

Hallstrom counters that under the FEHA an employee need not *be* disabled if her employer *regards* her as disabled.[33] Furthermore, she argues, to establish disability discrimination a person need only show she is precluded from engaging in her particular employment.[34]

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[33] At the time Hallstrom was terminated Government Code section 12926, subdivision (k) stated "'[p]hysical disability' includes, but is not limited to . . . (3) Being regarded as having or having had a disease, disorder, condition, . . . or health impairment described in paragraph (1) or (2)." (Stats. 1993, ch. 1214, § 5.) As previously discussed hysterectomies and hormonal imbalances are impairments affecting the reproductive system and therefore come within paragraph (1) of subdivision (k). See discussion at pages 11-12, *ante*.

[34] Government Code section 12926.1, subdivision (c). The statute states in full: "The Legislature finds and declares as follows:
(a) The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (Public Law 101-336). Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.
(b) The law of this state contains broad definitions of physical disability, mental disability, and medical condition. It is the intent of the Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.
(c) Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease. In addition, the Legislature has determined that the definitions of "physical disability" and "mental disability" under the law of this state require a "limitation" upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a "substantial limitation." This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, "working" is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.
(d) Notwithstanding any interpretation of law in *Cassista v. Community Foods* (1993) 5 Cal.4th 1050, the Legislature intends (1) for state law to be independent of the

In her declaration opposing summary adjudication Hallstrom stated: "[I]n the Spring of 1995, Barker started badgering me about my weight. I explained to him about my hormonal imbalance and that, as I understood it, until the medication succeeded in balancing my hormones, the only way I could lose the weight immediately was by going off the medication. Barker told me 'do whatever it takes, just lose the weight.'" The following day the CEO of the show's production company came to Hallstrom's dressing room and told her he was there to "to discuss [her] 'weight problem.'" After the show finished taping that evening the director came to Hallstrom's dressing room and told her Barker "wanted to shoot [her] differently because of [her] weight problem, and that he would be cutting [her] out of certain parts of the show because of [her] weight." When the show resumed taping the next day Hallstrom was "cut out of 50 percent of the show and when [she] was on camera [she] was usually hidden away behind something." Hallstrom testified, "This became the pattern of my appearances on the show" for the remainder of her employment.

Hallstrom maintains her evidence raises a triable issue of fact as to whether defendants regarded her as disabled due to being overweight.

Defendants contend Hallstrom's evidence does not raise a triable issue of fact because, under *Cassista*, "it is not enough to show that an employer's decision is based on the perception that an applicant is disqualified by his or her weight."[35] Rather, for an employee to be deemed disabled based on the employer's perception of disability the employee must have been "'regarded as having or having had' a condition 'described in

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Americans with Disabilities Act of 1990, (2) to require a "limitation" rather than a "substantial limitation" of a major life activity, and (3) by enacting paragraph (4) of subdivision (i) and paragraph (4) of subdivision (k) of Section 12926, to provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity.
(e) The Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation, as this requirement has been articulated by the Equal Employment Opportunity Commission in its interpretive guidance of the Americans with Disabilities Act of 1990."

[35] *Cassista*, *supra*, 5 Cal.4th at page 1065.

paragraph (1) or (2) [of section 12926, subdivision (k)],' to wit, a physiological disease or disorder affecting one or more of the bodily systems."[36]

In *Cassista* the Supreme Court held the plaintiff could not show the defendant "regarded" her as disabled because to be "regarded" as disabled under Government Code section 12926, subdivision (k)(3), as it read at the time, the individual had to have a condition which was described in the statute or an impairment which was the result of such a condition. The court found, "The record is devoid of any evidence that plaintiff's weight is the result of a physiological condition or disorder affecting one or more of the body systems."[37]

In the case before us, however, Hallstrom provided evidence her weight gain was attributable to a disorder or condition affecting her reproductive system which is one of the "body systems" described in Government Code section 12926, subdivision (k)(1).[38] Thus, a triable issue of fact exists as to whether defendants regarded Hallstrom as disabled.

Hallstrom also produced evidence defendants continued to regard her as disabled despite her loss of weight during the show's summer hiatus. She quotes Barker as telling her: "Obviously this weight problem is going to be a problem for you the entire time you're on The Price Is Right."

We further hold a prima facie showing of disability discrimination does not require Hallstrom to prove her weight prevents her from gaining employment anywhere in the national economy or even in a broad class of jobs. Although some Court of Appeal opinions have interpreted the FEHA to require such a showing, these decisions are based on the incorrect assumption the statute requires proof the disability "substantially" limits

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[36] *Cassista*, *supra*, 5 Cal.4th at page 1065 [ellipses added; italics omitted]; see former Government Code section 12926, subdivision (k)(3) (Stats. 1993, ch. 1214, § 5.)

[37] *Cassista*, *supra*, 5 Cal.4th at page 1066.

[38] See discussion at page 11, *ante*.

the plaintiff's ability to work.[39] As our Supreme Court explained in *Colmenares v. Braemar Country Club, Inc.*, the FEHA has never required an individual to prove her disability "substantially" limits her ability to work.[40] Unlike its federal counterpart, the Americans with Disabilities Act, the FEHA only requires a "limitation" on a major life activity such as work, not a "substantial" limitation.[41] In 2000 the Legislature added a new section to the FEHA, Government Code section 12926.1, specifying the Act only requires "a 'limitation' rather than a 'substantial limitation' of a major life activity" and that "'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."[42] The Supreme Court, in *Colmenares*, held in this amendment "the Legislature merely clarified the existing 'limits' test in the FEHA and . . . did not retrospectively change that test."[43]

C. A Triable Issue Of Fact Exists As To Whether Defendants Terminated Hallstrom Because Of Her Weight.

Hallstrom presented direct evidence defendants terminated her because of her weight.

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[39] See e.g., *Diffey v. Riverside County Sheriff's Department* (2000) 84 Cal.App.4th 1031, 1039; *Maloney v. ANR Freight System, Inc.* (1993) 16 Cal.App.4th 1284, 1287.

[40] *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1030-1031. In 1995, when Hallstrom's cause of action arose, Government Code section 12926, subdivision (k)(1)(B) defined a "physical disability" as a condition which "*[l]imits* an individual's ability to participate in major life activities." [Italics added.]

[41] *Colmenares, supra*, 29 Cal.4th at page 1026. Cf. 42 United States Code section 12102 (2)(A); Compare *Sutton v. United Airlines* (1999) 527 U.S. 471, 491. In *Sutton* the court held: "When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at minimum, that plaintiffs allege they are unable to work in a broad class of jobs." (*Ibid.*)

[42] Government Code section 12926.1, subdivisions (c), (d). (Stats. 2000, ch. 1049, § 6.) See the text of this statute in footnote 34, *ante*.

[43] *Colmenares, supra*, 29 Cal.4th at page 1031.

We previously discussed some of this evidence.[44] Hallstrom testified Barker began "badgering" her about her weight in the Spring of 1995 while the show was still taping its 1994-1995 season. In one conversation Barker told Hallstrom, to "do whatever it takes [to] lose the weight." The CEO of the show's production company came to Hallstrom's dressing room and told her he wanted to discuss her "weight problem." Jeremy Shamos, president of the show's production company, admitted calling Hallstrom to her face "the Pillsbury dough girl." On Barker's orders Hallstrom's time on camera was cut back and she was shot "usually hidden away behind something." Hallstrom further testified that a few weeks later Barker said to her: "'Obviously this weight problem is going to be a problem for you the entire time you're on The Price Is Right" and offered her a retirement package. When Hallstrom refused, she was fired.

When the plaintiff presents direct evidence of disability discrimination we do not apply the *McDonnell Douglas* burden shifting analysis.[45] That test is designed to assure the plaintiff has her day in court despite the unavailability of direct evidence of discrimination. It has no application where direct evidence exists.[46]

Direct evidence of employment discrimination includes "evidence of conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the fact finder to infer that that attitude was more likely than not a motivating factor in the employer's decision."[47]

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[44] See discussion at page 14, *ante.*

[45] *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 121. Cf. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-803; *Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, 1654.

[46] *Trans World Airlines, Inc. v. Thurston*, *supra*, 469 U.S. at page 121.

[47] *Enlow v. Salemkeizer Yellow Cab Co.* (9th Cir. 2004) 371 F.3d 645, 650. [internal quotation marks, italics and citations omitted].

Here the numerous comments by Barker and other members of the production team about Hallstrom's "weight problem" and their decision to hide her behind props when taping the show were sufficient to allow a reasonable trier of fact to conclude her termination was based on a discriminatory criterion prohibited by the FEHA. Defendants, of course, may be able to convince a jury they had a legitimate, nondiscriminatory reason for terminating Hallstrom. But that is what a trial is for. By granting defendants' motion for summary adjudication the trial court denied Hallstrom her day in court with respect to the legitimacy of defendants' reasons for its employment decision.[48]

Even if we were to conclude Hallstrom's direct evidence is insufficient to support a finding of disability discrimination, a separate and independent ground for reversing the summary adjudication of this claim exists. Applying the *McDonnell Douglass* test, the record contains sufficient evidence to establish a prima facie case of disability discrimination and raise a triable issue of fact as to whether defendants had a legitimate, nondiscriminatory reason for terminating Hallstrom.

Defendants assert that in order to reduce the show's budget and make it more attractive to potential buyers they needed to decrease the number of models from four to three. They decided Hallstrom should be the one eliminated for reasons we will examine below.

Barker testified that beginning in January 1995 he and Jeremy Shamos, president of the show's production company, engaged in discussions about how to reduce the costs of producing the show. The show was for sale and Shamos believed trimming its budget would help lead a potential buyer to conclude the price was right. One of the options Barker and Shamos discussed was reducing the number of models on the show from four to three.

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[48] *Enlow v. Salemkeizer Yellow Cab Co., supra*, 371 F.3d at page 651.

According to Barker, scaling back the models from four to three was not a simple matter of eliminating the one with the least seniority or allowing attrition to resolve the problem of which model to let go. Two of the models, Kathleen Bradley and Gina Nolin, modeled swimsuits. The other two, Hallstrom and Janice Pennington, did not. Because Barker and the producers wanted two swimsuit models and Nolin voluntarily left the show during its 1995 summer hiatus it was necessary to hire a new swimsuit model and terminate either Pennington or Hallstrom. Barker testified he and the producers decided Hallstrom should be the one let go because between the two Pennington had seniority, was "much better liked" than Hallstrom, and Hallstrom had "a history of erratic behavior" a "long running conflict with the director" and an "abrasive personality." Barker and Shamos denied Hallstrom's termination had anything to do with her weight. Defendants hired Chantal Dubay as a model for the remainder of the 1995 season. Dubay was in her mid to late 20's when she was hired. She modeled swimsuits.

Downsizing alone, however, is not necessarily a sufficient explanation for the dismissal of a disabled worker.[49] "Invocation of a right to downsize does not resolve whether the employer . . . engaged in intentional discrimination when deciding which individual workers to retain and release."[50]

Hallstrom countered defendants' explanation of why she was fired with evidence defendants used downsizing as a pretext to eliminate her from the show.

Alan Sandler, the chief financial officer of the show's production company testified he never heard Barker and Shamos intended to reduce the number of models as a cost reduction measure in 1995. Jonathan Goodson, the production company's chief executive officer, testified there had been discussions for over a decade about reducing the number of models for cost reasons but he was unaware of any specific discussions taking place around the time Hallstrom was terminated.

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[49] *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358.

[50] *Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at pate 358.

Hallstrom testified: "During my 19 years on the show there was never any distinction between models who wore swimsuits and those who did not." Paul Alter, the show's director, confirmed Hallstrom's assertion. He stated at his deposition: "The only distinction was that we wanted to put a model that looked good in a bathing suit in a bathing suit." All the models except Pennington, who had a scar on her shoulder, wore swim suits on the shows. Alter also admitted that Hallstrom was in the category of "looking good in a swimming suit" when she was not "heavy."

A jury could find from the evidence defendants did not have a legitimate business reason for terminating Hallstrom. Defendants had already met their budgetary goal of reducing the cast of models from four to three because one of the models had already voluntarily left the show. The jury could find categorizing the models as swimsuit models and nonswimsuit models was a sham created to cover defendants' true motives for terminating Hallstrom. Under this scheme defendants created two new categories of models, one of which purportedly had to be reduced for budgetary reasons. They then placed Pennington and Hallstrom in the category which needed reducing knowing they could come up with ostensibly nondiscriminatory reasons for choosing to dismiss Hallstrom instead of Pennington. It probably would not escape the jury's attention the only two members of the category to be reduced suffered from physical disabilities. Pennington had a scar on her shoulder;[51] Hallstrom was overweight.

In the exercise of our independent judgment and for the reasons set forth above, we conclude defendants are not entitled to summary adjudication of Hallstrom's claim of disability discrimination because a question of fact exists as to whether defendants were more concerned with downsizing the show or downsizing plaintiff.

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[51] A physical disability under the FEHA included at the time "[b]eing regarded as having [a] . . . cosmetic disfigurement[.]" (Gov. Code, §12926, subd. (k)(3), Stats. 1993, ch. 1214, § 5.)

II. TRIABLE ISSUES OF FACT EXIST AS TO HALLSTROM'S CLAIM OF AGE DISCRIMINATION.

In order to establish a prima facie case of age discrimination the plaintiff must be able to show she was 40 years of age or older and satisfactorily performing her job when she suffered an adverse employment action.[52] The plaintiff must also produce some evidence showing the employer's intent to discriminate on the basis of age. When the plaintiff has been terminated this showing is usually made by evidence the employer replaced the plaintiff with a significantly younger person.[53]

Hallstrom was 43 years of age when defendants terminated her employment. Defendants concede Dubay was significantly younger than Hallstrom when she was hired at approximately the same time Hallstrom was terminated. Defendants maintain, however, Hallstrom has no evidence showing they hired Dubay to replace her rather than to replace Nolin who voluntarily left the show in the summer of 1995. They did not replace Hallstrom, defendants argue, they eliminated her position.

We believe the evidence raises a triable issue of fact as to whether defendants hired Dubay as a replacement for Hallstrom. Hallstrom and Dubay were both models, Dubay was significantly younger than Hallstrom and Dubay was hired at about the same time Hallstrom was terminated.

As a defense to Hallstrom's age discrimination claim defendants can introduce evidence about downsizing and categorizing the models as swimsuit models and nonswimsuit models as discussed above.[54] If the jury believes defendants' assertion they had a legitimate business reason for categorizing the show's models as swimsuit models and nonswimsuit models the jury could find defendants replaced Nolin, a swimsuit model, with Dubay, another swimsuit model. On the other hand, as we explained in our

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[52] *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1003.

[53] *Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at page 366.

[54] See discussion at pages 18-19, *ante*.

discussion of Hallstrom's disability claim,[55] if the jury disbelieves defendants' downsizing explanation it could find categorizing the models as swimsuit models and nonswimsuit models served as a pretext for terminating Hallstrom. It is noteworthy in this respect the only two members of the category of models needing reduction were the two models over age 40, Hallstrom and Pennington.

Of course, the fact defendants have shown they have evidence in *defense* of Hallstrom's age discrimination claim does not mean they have shown Hallstrom cannot make out a prima facie case. For this reason the trial court erred in granting summary adjudication on Hallstrom's cause of action for age discrimination.

III. THE TRIAL COURT ERRED IN REFUSING TO ALLOW HALLSTROM TO AMEND HER CROSS-COMPLAINT TO ALLEGE A CAUSE OF ACTION BASED ON DEFENDANTS' RETALIATION AGAINST HER FOR OPPOSING BARKER'S SEXUAL HARASSMENT OF ANOTHER MODEL.

Four months after the trial court granted defendants' motion for summary adjudication of her FEHA causes of action Hallstrom moved to amend her cross-complaint to add a cause of action for termination in violation of public policy. No longer represented by the attorney who filed the original cross-complaint, Hallstrom sought to allege defendants terminated her in retaliation for her refusal to support Barker in his defense of the FEHA sexual harassment complaint brought by another of the show's former models, Dian Parkinson.

The FEHA makes it an unlawful employment practice for an employer "to harass, discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden under" the FEHA.[56] A violation of this statutory provision will also support a nonstatutory, common law cause of action for wrongful

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[55] See discussion at page 20**,** *ante*.

[56] Government Code section 12940, subdivision (h).

termination in violation of public policy.[57] We find ample evidence in the record to support Hallstrom's claim she was terminated for failing to back Barker in his defense of Parkinson's suit.

Parkinson filed a verified complaint alleging in the most explicit and graphic terms behavior by Barker which, if proven, would subject him to liability for both "quid pro quo" and "hostile environment" sexual harassment under the FEHA.

According to Hallstrom's declaration, a few months after Parkinson filed this lawsuit Barker ordered Hallstrom to do television and magazine interviews stating Parkinson's accusations were lies and he would never do the things she alleged in her complaint. Hallstrom resisted doing these interviews as much as possible and when she did do a television interview she refused to "trash" Parkinson. This made Barker "furious." Barker also wanted Hallstrom to do interviews undermining the credibility of one of Parkinson's witnesses. Hallstrom states she refused and "Barker was clearly angry with me for not cooperating." Hallstrom further testified Barker sought her cooperation in an attempt to get revenge against Parkinson after settling her lawsuit. Barker wanted Hallstrom to give a list of Parkinson's former boyfriends, lovers and sexual partners to a reporter at a tabloid in the hope Parkinson's new fiancé would be shocked by these revelations and "'dump' her." Hallstrom stated: "When I told Barker I didn't think my friend at the tabloid would be interested in running a story about Parkinson's ex-boyfriends he was clearly angry. Barker turned to me and said, 'Have you lost weight?'"

Hallstrom testified after she refused to assist Barker in breaking up Parkinson's engagement Barker began focusing on her weight as discussed above.[58]

The trial court denied Hallstrom's motion to amend her cross-complaint. Defendants contend the trial court ruled correctly because the new cause of action was barred by the one-year statute of limitations, Hallstrom failed to establish good cause for the delay in seeking leave to amend, and permitting the amendment would have unfairly

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[57] *Rojo v. Kliger*, *supra*, 52 Cal.3d at page 86.

[58] See discussion at pages 2, 17, *ante*.

prejudiced defendants. As discussed more fully below, none of these contentions justify the trial court denying the motion to amend. Barker's defamation action against Hallstrom tolled or waived the statute of limitations as to Hallstrom's compulsory causes of action. Furthermore, leave to add a compulsory cause of action cannot be denied if the party who failed to plead the cause acted in good faith.

A. The Retaliation Cause Of Action Is Not Barred By The Statute Of Limitations Because It Relates Back To The Same Transactions And Occurrences Alleged In Barker's Complaint For Defamation.

It is undisputed defendants terminated Hallstrom from The Price Is Right in 1995 and she did not file her motion to amend the cross-complaint until 2000. Thus the new cause of action for wrongful termination in violation of public policy normally would be barred by the one-year statute of limitations.[59] The rule is different, however, when, as here, the original complaint was filed before the statute of limitations expired on the cross-complaint. Under the "relation back" rule an amendment to the cross-complaint need only be related to the subject matter of the plaintiff's complaint.[60] Thus, when the proposed amendment to a cross-complaint is "compulsory," i.e., the new cause of action arises "out of the same transaction, occurrence, or series of transactions or occurrences as the plaintiff alleges in the complaint" the amendment relates back to the filing date of the complaint for statute of limitation purposes.[61]

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[59] See *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1189.

[60] *Sidney v. Superior Court* (1988) 198 Cal.App.3d 710, 714-715.

[61] Code of Civil Procedure section 426.10, subdivision (c); *Sidney v. Superior Court*, *supra*, 198 Cal.App.3d at pages 714-715. The inclusion of such a cause of action in the cross-complaint is "compulsory" in the sense that cross-complaints relating to the subject matter of the action must be filed therein or are deemed lost. (Code Civ. Proc., § 426.30, subd. (a).)

Although Hallstrom gives different dates for her termination it appears to have occurred at the earliest on or about July 26, 1995 and at the latest on or about September 21, 1995. Barker filed his defamation action against Hallstrom in December 1995. Thus, the one-year statute of limitations on Hallstrom's cause of action for wrongful termination had not expired when Barker filed his complaint.

Hallstrom's allegation Barker retaliated against her for opposing his sexual harassment of Parkinson relates back to Barker's original complaint against Hallstrom for defamation. Barker's cause of action for libel alleged Hallstrom gave an interview to a tabloid in which she told the reporter "Barker had a second reason [besides weight] for 'getting rid' of her arising from Hallstrom's failure to support Barker when 'he arranged interviews for the models to proclaim his innocence [in the Parkinson suit] but I resisted . . . he pressured me, calling me at home and insisting I do interviews . . . .'" Hallstrom's proposed amendment is "compulsory" because it arises out of the same series of transactions or occurrences involving the Parkinson lawsuit which Barker alleged in his defamation action against Hallstrom.

B. The Trial Court Erred In Denying Hallstrom Leave To Amend Her Cross-Complaint Because Defendants Produced No Evidence She Acted In Bad Faith.

While a party can always seek leave to amend a pleading prior to judgment,[62] "the Legislature has created a distinctive statutory scheme regulating compulsory cross-complaints."[63] This statutory scheme is found in section 426.50 of the Code of Civil Procedure which states: "A party who fails to plead a cause of action subject to the requirements of this article, whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend his pleading . . . to assert such cause at any time during the course of the action. The court, after notice to the adverse

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[62] Code of Civil Procedure sections 473, subdivision (a)(1), 526.

[63] *Sidney v. Superior Court*, *supra*, 198 Cal.App.3d at page 717.

party, shall grant, upon such terms as may be just to the parties, leave to amend the pleading . . . to assert such cause if the party who failed to plead the cause acted in good faith. This subdivision shall be liberally construed to avoid forfeiture of causes of action." Under this statutory scheme, "the Legislature has not only made it clear that the court retains power to permit a defendant to amend a cross-complaint to avoid forfeiture of a related claim but has also mandated liberality in allowing such amendments at any time during the course of the lawsuit."[64]

The only cases in which leave to amend can be denied are those involving bad faith on the part of the cross-complainant. The burden is on the cross-defendant to demonstrate such bad faith. In *Silver Organizations Ltd. v. Frank* the court held: "The legislative mandate [of section 426.50] is clear. . . . A motion to file a cross-complaint at any time during the course of the action must be granted unless bad faith of the moving party is demonstrated where forfeiture would otherwise result. Factors such as oversight, inadvertence, neglect, mistake or other cause, are insufficient grounds to deny the motion unless accompanied by bad faith."[65]

In the present case defendants do not contend Hallstrom's motion to amend her cross-complaint was made in bad faith.

Defendants do contend, however, allowing an amendment alleging retaliation would have prejudiced them because they would have had to conduct additional discovery. The record does not support defendants' claim of prejudice.[66]

Barker's defamation action against Hallstrom and Hallstrom's cross-complaint against Barker were both pending during the time defendants were conducting discovery.

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[64] *Sidney v. Superior Court*, *supra*, 198 Cal.App.3d at page 717; citation omitted.

[65] *Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 98-99.

[66] The statute does not directly address the question whether the motion to amend may be denied if the amendment would prejudice the cross-defendant. The Legislature may have believed any prejudice to the cross-defendant could be cured by the provision granting the trial court discretion to permit the amendment "upon such terms as may be just to the parties." Because we conclude no prejudice would occur in the present case we need not tackle this issue here.

In the defamation action Barker alleged Hallstrom libeled him by claiming he fired her because she refused to publicly support his efforts to discredit Parkinson in connection with Parkinson's sexual harassment suit. Hallstrom repeated this accusation in her deposition in connection with the present litigation. She stated she believed one of the reasons Barker fired her was because "I was not cooperating with his publicity campaign to smear Dian when she filed suit against him."

Thus, the record shows Barker's pending defamation suit against Hallstrom involved the same accusation of retaliation Hallstrom later sought to add to her cross-complaint. Barker cannot justifiably complain about the lack of opportunity to conduct discovery on the retaliation issue. He had a strong incentive in his own pending defamation action against Hallstrom to conduct discovery on Hallstrom's retaliation claim in order to prove the claim was false and made with malice.[67] Whatever Barker learned in this discovery would be applicable to defending against Hallstrom's cause of action for retaliation in her cross-complaint. To the extent he failed to conduct such discovery he, not Hallstrom, is responsible for any additional discovery he believes he must now undertake to defend against Hallstrom's new cause of action.

For the reasons stated above, we conclude the trial court erred in denying Hallstrorm's motion to add a compulsory cause of action to her cross-complaint.

IV. THE TRIAL COURT CORRECTLY GRANTED SUMMARY ADJUDICATION TO DEFENDANTS ON HALLSTROM'S CAUSE OF ACTION FOR GENDER DISCRIMINATION.

In order to establish a prima facie case of gender discrimination the plaintiff must be able to prove inter alia "others not in the protected class were retained in similar jobs,

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[67] This burden of proof rests on Barker because he clearly is a public figure. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280.)

and/or [her] job was filled by an individual of comparable qualifications not in the protected class."[68]

Hallstrom has no evidence to support this element of her cause of action. No male models were retained when Hallstrom was terminated and the model defendants hired after terminating Hallstrom was female. Hallstrom attempts to compare her role as a model to that of the show's 300-pound male announcer, who was not terminated. This comparison is, to put it politely, unpersuasive.

V. TRIABLE ISSUES OF FACT EXIST AS TO HALLSTROM'S CAUSES OF ACTION FOR SLANDER AND LIBEL.

In Hallstrom's sixth cause of action she alleges Barker slandered her by making the following false and defamatory statements about her in television interviews.

- Hallstrom is "'not telling the truth'" when she says Barker told her she "'should retire because of her weight.'"
- "'[Hallstrom's] weight has been such that her dress size has fluctuated from an 8 to a 14. There were times when [Hallstrom] was wearing a full body girdle down to her thighs.'"
- "'[Hallstrom] has had problems with her weight for the 19 years that she has been on 'The Price Is Right.' Her weight goes up, down, up, down.'"
- Hallstrom is "'unprofessional.'" On one occasion "'she walked off the set, walked right out the door'" just as the show was about to begin taping.
- "'[Hallstrom] has had bouts with overweight [sic] for years, for many years.'"
- Hallstrom is "'smearing the image of the company. She's smearing the image of the show and she's doing all she can to ruin [Barker's] reputation.'"

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[68] *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1318.

- In her seventh cause of action Hallstrom alleges Barker libeled her in a form letter to fans of The Price Is Right by stating: "'The reasons [Hallstrom] has given in interviews for leaving the show are untrue.'"

Hallstrom contends the trial court erred in granting defendants' motion for summary adjudication on her defamation claims because there are triable issues of fact as to the truth or falsity of Barker's statements. Defendants contend there are no triable issues of fact as to the truth of these statements because Hallstrom either admitted the truth of a statement or defendants provided undisputed evidence a statement was true or substantially true.

Exercising our independent review of the record we conclude triable issues exist as to the truth or falsity of some of the statements.

No triable issues of fact exist as to the truth or falsity of the following statements because they are "opinions" not susceptible to proof or refutation by reference to concrete, provable data:[69] "'[Hallstrom] has had problems with her weight for the 19 years that she has been on 'The Price Is Right.' Her weight goes up, down, up, down.'" "'[Hallstrom] has had bouts with overweight [sic] for years, for many years.'" Hallstrom is "'unprofessional.'" Hallstrom is "'smearing the image of the company. She's smearing the image of the show . . . ."

No triable issues of fact exist as to the truth or falsity of the following statements because Hallstrom admitted their truth or the undisputed evidence shows they are substantially true:[70] "'[Hallstrom's] weight has been such that her dress size has fluctuated from an 8 to a 14." Hallstrom's "weight goes up, down, up, down." On one occasion "'she walked off the set, walked right out the door'" just as the show was about to begin taping.

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[69] *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1154.

[70] *Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 516-517.

Triable issues of fact exist, however, as to the truth or falsity of following statements because Hallstrom has not admitted their truth and defendants failed to demonstrate Hallstrom does not possess or cannot reasonably obtain the evidence needed to prove their falsity and that they were made with malice:[71] Hallstrom is "'not telling the truth'" when she says Barker told her she "'should retire because of her weight.'" "'There were times when [Hallstrom] was wearing a full body girdle down to her thighs.'" Hallstrom is "'doing all she can to ruin [Barker's] reputation.'" "'The reasons [Hallstrom] has given in interviews for leaving the show are untrue.'"

Because triable issues of truth or falsity remain as to the last statements quoted in the preceding paragraph the trial court erred in granting summary adjudication on the slander and libel causes of action.

VI. TRIABLE ISSUES OF FACT EXIST AS TO HALLSTROM'S CAUSE OF ACTION FOR MISREPRESENTATIONS PREVENTING HER EMPLOYMENT.

Under Labor Code sections 1050 and 1054 a discharged employee may bring an action for damages against a former employer who "by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment[.]"[72]

Hallstrom's complaint alleges defendants, in making the statements quoted in Part V above and in falsely describing the reasons for her termination, made misrepresentations which prevented Hallstrom from obtaining employment. Defendants made these statements to the media and in public appearances knowing they would be heard by members of the entertainment industry from whom Hallstrom would be seeking employment and knowing such persons would be unwilling to hire a model or television

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[71] *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 855. (We assume for purposes of this appeal Hallstrom is a public figure and will have to demonstrate at trial Barker acted with actual malice. *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at pages 279-280.)

[72] Labor Code section 1050.

personality who had "weight problems," was "unprofessional" and lied to the media about her employer.

Defendants moved for summary adjudication of this cause of action on the grounds the statements to which Hallstrom objects were true and *Hallstrom* "has not shown any causal link between [their] statements and her failure to secure alternate employment." Neither of these grounds entitled defendants to summary adjudication of the Labor Code cause of action.

The first ground fails because, as we explained in Part V above, triable issues of fact exist as to the truth or falsity of some of defendants' statements to the media regarding Hallstrom's performance on the show and the reason for her termination.

The second ground fails because Hallstrom did not have the burden of producing evidence of a causal link between defendants' statements and her failure to secure employment. Defendants, as the parties moving for summary adjudication, were required to produce evidence which conclusively negated an element of Hallstrom's Labor Code cause of action or evidence Hallstrom does not possess, and cannot reasonably obtain, the evidence she needs to support her claim.[73] Evidence affirmatively negating an element of a cause of action may be produced through affidavits, declarations, responses to discovery and the like.[74] Evidence of an inability to marshal facts to support an element of a cause of action can be produced through "admissions by the plaintiff following extensive discovery to the effect that [she] has discovered nothing."[75] The key point, frequently overlooked by trial courts and moving defendants, is that until the defendant makes its requisite showing the plaintiff has no obligation to make a counter showing.[76]

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[73] *Aguilar*, *supra*, 25 Cal.4th at page 855.

[74] Code of Civil Procedure section 437c, subdivision (b).

[75] *Aguilar*, *supra*, 25 Cal.4th at page 855.

[76] Code of Civil Procedure section 437c, subdivision (p)(2); *Aguilar*, *supra*, 25 Cal.4th at page 850.

Defendants maintain they produced evidence of Hallstrom's inability to marshal facts to support her Labor Code cause of action because she answered no when asked whether Barker, Shamos or anyone else connected with The Price Is Right had "done anything of which you have knowledge to prevent you from obtaining alternative employment."

This deposition question and answer did not provide sufficient evidence of Hallstrom's lack of facts to justify summary adjudication for defendants. In *Aguilar* the Supreme Court observed evidence of a lack of facts requires "*admissions* by the plaintiff following *extensive* discovery to the effect that [she] has discovered nothing."[77] The brief colloquy at Hallstrom's deposition does not qualify as "extensive" discovery into the facts regarding conduct by defendants which prevented Hallstrom's employment nor does it constitute an "admission" by Hallstrom to the effect she "has discovered nothing." It is not realistic to presume that during the discovery phase of litigation the client knows everything her lawyer knows. Furthermore, the question as framed would not necessarily produce information from Hallstrom if it was gathered by Hallstrom's attorney but not personally known by Hallstrom.

A defendant intending to move for summary judgment based on the plaintiff's admission she "has discovered nothing" after having had a reasonable opportunity to discover something should do so based on the plaintiff's factually devoid answers to interrogatories or requests for admission rather than relying solely on the plaintiff's answers to deposition questions about her personal knowledge of the facts.[78]

Defendants, having failed to negate Hallstrom's cause of action through their own evidence or Hallstrom's lack of evidence, were not entitled to summary adjudication on the Labor Code cause of action.

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[77] *Aguilar*, *supra*, 25 Cal.4th at page 855.

[78] See *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 576, 592-593.

VII. HALLSTROM'S COMPLAINT STATES A CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The trial court sustained defendants' demurrer to Hallstrom's cause of action for intentional infliction of emotional distress because "[i]n its present form the sweeping all inclusive applications of the [cause of action] causes the action to be pre-empted by the Workers Compensation Act." The court erred in sustaining the demurrer.

Among the allegations swept into the cause of action for emotional distress were those pertaining to defendants' discrimination against Hallstrom on the basis of disability and age and those pertaining to defendants' libel and slander. It is well settled a cause of action for infliction of emotional distress based on discrimination prohibited under the FEHA or on the employer's defamatory statements about the plaintiff is not barred by the exclusive remedy provisions of the Workers Compensation Act because such conduct falls outside the "compensation bargain."[79]

Admittedly some of the factual allegations incorporated by reference into the cause of action for infliction of emotional distress do not, as a matter of law, support that cause of action, e.g., allegations pertaining to breach of contract. But this is not ground for a general demurrer to the cause of action. If there are sufficient factual allegations to entitle the plaintiff to relief the allegations which do not provide a basis for relief are ignored as mere surplusage or may be stricken.[80]

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[79] *City of Moorpark v. Superior Court, supra*, 18 Cal.4th at page 1155 [discrimination prohibited under the FEHA]; *Howland v. Balma* (1983) 143 Cal.App.3d 899, 904, approved in *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 814 [defamation].

[80] *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-1683. In fairness to the trial court it must be said Hallstrom's original attorney contributed to the court's error by engaging in the disfavored "chain letter" pleading style in which the allegations of each cause of action are incorporated by reference into each succeeding cause of action. This style of pleading should be avoided because it creates ambiguity, redundancy, and confusion. (See *Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 285.)

In their brief on appeal defendants do not attempt to justify the trial court's ruling sustaining their demurrer. They only argue any error was harmless because the court subsequently granted their motion for summary adjudication on the FEHA causes of action and the cause of action for defamation leaving Hallstrom with no factual basis for her emotional distress claim. We need not explore the validity of this argument. It is moot because we are reversing the summary adjudication of the FEHA causes of action for disability and age discrimination and the cause of action for defamation.[81]

In accordance with the discussion above, Hallstrom may proceed with her cause of action for intentional infliction of emotional distress.

VIII. DEFENDANTS WERE ENTITLED TO JUDGMENT ON THE PLEADINGS AS TO HALLSTROM'S CAUSE OF ACTION FOR ABUSE OF PROCESS.

Treating defendants' motion for summary adjudication as including a motion for judgment on the pleadings,[82] we find Hallstrom's complaint fails to state a cause of action for abuse of process.

The two essential elements of this tort are "first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding."[83]

Hallstrom alleges defendants, in bringing their suit against her for libel and slander, "misused the civil filing process by filing and serving this complaint and prosecuting this action by propounding discovery and other means in an attempt to chill Hallstrom's first amendment rights and stop her from making any statements regarding her termination from 'The Price Is Right.'"

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[81] See discussion in Parts I, II and V, *ante*.

[82] *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118.

[83] *Templeton Feed & Grain v. Ralston Purina Co.* (1968) 69 Cal.2d 461, 466, internal quotation marks and citations omitted.

Although Hallstrom's complaint alleges an ulterior purpose to defendants' defamation action—to chill Hallstrom's freedom of speech—it fails to allege an improper use of process. The mere filing of a complaint, even for an improper purpose, is not an abuse of process.[84] Service of the complaint and discovery in connection with the complaint *may* give rise to a cause of action for abuse of process but only if the elements of ulterior purpose and improper use of the process are present.[85] Hallstrom does not allege anything improper occurred respecting the way in which defendants served her with the summons and complaint in their defamation action. Nor does she allege any improper use of the tools of discovery. The use of discovery to uncover evidence relating to the plaintiff's case or the defendant's defense cannot be characterized as a misuse of the discovery process.[86]

We conclude, therefore, the trial court properly dismissed the cause of action for abuse of process.

IX. MGP AND PRICE PRODUCTIONS HAD STANDING TO COMPEL ARBITRATION OF HALLSTROM'S BREACH OF CONTRACT CLAIM.

In Parts IX through XI of this opinion we address Hallstrom's objections to the trial court's order confirming the arbitration award in defendants' favor on her cause of action for breach of contract. Hallstrom claimed defendants breached an agreement not

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[84] *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1169.

[85] *Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1465-1466 [allegation of execution of false declaration of service satisfied elements of ulterior purpose and improper use of process]; *Younger v. Solomon* (1974) 38 Cal.App.3d 289, 298 [use of discovery process "to disclose and publish material calculated to injure [plaintiff's] reputation and to expedite his demise as a practicing lawyer"].

[86] *Younger v. Solomon, supra,* 38 Cal.App.3d at page 298.

to terminate her employment except for good cause.[87] The arbitrator ruled this claim was barred by the AFTRA agreement's time limit for initiating arbitration.

In this Part we address Hallstrom's contention MGP, the show's producer, lacked standing to compel arbitration of her contract claim. In Part X we discuss whether the arbitration provisions of the AFTRA agreement are subject to review for unconscionability. Finally, in Part XI we address the arbitrator's ruling Hallstrom's contract claim is time barred under the AFTRA arbitration agreement.[88] We conclude the trial court's order confirming the arbitration award should be affirmed.

Hallstrom contends MGP lacked standing to compel arbitration of her contract claim because (A) MGP no longer existed at the time of the motion to compel; (B) MGP was not a signatory to the AFTRA agreement at the time Hallstrom entered into the relevant employment contract; and (C) at the time MGP sought to compel arbitration it was in violation of the AFTRA agreement because it had ceased making payments on Hallstrom's behalf into the AFTRA health and retirement funds. We find these contentions lack merit.

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[87] The breach of contract claim was alleged against MGP, Price Productions, Inc. and TPIR. The motion to compel arbitration was filed on behalf of MGP, TPIR and Barker. The arbitration award was rendered and confirmed on behalf of MGP, Price Productions and TPIR.

[88] Hallstrom also claims the trial court improperly delegated to the arbitrator the question whether the contract claims were arbitrable. The record does not support this contention. As we stated in a previous unreported decision in this matter, "The trial court deemed [the contract action] to be arbitrable under the terms of the AFTRA agreement and [Hallstrom] does not contest this finding in this appeal." (*Barker v. Hallstrom*, *supra*, B107908 at page 4) Furthermore, in confirming the arbitration award the trial court affirmed that it, and not the arbitrator, made the decision the contract claim was subject to arbitration.

A. MGP Existed At The Time It Sought Arbitration.

Hallstrom filed her cross-complaint against MGP in July 1996. MGP moved to compel arbitration of the breach of contract claim a month later. Hallstrom contends she did not learn until five years later MGP sold substantially all its television programming assets, including The Price Is Right, in October 1995. She argues as a result of this sale MGP "ceased to exist" as of October 1995 and therefore could not petition to compel arbitration in July 1996.

This argument fails because the undisputed evidence shows even after MGP sold off a majority of its television interests it continued to exist as an entity and continued as the producer of The Price Is Right until the end of December 1995.

B. At The Time Hallstrom Was Terminated Her Employment Contract Was Subject To The AFTRA Arbitration Provision.

We also reject Hallstrom's argument her employment contract for the relevant time period was not subject to the AFTRA arbitration agreement.

It is undisputed Hallstrom belonged to AFTRA throughout her employment on The Price Is Right. The terms of her membership obligated her to arbitrate any contractual dispute with a producer who was a signatory to the AFTRA agreement. The evidence further shows, however, when MGP took over production of The Price Is Right in January 1994 it was not a signatory to the AFTRA agreement. It did not sign the agreement until April 1994. In the meantime, Hallstrom signed an agreement with MGP's predecessor producer, Price Productions, in February 1994 and modified it in March 1994. The parties agree Price Productions was a signatory to the AFTRA agreement throughout 1994. Price Productions, however, was not the producer of The Price Is Right when it entered into the February and March agreements with Hallstrom

and the AFTRA arbitration clause only applies to "producers."[89] Therefore, Hallstrom argues, her employment contract was not subject to the AFTRA arbitration agreement. We disagree.

The evidence shows Hallstrom was already under contract with Price Productions in January 1994 when MGP took over production of The Price Is Right and the agreements Hallstrom executed in February and March of 1994 were modifications of her existing contract. The evidence further shows Price Productions was a signatory to the AFTRA agreement at the time it entered into the employment contract with Hallstrom. Finally, there is uncontradicted evidence at the time MGP became the show's producer it assumed all of Price Productions' contractual obligations with respect to Hallstrom. This assumption of obligations would normally include Price Productions' obligations to Hallstrom under the AFTRA agreement including the AFTRA arbitration provisions.[90] Hallstrom has offered no evidence to the contrary. Thus, a dispute between MGP and Hallstrom arising out of the employment contract with Price Productions which was assumed by MGP is covered by the AFTRA arbitration clause.

Furthermore, Hallstrom named Price Productions as a defendant in her breach of contract cause of action. Because it is undisputed Price Productions was a signatory to the AFTRA agreement when it contracted with Hallstrom, Price Productions would clearly have standing to move to compel arbitration under the agreement.

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[89] The arbitration provision applies to "[a]ll disputes and controversies . . . between any producer and any member of AFTRA . . .."

[90] In *Retail Clerks Union, Local 775 v. Purity Stores, Inc.* (1974) 41 Cal.App.3d 225, 229 the court held "[a] successor of an employer is bound by the arbitration provision in a collective bargaining agreement executed by its predecessor if 'there is substantial similarity of operation and continuity of identity of the business enterprise before and after a change of ownership.'" [Citations omitted.] Here the evidence shows a substantial similarity of operation and continuity of identity between Price Productions and MGP. MGP assumed all the rights and obligations of Price Productions, maintained the same employees, produced the same show and continued to make AFTRA contributions on behalf of the performers.

C. MGP Was Not In Breach Of The AFTRA Agreement When It Sought To Compel Arbitration.

Hallstrom maintains MGP cannot seek specific performance of the arbitration provision of the AFTRA agreement, an equitable remedy, because prior to seeking arbitration MGP had ceased making payments on Hallstrom's behalf into the AFTRA health and retirement funds as required under other provisions of the agreement. She further maintains MGP's breach of the agreement's health and retirement provisions excused her duty to perform under the arbitration provision. We need not address these arguments because we find they rest on a faulty premise. As we read the AFTRA agreement, MGP had no obligation to continue making payments into the health and retirement funds after Hallstrom's last appearance on the show in July 1995. It is undisputed MGP made all required contributions through her last performance.

Under paragraph 102, section (1)(a) of the AFTRA agreement, which governs contributions to the health and retirement funds, a producer is only obligated to make contributions "with respect to services performed under this [agreement]." "Services performed" is defined to include "all services such as rehearsal theretofore performed in connection therewith." We interpret paragraph 102, especially in light of the reference to rehearsals, as applying only when the artist is actually performing her professional "service," i.e., acting, modeling, announcing, et cetera. It would not apply, for example, where an artist who is a member of the cast does not rehearse or perform on a particular program. If benefit contributions were to be calculated simply on the basis of the artist's contractual compensation, as opposed to her actual performances, there would be no need for the stipulation regarding "services performed."

For all of the reasons discussed above, we conclude MGP and Price Productions had standing to move to compel arbitration under the AFTRA agreement.

X. COURTS GENERALLY DO NOT INQUIRE INTO THE FAIRNESS OF THE ARBITRATION PROCEDURE UNDER A COLLECTIVE BARGAINING AGREEMENT.

The trial court should not have ordered arbitration under the AFTRA agreement, Hallstrom argues, because the procedures set out in the agreement are unfair and unconscionable. She cites as examples the agreement's lack of mutuality of remedies between the producer and the artist, limitations on the damages for breach of contract normally available to an employee, the failure to provide for judicial review, the unfair cost burden on the artist, and the agreement's failure to provide for a neutral arbitrator.

Even assuming the agreement suffers from the defects Hallstrom ascribes to it, the agreement is the product of collective bargaining between AFTRA and representatives of television and radio producers. As such, an inquiry into the fairness of the arbitration procedure is not part of the court's role in considering a motion to compel arbitration under the agreement.

Our Supreme Court's decision in *Dryer v. Los Angeles Rams* is directly on point.[91] Dryer sued the Rams for breach of contract after the Rams removed him from the active duty roster. The Rams moved to compel arbitration under provisions of the National Football League collective bargaining agreement. Dryer resisted arbitration on the ground the arbitration procedure established by the agreement failed to meet the "minimum levels of integrity," including the provision of a neutral arbitrator, established in the court's earlier decision in *Graham v. Scissor-Tail, Inc.*[92] The court rejected Dryer's argument explaining that, unlike the arbitration agreement in *Graham*, the NFL arbitration agreement came within the federal Labor Management Relations Act and was part of a collective bargaining agreement.[93] In upholding the Ram's right

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[91] *Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406.

[92] *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 828.

[93] *Dryer v. Los Angeles Rams, supra,* 40 Cal.3d at page 411.

to arbitration the court stated: "We find no federal precedent for a *Graham*-type inquiry into the fairness of the arbitration machinery itself as part of the court's role in considering a motion to compel arbitration under a bona fide collective bargaining agreement."[94]

This is not to say a union member could never challenge the provisions of a collectively bargained arbitration agreement. As *Dryer* observed a court may consider a challenge based on the union's breach of the duty of fair representation.[95] It has also been suggested in some situations an employee might be able to argue the union exceeded the scope of its agency in agreeing to the terms of the arbitration agreement.[96] Hallstrom, however, has not asserted a lack of fair representation on the part of AFTRA nor a claim of defective agency.

Accordingly, we will not order the arbitration award set aside on procedural grounds.

XI. THE ARBITRATOR DID NOT EXCEED HER POWER IN DISMISSING HALLSTROM'S BREACH OF CONTRACT CLAIM AS UNTIMELY.

The AFTRA agreement contains a time limit for instituting arbitration of a covered claim. It states: "Proceedings for grievance and/or arbitration of a claim must be commenced on or before the earlier of: (a) Twelve (12) months following the date on which the party bringing the grievance or arbitration proceeding knew or should have known of the facts upon which the claim is based; or (b) Two (2) years following the date on which the event in dispute occurred."

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[94] *Dryer v. Los Angeles Rams, supra*, 40 Cal.3d at page 412.

[95] *Dryer v. Los Angeles Rams, supra*, 40 Cal.3d at page 413.

[96] Stempel, A Better Approach To Arbitrability (1991) 65 Tul. L. Rev. 1377, 1444-1446.

The arbitrator found Hallstrom knew the facts on which her contract claim is based no later than September 21, 1995. On that date she issued a press release claiming she had been fired by The Price Is Right because of her weight. Therefore, the arbitrator concluded, under the terms of the arbitration agreement Hallstrom should have brought her grievance by September 21, 1996. The arbitrator found she did not.

Hallstrom argues the arbitrator exceeded her powers by applying the one-year limitation period in the arbitration agreement rather than the four-year period for breach of a written contract in Code of Civil Procedure section 337. She cites no relevant authority for this argument.

We find no basis for holding the arbitrator exceeded her powers. Regardless of the time limit the Legislature selects for bringing a breach of contract action in the civil courts we know of no rule, and Hallstrom has not cited one, which prevents the parties to an arbitration agreement from selecting a shorter period.[97] Furthermore, under California law the arbitrator, not the court, decides whether a request for arbitration is timely under the terms of the agreement.[98]

The trial court's order confirming the arbitration award is affirmed.

DISPOSITION

The judgment is reversed as to plaintiff's causes of action for disability and age discrimination, libel, slander and violation of Labor Code section 1050. The order denying plaintiff's motion to amend her complaint to allege a cause of action for wrongful termination based on opposing sexual harassment is reversed and the trial court is directed to set a reasonable time in which plaintiff is to file the amendment.

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[97] See *Kennedy, Cabot & Co. v. National Assn. of Securities Dealers, Inc.* (1996) 41 Cal.App.4th 1167, 1175, 1178-1179; [arbitrator has authority to decide whether to apply statutory limitations period or period set out in arbitration].

[98] *Kennedy, Cabot & Co. v. National Assn. o f Securities Dealers, Inc.*, *supra*, 41 Cal.App.4th at pages 1177-1178.

The order sustaining defendants' demurrer to plaintiff's cause of action for intentional infliction of emotional distress is reversed. In all other respects the judgment is affirmed.

The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, Acting P.J.

We concur:

WOODS, J.

ZELON, J.