# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

**Civil Division**

Central District, Stanley Mosk Courthouse, Department 73

**21STCV26571** February 15, 2022
**DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING vs** 8:30 AM
**ACTIVISION BLIZZARD, INC., et al.**

Judge: Honorable Timothy Patrick Dillon
Judicial Assistant: M. Y. Carino
Courtroom Assistant: E. Villanueva

CSR: F. Carrillo, CSR#9555
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Amy L. Maurer (LA Court connect); Melanie Lea Proctor* , Tony Lawson and Azadeh Hosseinian (LA Court Connect)

For Defendant(s): Elena R. Baca and Felicia A. Davis (LA Court Connect); Brad D. Brian and David Fry

**NATURE OF PROCEEDINGS:**
Hearing on Demurrer - with Motion to Strike (CCP 430.10) Plaintiff's First Amended Complaint (Res ID: 6349);

Case Management Conference

The matter is called for hearing.

The court's tentative ruling is posted online for parties/counsel to review.

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, rule 2.956, Felipe Carrillo, CSR#9555, certified shorthand reporter is appointed as an official court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

Demurrer and motion are heard and argued as fully reflected in the notes of the official court reporter pro tempore.

After hearing argument, the court will issue a ruling by today.

Case Management Conference is held.

Parties have complied with California Rules of Court, rule 3.720 et seq., and have filed case management statements. The court finds there is not enough grounds to appoint a discovery referee absence a stipulation and order by parties. Parties are to meet and confer.

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There is not a cross-complaint in this matter. Defendant has been served and has answered or appeared.

Parties agrees to mediate the case in open court. Defendant demands jury trial and has posted jury fees.

Final Status Conference is scheduled for 02/14/2023 at 08:30 AM in Department 73 at Stanley Mosk Courthouse.

Jury Trial (15 days) is scheduled for 02/27/2023 at 08:30 AM in Department 73 at Stanley Mosk Courthouse.

Parties to comply with the requirements set forth in the Trial Preparation Order posted on the court website.

Case management order is issued and filed this date. Parties may obtain a copy of the order through the court website.

Pursuant to the request of moving party, the Hearing on Motion - Other To Remove Irrelevant and Protected Documents and Information From The Record (Res ID: 0141) scheduled for 03/17/2022, and Hearing on Motion for Protective Order (Res ID: 1970) scheduled for 03/17/2022 are advanced to this date and continued to 03/10/2022 at 08:30 AM in Department 73 at Stanley Mosk Courthouse.

Notice is waived.

LATER:
After hearing oral arguments and further review, the court adopts the tentative ruling as the final order of the court, as follows:

The Court OVERRULES Defendants' demurrer to all causes of action in the First Amended Complaint, to the extent that they are brought on behalf of its contingent and temporary workers. The Court OVERRULES Defendants' demurrer to the FAC on the ground of uncertainty.

The Court SUSTAINS Defendants' demurrer to the third cause of action employment discrimination because of sex – termination, with leave to amend.

The Court OVERRULES Defendants' demurrer to the fourth cause of action for employment discrimination because of sex – constructive discharge.

The Court OVERRULES Defendants' demurrer to the tenth cause of action for waiver of rights, forums, or procedures and release of claims.

The Court DENIES Defendants' motion to strike the First Amended Complaint.

Background

On August 23, 2021, plaintiff California's Department of Fair Employment and Housing ("DFEH") filed the operative First Amended Complaint ("FAC") against defendants Activision Blizzard ("Activision Blizzard"), Blizzard Entertainment, Inc. ("Blizzard"), and Activision Publishing, Inc. ("Activision Publishing") (collectively, "Defendants"), alleging the following eleven causes of action:

(1) Employment discrimination because of sex – compensation;
(2) Employment discrimination because of sex – promotion;
(3) Employment discrimination because of sex – termination;
(4) Employment discrimination because of sex – constructive discharge;
(5) Employment discrimination because of sex – harassment;
(6) Retaliation;
(7) Failure to prevent discrimination and harassment (on behalf of Group);
(8) Failure to prevent discrimination and harassment (on behalf of DFEH);
(9) Unequal pay;
(10) Waiver of rights, forums, or procedures and release of claims; and
(11) Failure to maintain and produce records (on behalf of DFEH only).

The FAC alleges the following. DFEH is a state agency tasked with investigating and prosecuting civil rights actions. (FAC, ¶ 9.) Defendant Activision Blizzard is one of the largest American video game developers and distributors with approximately 9,500 employees and over 100 million players worldwide. (FAC, ¶ 2.) Activision Blizzard conducts business through its subsidiaries, including defendants Blizzard and Activision Publishing. (FAC, ¶ 2.)

Unlike its customer-base of increasingly diverse players, Defendants' workforce is only about 20 percent women. (FAC, ¶ 9.) Very few women ever reach top roles at the company and those reach higher roles, earn less salary, incentive pay, and total compensation than their male peers.

(FAC, ¶ 3.) Defendants promote women more slowly and terminate them more quickly than their male counterparts. (FAC, ¶ 4.) Faced with such adverse terms and conditions of employment, many women have been forced to leave the company. (FAC, ¶ 4.) Female employees and contingent or temporary workers were also subjected to constant sexual harassment, including having to continually fend off unwanted sexual comments and advances by their male co-workers and superiors. (FAC, ¶ 6.) Employees were further discouraged from complaining as human resource personnel were known to be close to alleged harassers and the complaints were treated in a dismissive manner. (FAC, ¶ 7.) As a result of these complaints, female employees and contingent or temporary workers were subjected to retaliation, including but not limited to being deprived of work on projects, unwillingly being transferred to different units, and selected for layoffs. (FAC, ¶ 7.)

This enforcement action seeks to remedy, prevent, and deter the pattern or practice of unlawful discrimination and other violations, disparate impact of discrimination, and continuing violations that Defendants engaged in against aggrieved female employees and contingent or temporary workers. (FAC, ¶ 28.)

Discussion

On November 8, 2021, Defendants filed a Demurrer or, in the alternative, a Motion to Strike DFEH's First Amended Complaint, arguing:

· Demurrer

o DFEH failed to meet statutory pre-filing requirements with respect to contingent and temporary workers. Therefore, all eleven causes of action brought on behalf of those workers fail.

o DFEH failed to join temporary services providers (that employed the contingent and temporary workers) as necessary parties and are now time-barred from doing so.

o The FAC is vague and fails to state a cause of action because it does not identify any relevant time period for its claims.

o The third cause of action for employment discrimination because of sex – termination fails because DFEH does not allege facts sufficient to support its discrimination theories.

o The fourth cause of action for employment discrimination because of sex – constructive discharge fails because there are no facts establishing causation between any intolerable working conditions and the alleged forced resignation of female employees.

o Tenth cause of action for waiver of rights, forums, or procedures and release of claims fails because DFEH does not allege what agreements were purportedly unlawful, the individuals who were required to agree to them, or the circumstances under which they entered into the agreements.

· Motion to Strike

o The Court should strike any mention of "contingent or temporary workers" in the FAC because (1) DFEH failed to exhaust claims brought on behalf of those workers, (2) DFEH failed to add them as necessary parties in this lawsuit, and (3) DFEH is now time-barred from correcting those two failures.

o Defendants also move for an order striking the third, fourth, and tenth causes of action in the FAC, for failure to state a claim.

In opposition, DFEH contends,

· Defendants' arguments regarding contingent and temporary workers fail because the definition of an employee under the Fair Employment and Housing Act ("FEHA") regulations includes those workers.

· Temporary staffing agencies ("TSA," plural "TSAs"), which Defendants refer to as temporary service providers, are not necessary parties just because they are joint employers of Defendants' contingent and temporary workers.

· The FAC's allegations are adequately pled with respect to time because DFEH is bringing this action on behalf of a specific and ascertainable group of individuals, which is "in the public interest for the state and for Defendants' female employees and contingent or temporary workers."

· The third cause of action for discriminatory termination is sufficiently pled because the FAC alleged facts to support various theories of liability, including disparate impact and/or disparate treatment.

· The fourth cause of action for constructive discharge is sufficiently pled as to causation because the FAC alleges, among other things, that Defendants subjected women to sexual harassment and a hostile work environment, constructively forcing them to leave their employment as a result.

· The tenth cause of action for waiver of rights, forums, or procedures and release of claims is sufficiently pled because the FAC alleges that Defendants required female workers to waive rights, forums, and/or procedures as a condition of their employment, continued employment, or receipt of any employment-related benefit.

· To the extent the Court agrees the allegations for the third, fourth, and tenth causes of action should be elaborated further, DFEH requests leave to amend.

In reply, Defendants argues,

· If it was self-evident that the definition of employee includes "female contingent or temporary workers," then there would be no need for DFEH to amend the FAC to add the latter.

· DFEH's claims as to the contingent or temporary workers are time-barred and DFEH failed to address that argument in its opposition other than to reiterate that its notices encompassed contingent or temporary workers.

· DFEH failed to join the temporary service providers as parties and DFEH's claim that it can sue Defendants as a "joint employer" does not rectify the issue.

· DFEH has still not pled facts sufficient to support its third, fourth, and tenth causes of actions.

· DFEH only repeats its harassment allegations that pertain to other counts while ignoring the lack of factual underpinnings for its fourth cause of action for termination and tenth cause of action for waiver.

REQUEST FOR JUDICIAL NOTICE

The Court grants Defendants' request for judicial notice, filed November 8, 2021, as to all requests (Baca Decl., Exs. A-D). (Evid. Code, § 452, subd. (h) [providing that judicial notice may be taken of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable

accuracy"].)

ANALYSIS

A. Demurrer

1. Legal Standard for Demurrer

A demurrer should be sustained only where the defects appear on the face of the pleading or are judicially noticed. (Code Civ. Proc., §§ 430.30, et seq.) In particular, a court should sustain a demurrer if a complaint does not allege facts that are legally sufficient to constitute a cause of action. (See Id. § 430.10, subd. (e).) As the Supreme Court held in Blank v. Kirwan (1985) Cal.3d 311: "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. . . . Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (Id. at p. 318; see also Hahn. v. Mirda (2007) 147 Cal.App.4th 740, 747 ["A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed. [Citation.]")

A demurrer should not be sustained without leave to amend if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment. (Schifando v. City of Los Angeles, supra, 31 Cal.4th at p. 1081.) The demurrer also may be sustained without leave to amend where the nature of the defects and previous unsuccessful attempts to plead render it probable plaintiff cannot state a cause of action. (Krawitz v. Rusch (1989) 209 Cal.App.3d 957, 967.)

2. Contingent and Temporary Workers

Defendants contend that all of Plaintiff's eleven causes of action, to the extent that they are brought on behalf of contingent and temporary workers, fail as a matter of law for the following reasons.

First, DFEH impermissibly amended the FAC to include contingent and temporary workers without giving Defendants notice that it intended to seek relief for those group of workers. Before filing this action, DFEH served a notice of complaint and its intent to investigate ("Investigation Notice") on defendant Blizzard, alleging that Blizzard "may have engaged … in discriminatory practices against female employees and job applicants on the basis of sex," and

that DFEH intended to pursue its investigation on behalf of "all female employees and applicants for employment ….' [Citations.]" (Demurrer, p. 8:4-9 [emphasis in original]; See Baca Decl., Ex. A.) However, even after twice amending its Investigation Notice to add the other two defendants, DFEH never stated that its investigation extended to contingent or temporary workers. (Demurrer, p. 8:14-20; Baca Decl., Ex. B-C.) DFEH is now barred from bringing this action on behalf of those workers because the statute of limitations has passed. (Demurrer, p. 13:5-12.)

Second, the FAC has a defect of misjoinder because the TSAs are necessary parties but the DFEH did not add them as defendants in this lawsuit. (Demurrer, pp. 13:5-16:7.)

In opposition, DFEH argues that it brought this action under FEHA, and contingent and temporary workers are included in FEHA's definition of an employee. (Opposition, pp. 6:2-5; 9:5-6.) Therefore, when DFEH gave Defendants notice that it was investigating allegations of unlawful practices against "female employees and applicants" across the company, Defendants were on notice that contingent or temporary workers were included in that group. (Opposition, p. 10:10-13.) Even assuming arguendo that temporary and contingent employees expanded the scope of the lawsuit, DFEH further argues, such expansion can be said to reasonably arise from its investigation of wrongdoing against the female job applicants and employees. (Opposition, pp. 11:1-12:20.) As to Defendants' argument regarding misjoinder, DFEH did not need to add the TSAs to this lawsuit because (1) Defendants and the TSAs are joint employers of the contingent or temporary workers and (2) the allegations in the FAC concern what occurred at Defendants' (not the TSAs') offices and events. (Opposition, p. 13:10-14:13.)

In reply, insist that DFEH was required to specifically state "contingent and temporary workers" in its administrative complaint in order to satisfy its pre-suit notice requirements, a "reasonably related" exception to the notice requirements does not exist, DFEH failed to add the TSAs as necessary parties, and DFEH cannot rectify the misjoinder issue by arguing that it is suing Defendants as joint employers of the contingent and temporary workers.

a. Definition of an Employee

According to FEHA regulations, as DFEH points out and Defendants concede (Reply, pp. 9:21-10:2), "[a]n individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service agency is an employee of that employer for such terms, conditions and privileges of employment under the control of that employer." (Cal. Code Regs., tit. 2, § 11008, subd. (c)(5).) Therefore, by specifying in its notice that its

investigation was on behalf of "all female employees," DFEH gave Defendants constructive notice that its investigation included female contingent and temporary workers of whose terms, conditions, and privileges Defendants controlled. (Baca Decl., Exs. A-C, ¶ 6.)

Granted, "[f]ollowing an order sustaining a demurrer … with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order." (Harris v. Wachovia Mortgage, FSB (2010) 185 Cal.App.4th 1018, 1023.) Here, the court did not authorize DFEH to amend its Complaint to add the phrase "contingent or temporary workers." However, even if the Court were to strike the phrase "contingent or temporary workers" from the FAC, that will not change the fact that FEHA regulations, which govern the allegations in this lawsuit, include contingent and temporary workers (whose terms, conditions, and privileges of their employment that Defendants controlled) in their definition of an "employee." (Cal. Code Regs., tit. 2, § 11008, subd. (c)(5).)

Mathieu v. Norrell Corp. (2004) 115 Cal.App.4th 1174 ("Mathieu") is instructive. Just like in this case, Mathieu involved a lawsuit brought under the FEHA. The plaintiff (Laura Mathieu) was hired by a temporary employment agency, Norrell Corporation ("Norrell"), which placed her as a worker with its client Gulfstream Aerospace Corporation ("Gulfstream"). (Id. at p. 1179.) Mathieu's ex-boyfriend Richard Fluck was also employed by Gulfstream. (Ibid.) Fluck harassed Mathieu once she started working at Gulfstream. (Ibid.) The California Court of Appeal held that both Norrell and Gulfstream can be considered Mathieu's employer for purposes of potential liability for sexual harassment and retaliation under FEHA. (Id. at p. 1182.) In so holding, the Court stated:

In the content of an individual who is employed by a temporary agency and assigned to work on the premises of the agency's client, we believe the purpose of FEHA to safeguard an employee's right to hold employment without experiencing discrimination is best served by applying the traditional labor law doctrine of 'dual employers,' holding both the agency and the client are employers and considering harassment by an employee of the client coworker harassment rather than harassment by a third party.

(Id. at p. 1183.) Indeed, "[a]s with all other aspects of the Fair Employment and Housing Act, the investigatory and adjudicatory procedure is to be 'construed liberally for the accomplishment of the purposes of [the Act].' Cal. Gov't Code § 12993(a)." (Department of Fair Employment and Housing v. Law School Admission Council Inc. (N.D. Cal. 2012) 896 F.Supp.2d 849, 862.)

Accordingly, given the definition of an "employee" under FEHA regulations and the Court of

Appeal's holding in Mathieu, the Court finds that DFEH did not expand the scope of this lawsuit by amending the Complaint to add the phrase "contingent and temporary workers." The Court also finds that the FAC has pled facts sufficient to show that the group of female contingent and temporary workers were Defendants "employees," by alleging that "Defendants jointly supervised and controlled employee's conditions of employment, determined rate of pay or method of payment, had authority to hire or fire employees, and maintained employment records." (FAC, ¶ 14.)

b. Necessary Parties

"Code of Civil Procedure section 389 (section 389) governs joinder of parties." (Van Zant v. Apple Inc. (2014) 229 Cal.App.4th 965, 973 ("Van Zant").) "Subdivision (a)," of section 389, "defines persons who should be joined in a lawsuit if possible and are thus deemed necessary to the action." (Pinto Lake MHP LLC v. County of Santa Cruz (2020) 56 Cal.App.5th 1006.)

Here, the Court does not find that the TSAs are necessary parties, as explained below.

Under section 389, subdivision (a)(1), parties "should be joined as defendants if, in their absence, 'complete relief cannot be accorded among those already parties.' [Citation.]" (Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal.App.4th 785, 793 ("Countrywide").) For example, in Countrywide, the Court of Appeal found that borrowers were not necessary parties because plaintiff was seeking to recover general and exemplary damages. (Ibid.) Therefore, assuming that the plaintiff prevailed in that action, its damages could be ascertained, and judgment entered, even if the borrowers were not joined as parties. (Id. at 794.) Here, Defendants have not shown why relief cannot be accorded among the current parties in the absence of the TSAs. Therefore, the Court finds that the TSAs are not necessary parties under section 389, subdivision (a)(1).

Section 389, subdivision (a)(2), "sets forth two prongs under which a party may be deemed necessary—(a)(2)(i) and (ii)." (Van Zant, supra, 229 Cal.App.4th at p. 974–975.) However, "both prongs are subject to the same predicate condition: that the absent party 'claims an interest relating to the subject of the action ....' [Citation.]" (Ibid.) For example, in Van Zant, a class action lawsuit brought against defendant Apple Inc. relating to the company's marketing and sales of an iPhone, the Court of Appeal held that a network carrier (AT&T Mobility LLC) had implicitly claimed an interest in subject matter of that class action lawsuit because it litigated that subject matter in multidistrict litigation proceedings. Here, Defendants have not shown that the TSPs claimed an interest in the subject matter of the lawsuit. Therefore, the Court finds that the

TSAs are not necessary parties under section 389, subdivision (a)(2).

Defendants argue that the TSAs are necessary parties under section 389, subdivision (a), because they are active participants in the allegations made in the FAC. However, Defendants do not point to any allegation in the FAC that mention the TSAs. In addition, as DFEH points out, the allegations in the FAC concern only what occurred at Defendants' offices and events. Accordingly, the Court does not find that the TSAs are necessary parties.

c. Conclusion

For the reasons set forth above, the Court overrules Defendants' demurrer to all causes of action, to the extent that they are brought on behalf of its contingent and temporary workers, on the grounds of misjoinder (Code Civ. Proc., § 430.10, subd. (d)) and failure to state facts sufficient to constitute a cause of action (Code Civ. Proc., § 430.10, subd. (e)).

3. Uncertainty

Defendants demurer to the entire FAC on the ground that it is vague because it fails to identify any relevant time period for its claims. (Demurrer, p. 18:2-3.) Citing an unreported federal class action case, Defendants argue that the putative Group is "not sufficiently 'precise, objective and presently ascertainable.'" (Demurrer, p. 18:10-14, citing Kevari v. Scottrade, Inc. (C.D. Cal., Aug. 31, 2018, No. CV 18-819-JFW(GJSX)) 2018 WL 6136822, at *10.) Without knowing the time frame that covers the purported group of employees, Defendants argue, the parties will be unable to meaningfully determine appropriate discovery limits, the scope of admissible (or inadmissible) evidence, and the period for which DFEH is seeking recovery. (Demurrer, p. 18:16-20.)

In opposition, DFEH contends that it is not subject to class certification requirements. (Opposition, 14:18-19.) Nevertheless, the FAC's allegations are adequately pled with respect to time because Plaintiff brought this action "seeking relief in the public interest for the state Defendants' female employees and contingent or temporary workers." (Opposition, p. 15:1-4.) In addition, the FAC alleges continuing allegations. (Opposition, p. 15:7-8.) Therefore, it is premature for Plaintiff to attempt to define a specific time period, which relates to damages and other relief. (Opposition, p. 15:8-10.)

In reply, Defendants contend that DFEH's assertion, that it is not required to allege a timeframe because it is not subject to class certification requirements, is irrelevant. (Reply, p. 14:7-8.) In

addition, DFEH's enforcement action cannot be limitless in terms of time. (Reply, p. 14:8-9.) The class action case that DFEH relies on is distinguishable from this case because in that case, Noel v. Thrifty Payless, Inc. (2019) 7 Cal.5th 955, the plaintiff specified the covered timeframe by defining the class as, "'[a]ll persons who purchased the Ready Set Pool at a Rite Aid store located in California within the four years preceding the date of the filing of this action.' [Citation.]" (Reply, p. 14:13-16.)

A party may demurrer on the ground that a pleading is uncertain. (Code Civ. Proc., § 430.10, subd. (f).) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (Khoury v. Maly's of Cal., Inc. (1993) 14 Cal.App.4th 612, 616.) Such demurrers "are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond." (Mahan v. Charles W. Chan Insurance Agency, Inc. (2017) 14 Cal.App.5th 841, 848.)

Here, although the FAC fails to allege a precise time period of the wrongdoing it alleges occurred, any such arguable ambiguity can be clarified through discovery, for example, through interrogatories or other discovery. Indeed, "[a] special demurrer for uncertainty is not intended to reach the failure to incorporate sufficient facts in the pleading, but is directed at the uncertainty existing in the allegations actually made." (Butler v. Sequeira (1950) 100 Cal.App.2d 143, 145–146.)

Accordingly, the Court overrules Defendants' demurrer to the FAC on the ground of uncertainty.

4. Third Cause of Action – Termination

Defendants demurer to DFEH's third cause of action for employment discrimination because of sex – termination, contending the following. Defendants argue that DFEH does not adequately allege facts sufficient to support the two different discrimination theories (disparate treatment and disparate impact termination) it advances for its third cause of action. To survive a demurrer for the disparate treatment theory, Plaintiff must allege (1) that members of a protected group were treated differently than similarly situated individuals and (2) evidence of discriminatory motive. In addition, to survive a demurrer based on a disparate impact theory, Plaintiff must allege facts or statistical evidence demonstrating a causal connection between the challenged policy and significant disparate impact on the allegedly protected group. However, here, Plaintiff has not adequately identified neutral policies or practices that it contends adversely impact women in regard to termination.

In opposition, DFEH contends that the FAC is sufficiently pled to support Plaintiff's third cause of action because it alleged specific facts to support various theories of liability, including disparate impact and/or disparate treatment. However, to the extent the Court believes the allegations should be clarified, Plaintiff requests leave to amend.

"In general, there are two types of illegal employment discrimination under FEHA: disparate treatment and disparate impact." (Jones v. Department of Corrections & Rehabilitation (2007) 152 Cal.App.4th 1367, 1379.) "Disparate treatment and disparate impact are different theories of discrimination, requiring different proof." (Turman v. Turning Point of Central California, Inc. (2010) 191 Cal.App.4th 53, 61.) "'Disparate treatment' is intentional discrimination against one or more persons on prohibited grounds. [Citations.] Prohibited discrimination may also be found on a theory of 'disparate impact,' i.e., that regardless of motive, a facially neutral employer practice or policy, bearing no manifest relationship to job requirements, in fact had a disproportionate adverse effect on members of the protected class.'" (Guz v. Bechtel Nat. Inc. (2000) 24 Cal.4th 317, 354, fn. 20.)

"To prevail under the disparate treatment theory, an employee must show that the employer harbored a discriminatory intent." (Mixon v. Fair Employment & Housing Com. (1987) 192 Cal.App.3d 1306, 1317.) However, "[i]n most cases, the complainant will be unable to produce direct evidence of the employer's intent." (Ibid.) Therefore, "California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination, … based on a theory of disparate treatment." (Guz v. Bechtel Nat. Inc., supra, 24 Cal.4th at p. 354.) "This so-called McDonnell Douglas test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially." (Ibid.)

The following are the three steps of the McDonnell Douglas test: "1) The complainant must establish a prima facie case of discrimination; ¶ 2) The employer must offer a legitimate reason for his actions; ¶ [and] 3) The complainant must prove that this reason was a pretext to mask an illegal motive." (Mixon v. Fair Employment & Housing Com., supra, 192 Cal.App.3d at p. 1317.) "The plaintiff, of course, must plead a prima facie case," the first step under the McDonnell Douglas test, "in order to survive demurrer." (Caldwell v. Paramount Unified School Dist. (1995) 41 Cal.App.4th 189, 203, fn. 7.) "Accordingly, the complaint must include the prima facie elements of employment discrimination specified in McDonnell Douglas." (Ibid.) "The prima facie case for discriminatory discharge can therefore be stated thusly: ¶ (1) complainant belongs to a protected class; ¶ (2) his job performance was satisfactory; ¶ (3) he was discharged;

and ¶ (4) others not in the protected class were retained in similar jobs, and/or his job was filled by an individual of comparable qualifications not in the protected class." (Mixon v. Fair Employment & Housing Com., supra, 192 Cal.App.3d at p. 1318.)

The FAC satisfies the first prong by alleging that DFEH is bringing this action to vindicate the rights of female employees, a protected class (sex or gender) under FEHA. (FAC, ¶ 1; Gov. Code, § 12940, subd. (a).) The FAC also satisfies the third prong, that the female employees were discharged, by alleging that the Defendants terminated female employees. (FAC, ¶¶ 4, 44, 81.) However, the FAC does not adequately facts supporting the second prong (job performance was satisfactory) and fourth prong (that after termination, others not in the protected class were retained in similar jobs, and/or his job was filled by an individual of comparable qualifications not in the protected class).
For the reasons set forth above, at this point, the FAC has not adequately alleged facts sufficient to support its third cause of action for employment discrimination because of sex – termination based on a disparate treatment theory. The Court also finds that the FAC does not adequately support a disparate impact theory because there are not sufficient facts alleging that a facially neutral employer practice or policy, bearing no manifest relationship to job requirements, had a disproportionate adverse effect on the female employees. DFEH should clarify.

Accordingly, at this point, the Court sustains Defendants' demurrer to the third cause of action employment discrimination because of sex – termination, for failure to state facts sufficient to constitute a cause of action, with leave to amend. (Code Civ. Proc., § 430.10, subd. (3).) DFEH has 20 days to file an amended complaint.

5. Fourth Cause of Action – Constructive Discharge

Defendants demurer to DFEH's fourth cause of action for employment discrimination because of sex – constructive discharge arguing that it fails to state a cause of action. They argue that the FAC does not allege facts establishing causation between any purported "aggravated" and "intolerable" working conditions on one hand, and Defendants' forced resignation of any woman, much less a group of female employees. (Demurrer, p. 20:7-9.)

The Court disagrees. "In order to establish a constructive discharge, an employee must plead and prove, … that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238, 1251.)

Here, the FAC alleges working conditions that were so intolerable or aggravated at the time of the relevant employees' resignations that a reasonable employer would realize that a reasonable person in the employees' positions would be compelled to resign. The FAC alleges that Defendants fostered a pervasive "frat boy" workplace culture that continues to thrive. (FAC, ¶ 5.) For example, women are subjected to "cube crawls" in which male employees drink copious amounts of alcohol as they "crawl" their way through various cubicles in the office and engage in inappropriate behavior towards female employees. (FAC, ¶ 5.) Male employees come into work hungover and play video games for long periods of time during work, while delegating their responsibilities to female employees, engage in banter about their sexual encounters, talk openly about female bodies, and joke about rape. (FAC, ¶ 5.) Defendants' "frat boy" culture is a breeding ground for harassment and discrimination against women. (FAC, ¶ 6.) Further, as a result of Defendants "denying women promotions, assignments and compensation in comparison to their male counterparts and subjecting them to sexual harassment and a hostile work environment, Defendants effectively forced female workers to leave their employment with Defendants." (FAC, ¶ 91.)

The FAC also alleges that the employer knowingly permitted such working conditions. The FAC alleges that "[n]umerous complaints about unlawful harassment, discrimination, and retaliation were made to Defendants' human resources personnel and executives, including to Blizzard Entertainment's President J. Allen Brack." (FAC, ¶ 7.) However, "employee's complaints were treated in a perfunctory and dismissive manner …" and "subjected to retaliation, including but not limited to being deprived of work on projects, unwillingly transferred to different units, and selected for layoffs." (FAC, ¶ 7.)

Accordingly, the Court overrules Defendants' demurrer to DFEH's fourth cause of action for employment discrimination because of sex – constructive discharge.

6. Tenth Cause of Action – Waiver

Defendants demurer to DFEH's fourth cause of action for waiver of rights, forums, or procedures and release of claims arguing that it fails to state a cause of action.

"Effective January 1, 2020, [Labor Code] section 432.6 prohibits California employers from requiring prospective and current employees to 'waive any right, forum, or procedure' for a violation of the [FEHA] or the Labor Code. (§ 432.6, subd. (a).)" (Midwest Motor Supply Co. v. Superior Court of Contra Costa County (2020) 56 Cal.App.5th 702, 714–715.) "Ordinarily, a

pleading 'is sufficient if it alleges ultimate rather than evidentiary facts.' [Citation.]" (Foster v. Sexton (2021) 61 Cal.App.5th 998, 1027.) "Generally, court and litigants are guided in making these distinctions by the principle that a plaintiff is required only to set forth the essential facts with """"particularity sufficient to acquaint a defendant with the nature, source and extent of [the plaintiff's] cause of action."""" [Citations.]" (Ibid.)

Here, the Court finds that DFEH has pleaded the ultimate facts sufficient to support its fourth cause of action. The FAC alleges that Defendants required female workers to waive rights, forums, and/or procedures as a condition of their employment, continued employment, or receipt of any employment-related benefit. (FAC, ¶ 150.) In addition, "female workers were required to sign a release of claims and/or rights in exchange for underpayment of compensation, or an adjustment, bonus, raise or payment, and/or for employment-related benefit," in violation of FEHA, Government Code section 12964.5. (FAC, ¶ 152.) To the extent that Defendants are arguing that tenth cause of action is uncertain because the FAC fails to allege specific facts about the agreements that were purportedly unlawful, the individuals who were required to agree to them, or the circumstances under which they entered into the agreements (Demurrer, p. 20:12-14), such ambiguities can be clarified through discovery.

Accordingly, the Court overrules Defendants' demurrer to DFEH's tenth cause of action for waiver of rights, forums, or procedures and release of claims.

B. Motion to Strike

Considering the Court's ruling on Defendants' demurrer above, the Court denies in full Defendants' motion to strike.

ORDER

The Court OVERRULES Defendants' demurrer to all causes of action in the First Amended Complaint, to the extent that they are brought on behalf of its contingent and temporary workers.

The Court OVERRULES Defendants' demurrer to the FAC on the ground of uncertainty.

The Court SUSTAINS Defendants' demurrer to the third cause of action employment discrimination because of sex – termination, with leave to amend within 20 days.
The Court OVERRULES Defendants' demurrer to the fourth cause of action for employment discrimination because of sex – constructive discharge.

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

**Civil Division**

Central District, Stanley Mosk Courthouse, Department 73

**21STCV26571** February 15, 2022
**DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING vs** 8:30 AM
**ACTIVISION BLIZZARD, INC., et al.**

Judge: Honorable Timothy Patrick Dillon
Judicial Assistant: M. Y. Carino
Courtroom Assistant: E. Villanueva

CSR: F. Carrillo, CSR#9555
ERM: None
Deputy Sheriff: None

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The Court OVERRULES Defendants' demurrer to the tenth cause of action for waiver of rights, forums, or procedures and release of claims.

The Court DENIES Defendants' motion to strike the First Amended Complaint.

Additional orders:
Parties agreed to mediate the case in open court. Parties are to select a mediator by 3/30/2022 and to complete mediation by 12/30/2022.

Clerk is to give notice. Certificate of Mailing is attached.