No. 25-____

IN THE

Supreme Court of the United States

BRIAN ARMSTRONG,

Petitioner,

v.

WB STUDIO ENTERPRISES, INC., AND
WARNER BROTHERS ENTERTAINMENT, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a judge or a jury decide the fact intensive question of whether intentional discrimination against white people in the workplace—done pursuant to a corporate DEI policy—satisfies the "but for" causation standard in 42 U.S.C. § 1981?

2. Whether, under the "but for" causation standard established in *Comcast Corp. v. National Ass'n of African American-Owned Media*, 589 U.S. 327 (2020), a court may grant summary judgment by examining only the actions of a single subordinate decision-maker in isolation, where the record contains evidence that supervisors above that decision-maker directed race-conscious hiring decisions as part of an integrated corporate scheme to implement a discriminatory diversity policy.

PARTIES TO THE PROCEEDING

Petitioner Brian Armstrong was the plaintiff-appellant below.

Respondents WB Studio Enterprises, Inc. and Warner Brothers Entertainment, Inc. (NASDAQ: WBD) were the defendants-appellees below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is an unpublished memorandum disposition filed October 27, 2025 (App. 1a). The order and judgment of the United States District Court for the Central District of California granting Respondents' motion for summary judgment is reported at App. 88a. The district court's rulings on Respondents' motion for summary judgment incorporated by the order and judgment is at App. 5a, 57a, 74a, and 87a.

JURISDICTION

The court of appeals entered judgment on October 27, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1981(a) provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. § 1981(b) provides: "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and

termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

INTRODUCTION

This case presents a question of exceptional importance in the post- *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College,* 600 U.S. 181 (2023) ("SFFA") landscape: Can an employer adopt a written policy committing to increase the hiring of "people of color," direct supervisors to implement that policy through explicit racial preferences, replace a white department head with a person of color to advance the policy's racial objectives, and then escape liability under 42 U.S.C. § 1981 simply because the newly installed decision-maker claims independent judgment—even while admittedly following the very policy that produced her appointment?

The Ninth Circuit said yes. Its decision permits exactly that result and, in doing so, creates a roadmap for every employer in America to insulate racial hiring from judicial scrutiny. The formula is simple: adopt a facially racial diversity policy; direct senior executives to implement it through racial quotas and preferences; delegate final hiring authority to a subordinate who shares the policy's goals; and then, when sued, point to that subordinate's "independent" judgment as a shield. Under the decision below, no amount of evidence—not a written corporate policy referencing race, not emails demanding to know "how many African Americans are on your list," not directives that department heads must not be "all white," not the decision-maker's own admission that she followed the policy—suffices to create a triable issue of fact.

The facts here are stark. Petitioner Brian Armstrong is an Emmy Award-winning television camera operator who worked continuously on Warner Brothers productions for twelve years. App. 7a–8a, 120a-121a. In 2018, Warner Brothers adopted a "Commitment to Diversity and Inclusion" that expressly pledged to increase the representation of "people of color . . . behind the camera." App. 8a–9a, 121a-122a. Senior executives immediately implemented the Commitment through race-based directives. Executive Producer Al Higgins demanded that department heads not be "all white" and asked subordinates "how many African Americans are on your list." Unit Production Manager Carol Miller tracked prospective employees by race. *See* App. 46a–47a, 97a-98a, 123a-125a. Armstrong's white Director of Photography, Steve Silver, was replaced by Patti Lee, a person of color. Lee then replaced Armstrong with Michelle Crenshaw, an African-American woman Lee had never worked with and whose work performance Lee knew nothing about. App. 11a–12a. 131a-132a, 134a-135a. Lee admitted she followed the Commitment and felt good about "increasing the amount of people of color behind the camera." App. 29a, 112a, 133a-134a.

Yet both the district court and the Ninth Circuit granted summary judgment for Warner Brothers. The courts dismissed the racial corporate policy, the executives' racial directives, and the decision-maker's own admission as insufficient evidence of intentional discrimination—reasoning that the Commitment "did not contain any specific instructions or directive on whom to hire." App. 3a. This elevates form over substance to a degree that eviscerates Section 1981's protections. A policy need not say "do not hire white people" to constitute evidence of intentional race discrimination. When the policy expressly targets race,

executives enforce it through racial quotas, and the decision-maker admits following it, the inference of discrimination is overwhelming.

This case warrants certiorari for two reasons. First, it presents the urgent question of whether corporate diversity policies that expressly reference race constitute evidence of intentional discrimination under Section 1981—a question this Court has never addressed, that is certain to recur with increasing frequency in the wake of *SFFA*, and on which the lower courts are providing no meaningful guidance. Second, the decision below conflicts with this Court's precedents in *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media,* 140 S. Ct. 1009, 1014 (2020) and *Staub v. Proctor Hosp.,* 562 U.S. 411, 422 (2011) by permitting employers to atomize an integrated discriminatory scheme into individually defensible decisions, thereby defeating "but for" causation as a matter of law even where the totality of the evidence points unmistakably to race as the determinative factor.

The practical consequences of the Ninth Circuit's holding cannot be overstated. Many of American employers maintain diversity, equity, and inclusion programs that set racial goals for hiring. The decision below tells those employers that they may implement such programs through explicit racial preferences without fear of Section 1981 liability, so long as final hiring authority is formally delegated to a subordinate who can articulate a race-neutral rationale for each individual decision. If this framework stands, Section 1981's prohibition on intentional race discrimination in contracting will be reduced to a prohibition only on the most cartoonishly explicit forms of individual bigotry—leaving untouched the systemic, policy-driven racial preferences that represent the most consequential

form of race discrimination in the modern American workplace.

STATEMENT OF THE CASE

Petitioner Brian Armstrong is a veteran television camera operator who worked continuously for Respondents on Chuck Lorre's television productions from 2007 to 2019—a period spanning approximately twelve years. App. 7a–8a, 120a-122a. During that time, Armstrong served as one of four camera operators on both "Two and a Half Men" and "The Big Bang Theory," earning eight Emmy nominations and one Emmy award for his work. App. 121a. Throughout this entire period, Armstrong reported to Director of Photography Steve Silver, and Producer Chuck Lorre stated that he wanted to keep "this family together" referring to Armstrong's being on the team with Silver. App. 121a. In March, 2019, President Peter Roth told Plaintiff, "[t]his family will never be broken up." App. 128a. Armstrong's employment with Respondents was continuous; when one Lorre production ended, Armstrong and his fellow camera crew members were customarily rolled over onto the next Lorre production at Warner Brothers. App. 7a-8a, 119a-121a.

In September 2018, Warner Brothers implemented a "Commitment to Diversity and Inclusion" that was included in all new-hire paperwork and posted on the camera door of The Big Bang Theory set. App. 121a-122a. The Commitment stated that Warner Brothers "must all ensure there is greater inclusion of . . . people of color . . . in greater numbers . . . behind the camera." App. 121a-122a. The Commitment further pledged that "[i]n the early stages of the production process, we will engage with our writers, producers, and directors

to create a plan for implementing this commitment." App. 121a-122a.

The Commitment was not merely aspirational. Executive producers promptly implemented it through racial directives with some executives telling Armstrong that they "need to work off the Warner Bros new diversity hiring program not only in front of the camera but behind the camera." App. 46a. Executive Producer Al Higgins sent an email stating: "I don't want them all white," referring to department heads on the upcoming "Bob Hearts Abishola" series. App. 123a. In another email, Higgins demanded: "I hate to put it bluntly but how many African Americans are on your list." App. 124a. Unit Production Manager Carol Miller responded by identifying crew members by race, stating: "These are our African Americans as of now. This does not touch upon our other minorities." App. 124a.

When asked about Higgins' statement that he did not want department heads to be "all white," Peter Roth, the President of Warner Bros. Television Group, declined to characterize it as problematic. App. 123a-124a. Executive Producer Chuck Lorre described Higgins' race-based demands as arising from "honorable" intent, adding that the efforts were consistent with Lorre's own commitment to diversity. App. 123a-124a. When asked about the impact of these policies on white employees, Lorre responded dismissively: "What about them? You're seriously asking me that question. Oh, my goodness." App. 125a.

Steve Silver—Armstrong's white director of photography on The Big Bang Theory—was directed to find African-American crew members. Silver asked subordinate Ben Steeples to search for crew members who were African-American. Steeples was instructed to

"start with African-American people, male or female, and then go from there." App. 46a, 125a-126a.

The racial staffing of Bob Hearts Abishola was driven in significant part by the desire to make the show's black cast to feel comfortable by having black crew members on set. Miller compared hiring African-American crew to providing the cast with desired food in craft services and satisfactory dressing rooms—framing racial hiring as a component of cast comfort. App. 123a, 126a-127a.

Again, these were not isolated comments or actions. And, when asked about them, Lorre defended them. In fact, Lorre felt the show should have been targeting "all minorities and groups that have in the past been excluded." App. 99a. That did not include Caucasians, though. Lorre said that including white people in a DEI hiring policy would be "preposterous" because such policies were designed to "make up, create opportunity for everyone else." App. 99a-100a.

This commitment to Warner Brothers' DEI policy forced the hand of producer Krisy Cecil, who oversaw the hiring of crew for the new series. She admitted to Armstrong that the changes he had heard about were "true," and confirmed that she "had to hand over the hiring process for Bob to Carol Miller" pursuant to the diversity initiative. App. 130a. Producer Robin Green told Armstrong: "Yep. It looks like we are an endangered species," and further stated: "Kristy has been ordered to follow this new diversity hiring program which includes, you know, we got to hire more Blacks." App. 130a.

Cecil replaced two white department heads with persons of color. She described this as a "coincidence" with the Commitment, yet she did not deny that

Armstrong was not selected to work on Bob Hearts Abishola due to the Commitment. App. 131a-132a. Critically, when Armstrong wrote to Cecil about what he described as "illegally vicious rumors" regarding race-based hiring changes, Cecil replied confirming that it was true—she had to replace Steve Silver with Patti Lee, and that as a result of this replacement, Respondents "lost" Armstrong as a television camera operator. App. 135a-136a. Cecil's admission is powerful but-for evidence: she essentially conceded that because Silver was replaced with Lee—a person of color—Armstrong lost his position. The causal chain is direct and unbroken: the racial replacement of Silver with Lee was the reason Armstrong was not retained. App. 135a-136a. Silver himself told Armstrong that "you have to be a certain demographic to move on to the Bob Hearts Abishola production." App. 126a. This statement confirms that race was the operative criterion for continued employment on the new series. Lee herself testified that she adhered to the Commitment in selecting television camera operators and felt good about "increasing the amount of people of color behind the camera" because she "like[s] to have a diverse and inclusive workplace." App. 111a-112a. Lee testified that she would continue to adhere to the Commitment in her future work with Respondents. App. 111a

The implementation of the Commitment spawned pervasive racially hostile commentary on the production set. Multiple crew members made statements to Armstrong about the impact of the race-based hiring policies on white employees. Crew member David Pearce told Armstrong: "Well, Army, I guess it's finally happened. It looks like we've been diversified out of the business." App. 44a, 127a. Crew member Todd Slater

called Armstrong "Honkie" and told him: "Didn't you see the note? You out of work my friend. You and me and people like us." App. 44a, 127a. Crew member T. Ryan Brennan stated: "You think people like you and I are ever going to work in this industry again because of that?" App. 101a, 127a.

Most severely, on May 2, 2019, Executive Producer Chuck Lorre told Armstrong: "You guys are going to be seeing a lot more schvartzes in the next couple of years"—using a Yiddish racial slur that Lorre himself admitted was a "hateful word" that would create a hostile work environment. App. 102a, 129a. On May 3, 2019, Cecil told Armstrong: "[D]idn't you see the DEI statement. Well, people like you are not—don't have much of a future in this business." App. 102a, 130a.

This was a new development. Throughout the final season of The Big Bang Theory, Respondents' senior executives repeatedly assured Armstrong of continued employment. Roth told Armstrong: "Don't you worry. This family will never be broken up" and "You'll always have a job here at Warner Bros. . . . as long as Chuck and I are here." App. 128a-129a. Lorre told Armstrong: "I hope you come with the rest of your guys . . . onto the next one" and "Army, you're gold. Why in the world would you never have as long a career as you ever want with me." App. 128a-129a.

Despite these assurances, Armstrong was not hired for Bob Hearts Abishola. Instead, Patti Lee—who knew Armstrong and was aware of his excellent performance as a television camera operator—was chosen as Director of Photography and selected her own crew. Lee replaced Armstrong with Michelle Crenshaw, an African-American woman whom Lee had never worked with and about whose work performance Lee had no personal knowledge. App. 134a-

135a Lee admitted that selecting Crenshaw made her feel good about "increasing the amount of people of color behind the camera." App. 134a.

Armstrong filed suit in the United States District Court for the Central District of California, asserting a single cause of action under 42 U.S.C. § 1981, encompassing theories of racial discrimination, retaliation, and hostile work environment. App. 6a.

Respondents moved for summary judgment. After extensive briefing and two oral argument hearings on May 6 and June 10, 2024, the district court (Wu, J.) issued a tentative ruling granting the motion in part as to the discrimination and hostile work environment theories. App. 5a–6a. The court ordered supplemental briefing on the retaliation claim. After further briefing, the court granted summary judgment on all theories on July 15, 2024. App. 88a.

On the discrimination claim, the district court focused its analysis on Patti Lee as the sole relevant decision-maker, concluding that because Lee had not previously worked with Armstrong and had filled the camera operator positions before Armstrong expressed interest, Armstrong could not establish a prima facie case. The court dismissed the racial statements and directives by the show's top producers and executives as irrelevant because those individuals were not the direct hiring decision-maker for camera operator positions. App. 20a–34a.

On the retaliation claim, the court found that Armstrong failed to establish causation. App. 35a–38a.

On the hostile work environment claim, the court concluded that the alleged conduct was not sufficiently severe or pervasive to alter the conditions of Armstrong's employment. App. 38a–51a.

The Ninth Circuit affirmed in an unpublished memorandum disposition dated October 27, 2025.

REASONS FOR GRANTING THE PETITION

I. The Question Whether Corporate Diversity Policies That Expressly Reference Race Constitute Evidence of Intentional Discrimination Under Section 1981 Is an Important and Recurring Question of Federal Law That This Court Should Resolve.

This case squarely presents the question whether a corporate diversity policy that expressly commits to increasing the hiring of "people of color" constitutes evidence of intentional race discrimination under 42 U.S.C. § 1981. The Ninth Circuit answered that question in the negative, holding that Warner Brothers' Commitment to Diversity and Inclusion "did not constitute a race-based reason for hiring other candidates because the commitment did not contain any specific instructions or directive on whom to hire." App. 3a. This holding cannot be reconciled with this Court's precedents and presents a question of exceptional national importance.

In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 206, (2023), this Court held that racial admissions programs at Harvard University and the University of North Carolina violated the Equal Protection Clause. The Court emphasized that "[e]liminating racial discrimination means eliminating all of it." It also held programs that use race as a factor in decision-making are constitutionally suspect regardless of whether they are designed to promote diversity or remedy past discrimination. *Id.* at 207-208. That makes sense.

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free doctrine of equality." *Id.* at 208 (quotations omitted). Of course, *SFFA* focused on the Equal Protection Clause, which prohibits race-based decision-making by state actors. This case deals with Section 1981. But the principles that the Court extolled in *SFFA* should apply with equal force in the 1981 analysis. After all, the Equal Protection Clause guarantees equality in government decision-making while section 1981 guarantees equality in making and enforcing contracts. And courts often analyze section 1981 and equal protection-based section 1983 claims together. *See, e.g., Ramirez v. Dep't of Corr., Colo.*, 222 F.3d 1238, 1244 (10th Cir. 2000) (holding that "allegations of racial and national origin discrimination which are sufficient to support Plaintiffs' equal protection claim under § 1983 are also sufficient to withstand Defendant's motion to dismiss their § 1981 claims"). Thus, this case is an ideal vehicle to consider how the principles discussed in *SFFA* apply in the private sector.

That is especially true here. The Commitment by Warner Brothers that is at issue here is not a generic, aspirational statement. It specifically pledges to increase the representation of "people of color . . . behind the camera," and contemplates a "plan for implementing this commitment" through engagement with "writers, producers, and directors." And, as explained above, this plan was implemented through explicit race-based hiring directives.

The question presented has enormous practical significance. Despite this Court's rejection of race-based decision-making in *SFFA,* regardless of the reason, employers maintain diversity, equity, and inclusion programs that set racial goals for hiring. The question

whether such programs constitute evidence of intentional discrimination when employees are passed over for members of favored racial groups is certain to recur with increasing frequency. This Court should grant certiorari to provide guidance on the evidentiary significance of racial corporate diversity policies under Section 1981.

Moreover, the rule of law adopted by the Ninth Circuit—that a corporate diversity policy expressly referencing race does not constitute evidence of intentional discrimination unless it contains "specific instructions or directive on whom to hire"—is not merely an erroneous application of existing law to unusual facts. It is the adoption of a new and fundamentally erroneous legal standard that will govern race-discrimination cases throughout the largest federal circuit in the country. Under this standard, only the most explicit and cartoonish racial directives—a policy stating "do not hire white applicants"—would constitute evidence of discrimination. Any policy that achieves the same result through even slightly more sophisticated language would be immunized from scrutiny. This is precisely the kind of erroneous rule of law, as distinguished from a mere erroneous factual finding or misapplication of a correctly stated rule, that warrants this Court's intervention.

And the time is now. In the wake of *SFFA*, a growing number of plaintiffs have brought Section 1981 claims challenging racial diversity programs in employment—the logical extension of *SFFA*'s principles from education to the workplace.

II. The Decision Below Conflicts With This Court's Precedent Regarding "But For" Causation Under Section 1981.

In *Comcast Corp. v. National Ass'n of African American-Owned Media*, 589 U.S. 328, 341 (2020), this Court resolved a circuit conflict by holding that a plaintiff need only "plead and prove that, but for race, it would not have suffered the loss of a legally protected right." The decision below misapplied this standard by compartmentalizing the evidence of racial discrimination and examining only the immediate hiring decision-maker in isolation from the corporate structure that directed racial hiring.

The Ninth Circuit's analysis veered from that standard by focusing exclusively on Patti Lee. App. 2a. However, given Lee's knowledge of Armstrong and his exceptional qualifications, there is a genuine issue of material fact as to whether Lee's decision to replace Armstrong with Crenshaw—an African-American woman Lee had never worked with and about whose work performance Lee had no personal knowledge—was itself motivated by race, separate and independent from the causal chain of Steve Silver's race-based replacement. Moreover, the Ninth Circuit's analysis ignored the undisputed evidence that Lee was selected as Director of Photography as part of a racial restructuring of the production's leadership, that her predecessor Steve Silver was replaced because supervisors did not want department heads to be "all white," and that Lee herself testified she followed the Commitment in making her selections. The but-for chain is further confirmed by Cecil's own admission that because she replaced Silver with Lee, Respondents "lost" Armstrong as a camera operator—and by Silver's statement to Armstrong that people had to "fit a

certain demographic" to move on to the next show. App. 44a. This evidence, combined with the fact that Armstrong reported to Silver for the entire 2007–2019 period and that Lorre stated he wanted to "keep this family together" referring to Armstrong's being on the team with Silver, and in March, 2019, and President Peter Roth told Plaintiff, "[t]his family will never be broken up, "demonstrates that but for the racial replacement of Silver, Armstrong would have continued in his position.

Moreover, the courts below imposed a requirement not found in Section 1981 itself—that Armstrong must show he 'applied for' the camera operator position in order to assert a discrimination claim. This requirement is particularly untenable in the entertainment industry, where there are often no formal applications for employment. App. 20a–22a. As Justice Alito emphasized in *Muldrow v. City of St. Louis,* 601 U.S. 346, 355 (2024), lower courts should not engraft requirements onto antidiscrimination statutes that the statutes themselves do not contain.

Equally concerning is the emerging trend among lower courts of requiring a Section 1981 plaintiff to plead and prove that he is a 'racial minority' in order to state a claim. Section 1981, by its plain text, protects '[a]ll persons'—not merely racial minorities. 42 U.S.C. § 1981(a). Yet some courts have held that a Section 1981 plaintiff must be a 'racial minority' to state a claim. *See, e.g., Bank v. Am. Airlines Group, Inc.,* No. 2:20-cv-09717, 2021 WL 2119502, at *1 (C.D. Cal. Apr. 21, 2021) (holding that a plaintiff must plead that '(1) the plaintiff is a member of a racial minority, (2) an intent to discriminate on the basis of race by the defendant, and (3) the discrimination concerns one or more of the activities enumerated in the statute'). This

judicially created requirement finds no support in the text of Section 1981 and, if left unchecked, would effectively read white plaintiffs out of the statute's protections—a result directly contrary to *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 296 (1976), which held that Section 1981 protects persons of all races, including white persons, from racial discrimination.

The Ninth Circuit's decision creates a roadmap for employers to evade Section 1981 liability. Under the decision below, an employer may implement a racial hiring policy, direct supervisors to carry it out, replace decision-makers who do not sufficiently advance the policy's racial objectives, and install new decision-makers who share the policy's racial goals—all without facing liability, so long as the final decision-maker can articulate a race-neutral justification for each individual hiring choice. This framework eviscerates the but-for causation standard established in *Comcast* by allowing employers to atomize an integrated discriminatory scheme into isolated, individually defensible decisions.

The record here presents a classic case of organizational discrimination. The Commitment established a racial policy. As explained above, executives directed its implementation through explicit racial directives. A white department head was replaced by a person of color to advance the policy's goals. The new department head admittedly followed the policy. And the plaintiff—a highly qualified, award-winning white employee who had been promised continued employment—was passed over in favor of a person of color whom the new department head had never worked with and about whose work performance she had no personal knowledge, despite the fact that Lee knew

Armstrong and was aware of his outstanding qualifications. But the courts below threw this case out because of confusing legal decisions and based on an incorrect assumption that Section 1981 treats racial discrimination against white people differently.

Thus, this error is not a fact-bound error confined to this case. It is a legal framework that will govern every Section 1981 case in the Ninth Circuit—and, if left uncorrected, will influence the development of the law nationwide. The Ninth Circuit's approach holds that "but for" causation under *Comcast* can be defeated at summary judgment by examining only the final decision-maker's stated rationale, regardless of the corporate infrastructure of racial directives that placed that decision-maker in her role and guided her selections. This fundamentally misreads *Comcast*'s holding. And it conflicts directly with *Staub*'s recognition that discriminatory animus by a supervisor who is not the ultimate decision-maker can establish employer liability when it is a proximate cause of the adverse action.

The decision below also illustrates the fundamental problem with continued reliance on the *McDonnell Douglas* burden-shifting framework, see *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-804 (1973), in Section 1981 cases involving direct evidence of discrimination. Here, the trial court applied the *McDonnell Douglas* framework to Armstrong's claim while simultaneously discounting the abundant direct evidence of racial decision-making—including the Commitment, the race-based directives from Higgins and Miller, the admissions by Cecil and Green, Lorre's use of a racial slur, and Lee's own testimony that she followed the Commitment. The *McDonnell Douglas* framework was designed as an evidentiary tool for

cases in which the plaintiff lacks direct evidence of discrimination. *See Comcast,* 589 U.S. at 340. Where, as here, there is direct evidence that race was a motivating factor in the employment decision, the *McDonnell Douglas* framework is not only unnecessary but counterproductive—it permits courts to ignore the totality of the circumstances by compartmentalizing evidence into artificial burden-shifting categories rather than asking the straightforward question whether race was a but-for cause of the adverse action. This case presents an ideal vehicle for this Court to clarify that the *McDonnell Douglas* framework does not apply where a Section 1981 plaintiff presents direct evidence of intentional discrimination, and that lower courts must evaluate the totality of the evidence under the but-for causation standard of *Comcast*.

This Court should grant certiorari to reaffirm that "but for" causation under Section 1981 requires consideration of the totality of the evidence—including the corporate policies, executive directives, and organizational structures that produce individual hiring decisions—and that an employer cannot defeat a Section 1981 claim at summary judgment by atomizing an integrated discriminatory scheme into separately defensible components.

CONCLUSION

Racial discrimination has no place in our society, regardless of the reason for it. That was *SFFA's* lesson. But Americans have not heeded that lesson, especially in the entertainment industry. Like Lorre said, they continue to view discrimination against white people as acceptable. Given the extreme evidence of direct racial discrimination, this case presents an ideal vehicle to reconcile *SFFA's* aspirations with the reality of Section 1981 litigation.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 26, 2026

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: Oct. 27, 2025]

No. 24-5049
D.C. No. 2:23-cv-03854-GW-JPR

BRIAN ARMSTRONG,

Plaintiff - Appellant,

v.

WB STUDIO ENTERPRISES, INC.;
WARNER BROTHERS ENTERTAINMENT, INC.,

Defendants - Appellees.

MEMORANDUM[*]

Appeal from the United States District Court for
the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted October 8, 2025
Pasadena, California

Before: RAWLINSON, MILLER, and JOHNSTONE, Circuit Judges.

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Brian Armstrong appeals from the district court's grant of summary judgment for WB Studio Enterprises, Inc. and Warner Brothers Entertainment, Inc. (collectively, "Warner Brothers"), on his 42 U.S.C. § 1981 discrimination, retaliation, and hostile work environment claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's grant of summary judgment. *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1103 (9th Cir. 2008). We affirm.

Section 1981 makes it unlawful to intentionally discriminate because of race when "mak[ing] and enforc[ing] contracts," which includes "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b); *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982). To show intentional discrimination because of race, plaintiffs must prove that "but for" race, they would not have suffered the loss of a right protected by the statute. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 333, 341 (2020).

1. The district court properly granted summary judgment on Armstrong's § 1981 discriminatory failure-to-hire claim. Armstrong failed to raise a genuine dispute of material fact that the hiring decision maker, Patti Lee, made her decisions because of race rather than legitimate reasons. *See id.*; *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 638, 640 (9th Cir. 2003). Statements made by people who were not involved in the hiring process are not material because Armstrong failed to establish a genuine dispute that those statements were connected to the hiring authority for the position at issue. *See Vasquez*, 349 F.3d at 640 (analyzing

conduct of facility director who made decision to transfer plaintiff rather than conduct of co-worker who made racially charged statements). Warner Brothers's statement regarding its "Commitment to Diversity and Inclusion" did not constitute a race-based reason for hiring other candidates because the commitment did not contain any specific instructions or directive on whom to hire, nor is there evidence that Patti Lee relied on the commitment in making her hiring decisions.

2. The district court properly granted summary judgment on Armstrong's § 1981 retaliation claim. Even assuming Armstrong engaged in a protected activity and suffered an adverse employment action, he failed to raise a genuine dispute of material fact that there was a causal link between the two. *See Surrell*, 518 F.3d at 1108. Whether a causal link may be inferred depends on some showing that the relevant decision maker was aware of the protected activity, which Armstrong did not genuinely dispute. *See Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003) (affirming summary judgment for school district because no evidence of requisite awareness by "the particular principals" who made allegedly retaliatory hiring decision).

3. The district court properly granted summary judgment on Armstrong's § 1981 hostile work environment claim. Armstrong failed to raise a genuine dispute of material fact that the alleged conduct was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive work environment. *See Manatt v. Bank of Am., NA*, 339 F.3d 792, 798 (9th Cir. 2003). Generally, "teasing, offhand comments, and isolated incidents (unless

extremely serious) will not amount to discriminatory changes" in the conditions of employment. *Id.* There is no genuine dispute that the conduct challenged by Armstrong was not severe, pervasive, or unreasonably interfered with his work performance. *See McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113 (9th Cir. 2004).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 23-3854-GW-JPRx
Date	May 7, 2024
Title	*Brian Armstrong v. WB Studio Enterprises, Inc., et al.*

Present: The Honorable GEORGE H. WU,
UNITED STATES DISTRICT JUDGE

Javier Gonzalez
Deputy Clerk

None Present
Court Reporter / Recorder

_____
Tape No.

Attorneys Present for Plaintiffs:
None Present

Attorneys Present for Defendants:
None Present

PROCEEDINGS: IN CHAMBERS - AMENDED TENTATIVE RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT [64]

Attached hereto is the Court's Amended Tentative Ruling on Defendants' Motion [64]. The Court adopts its tentative as its final and GRANTS Defendants' motion for summary judgment with regard to Plaintiff's discrimination and hostile work environment theories. However, the Court requests the parties submit supplemental briefing with respect to Plaintiff's retaliation theory concerning the alleged threat made by Sidell to Plaintiff. Each party will submit their briefs by May 21, 2024, with each brief limited to five pages.

_____:_____
Initials of Preparer JG

I. Background

Plaintiff Brian Armstrong ("Plaintiff" or "Armstrong") brings this action against Defendants WB Studio Enterprises, Inc., Warner Bros. Entertainment, Inc., and Does 1-20 (collectively "Defendants" or "WB") alleging a violation of 42 U.S.C. § 1981, *et seq*. ("Section 1981") under three theories of race-based discrimination: (1) failure to hire, (2) retaliation, and (3) hostile work environment. *See* Second Amended Complaint ("SAC"), Docket No. 25. Defendants moved to dismiss the SAC for reasons of estoppel and preemption. *See* Docket No. 26. The Court denied Defendants' motion, *see* Docket No. 32, 41, and the parties subsequently engaged in an unsuccessful mediation. *See* Docket Nos. 38-39. On November 9, 2023, Defendants filed an Answer to the SAC, s*ee* Docket No. 42, and the parties have since engaged in discovery.

Now before the Court is Defendants' motion for summary judgment, or in the alternative, partial summary judgment ("Mot"). *See* Docket No. 64. Plaintiff filed an opposition ("Opp."), *see* Docket No. 66, and Defendants filed a reply ("Reply"), *see* Docket No. 68.

II. Factual Background[1]

Armstrong identifies as a white, heterosexual, Christian male. *See* SGD 1. Plaintiff is a television camera operator with extensive experience working on multi-cam sitcoms. *See* SGD 2, 6. During his career, Plaintiff worked on many shows where Chuck Lorre ("Lorre") was the executive producer, including Dharma & Greg, Two and a Half Men, and The Big Bang Theory ("Big Bang"). *See* SGD 2, 6; ADF 8-9. Armstrong worked on Two and a Half Men as a camera assistant and camera operator from 2003-2015, and on Big Bang from 2007 to May 2019. *See* SGD 2, 6. While working on Big Bang, Plaintiff's employment was subject to the terms of the IATSE Local 600 collective bargaining agreement in which Armstrong was employed by Warner Bros. Television ("WBTV") on a daily basis. *See id.* 9-11. In 2013, while working on Big Bang, Plaintiff,

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[1] The Court has examined in detail: (1) Defendants' Statement of Uncontroverted Facts, Docket No. 64-2; (2) Plaintiff's Statement of Genuine Disputes (including Plaintiff's Additional Statement of Genuine Disputes ("ADF")), Docket No. 66-1; and (3) Defendants' Response to Statement of Genuine Disputes ("SGD"), Docket No. 68-1. Any citation to particular paragraphs within the SGD or ADF also references all parties' statements and responses to those same paragraphs.

The Court has reviewed such disputes and has included in this summary only facts that are supported by the cited evidence, altering the proffered facts if necessary to accurately reflect the uncontroverted evidence. To the extent the cited underlying "undisputed" facts have been disputed, the Court finds that the stated disputes: (1) fail to controvert the proffered "undisputed" facts; (2) dispute the facts on grounds not germane to the below statements; and/or (3) fail to cite evidence in support of the disputing party's position. As such, the Court treats such facts as undisputed. Any proffered facts not included in this ruling were found to be: (1) unsupported by admissible evidence; (2) irrelevant to the Court's present analysis; or (3) some combination thereof.

along with four other individuals, won an Emmy for Outstanding Technical Direction, Camerawork, Video Control. *See* ADF 12. Plaintiff received other Emmy nominations in his career and Lorre considered him to be a qualified and talented camera operator. *See id*. 14, 16. Additionally, from 2015-2019, Plaintiff also worked as a camera operator on all four seasons of the show The Ranch. *See* SGD 13.

Production on the pilot for a new WBTV and Lorre show, Bob Hearts Abishola ("Bob Hearts"), took place in late March and April 2019. *See id*. 14. The Bob Hearts pilot filmed on April 16-18, 2019. *See id*. Steve Silver ("Silver") served as the Director of Photography for the Bob Hearts pilot. *See id*. 17. Silver, Plaintiff's former supervisor on previous Lorre shows, did not ask Armstrong to work on the Bob Hearts pilot because Plaintiff was not available as it would have conflicted with his commitments on Big Bang and The Ranch. *See id*. 20-21. Carol Miller ("Miller") and Michael Collier ("Collier") were the producers responsible for staffing the Bob Hearts pilot. *See* ADF 25. Robinson Green ("Green"), Kristy Cecil ("Cecil"), and Patti Lee ("Lee") did not have any involvement with the Bob Hearts pilot. *See* SGD 27, 43.

Big Bang ended production on May 3, 2019. *See id*. 12. During the last season of Big Bang, in late 2018/ early 2019, Plaintiff saw the Warner Bros.' Commitment to Diversity and Inclusion ("Commitment") posted on the set of Big Bang and took a picture. *See* ADF 18. The Commitment reads in whole:

> WarnerMedia companies Warner Bros., HBO and Turner have long been committed to diversity and inclusion as moral and business imperatives. It is essential that our content and creative partners reflect the

> diversity of our society and the world around us. Together with other production companies, networks, guilds, unions, talent agencies and others in the industry, we all must ensure there is greater inclusion of women, people of color, the LGBTQ+ community, those with disabilities and other underrepresented groups in greater numbers both in front of and behind the camera.
>
> For our part, WarnerMedia pledges to use our best efforts to ensure that diverse actors and crew members are considered for film, television and other projects, and to work with directors and producers who also seek to promote greater diversity and inclusion in our industry. To that end, in the early stages of the production process, we will engage with our writers, producers, and directors to create a plan for implementing this commitment to diversity and inclusion on our projects, with the goal of providing opportunities for individuals from underrepresented groups at all levels. And we will issue an annual report on our progress.
>
> The companies of WarnerMedia have a historic and proven commitment to diversity and inclusion. But there is much more we can do and we believe real progress can be made in the industry. We will work with our partners in the entertainment community to make this commitment a reality.

See id. 19; Docket No. 67-1 at 2142. Plaintiff was offended by the Commitment as he felt it excludes white people. *See id*. 20. Additionally, in the last few months of Big Bang's production, Lorre and Peter Roth

("Roth"), then President of WBTV, made generalized comments to Plaintiff and other Big Bang crew about a desire to have those individuals continue to work together at WB on future shows. *See id.* 52-53, 57, 59-61, 64. Plaintiff's last day of employment with WB was May 3, 2019. *See* SGD 12.

On or around May 9, 2019, CBS ordered Bob Hearts to series for a first season. *See id*. 22. WBTV produces the Bob Hearts series, Lorre serves as an executive producer, along with Al Higgins ("Higgins") and others. *See id*. 23, 39. Green and Cecil were selected as producers of the Bob Hearts series. *See id*. 24. As producers, Green and Cecil oversaw the show's physical production, including the selection and hiring of department heads, including the Director of Photography. *See id*. 25, 29. The Director of Photography for a series is responsible for creating the look of the television show and oversees the camera department personnel. *See id*. 29. It is custom and practice in the television industry that the Director of Photography, as the head of the camera department, selects the camera operators. *See id*. 44. After Green and Cecil began working on the Bob Hearts series, they started looking for a Director of Photography. *See id*. 28. While Silver had been the Director of Photography for the Bob Hearts pilot, he was not chosen as Director of Photography for the Bob Hearts series. *See id*. 31. Green and Cecil considered and interviewed multiple candidates for the Director of Photography position, including Lee. *See id*. 35. Lee is a Chinese-American, lesbian woman that has extensive experience working as a Director of Photography on television series. *See id*. 36. Green and Cecil did not know Lee prior to considering her for the role, but Lee came recommended by Green's peers. *See id*. 38. After interviewing Lee for the job, Green and Cecil recommended hiring

Lee to Lorre and Higgins, who approved of the selection. *See id*. 39-40.

After Lee was selected as the Director of Photography for the Bob Hearts series, she began considering individuals to hire for the four camera operator positions. *See id*. 45. In her search, Lee believed the majority of people she considered for the camera operator positions on the Bob Hearts series were white. *See id*. 47. In late May 2019, Lee reached out to several camera operators whom she believed were qualified to inquire whether they were available and interested in working on the Bob Hearts series. *See id*. 48. To Lee, the most important consideration when selecting individuals was the person's qualifications, and other relevant factors were the person's interest, availability, and personality. *See id*. 51. On May 29, 2019, Lee sent an email to Green informing him of the crew she had selected to date, including Mark Davison, Michelle Crenshaw, and Jon Purdy as three of the four camera operators. *See id*. 49. On June 6, 2019, Lee sent an email to Green and Cecil informing them of the updated selections for camera operators, including Mark Davison ("Davison"), Chris Hinojosa ("Hinojosa"), Jon Purdy ("Purdy"), and Michelle Crenshaw ("Crenshaw"). *See id*. 60. Davison, Purdy, and Hinojosa identify as white males.[2] *See id*. 52, 57.

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[2] Plaintiff attempts to dispute the fact that Hinojosa identifies as white. *See* ADF 92. As evidence, Plaintiff relies on Ben Steeples' observations that he "believe[s] [Hinojosa] has some type of non-Caucasian heritage in his makeup." 2024 Ben Steeples Deposition Transcript, 58:3-9. In response, Hinojosa has declared that he identifies "as a White male." Declaration of Chris Hinojosa, Docket No. 64-9 ¶ 2. In light of a sworn declaration on the part of Hinojosa, and Plaintiff's claim being based solely on someone's conjecture, for purposes of this Order, the Court finds it undisputed that Hinojosa is a white male.

Lee selected Davison and Purdy because she had previously worked with them on prior productions. *See id*. 52. Lee selected Hinojosa because he had repeatedly contacted Lee expressing an interest in working with her. *See id*. at 57. Crenshaw identifies as a black woman. *See id*. 53. Lee selected Crenshaw because she had known Crenshaw for several years; Crenshaw was well recommended by others; and Lee had wanted to work with Crenshaw in the past, but Crenshaw had not been available. *See id*. 53-56. Lee did not consider or rely on the Commitment when hiring camera operators for the Bob Hearts series. *See id*. 91.

On June 6, 2019, Green and Cecil told Lee that they had no objections with the camera operators that she selected. *See id*. 61. Green and Cecil did not know of the races of the camera operators when approving Lee's selections. *See id*. 66. Given that approval, on June 6, 2019, Lee understood her hiring decisions for camera operators were final and did not consider any other applicants for the camera operator positions. *See id*. 62. Similarly, as of June 6, 2019, Green and Cecil understood that the camera operator roles were filled. *See id*. 63 Lorre was not involved with the selection of camera operators on the Bob Hearts series. *See id*. 67. Higgins was not involved with the selection of camera operators on the Bob Hearts series. *See id*. 68. Roth was not involved with the selection of camera operators on the Bob Hearts series. *See id*. 69. Miller was not involved with the selection of camera operators on the Bob Hearts series. *See id*. 70.

During Lee's consideration of the candidates for camera operators for the Bob Hearts series, she did not consider Armstrong for any of the positions. *See id*. 72. Lee had never worked with Plaintiff and did not recall having met with him, though they may have briefly

exchanged pleasantries in the past. *See id*. 73. At the time Lee was selecting camera operators, no one brought up Plaintiff to Lee. *See id*. 74. Armstrong never communicated any interest directly to Lee about the positions and never asked anyone for Lee's contact information. *See id*. 75-76. On June 10, 2019, Plaintiff sent an email to Cecil stating that he heard very unfortunate rumors about the new Bob Hearts series and asking to verify whether he would be working on the series. *See id*. 78; Docket No. 64-3 at 307. Additionally, in the email, Plaintiff asked for Cecil to respond "ASAP" because he heard the rumors were "illegally vicious." Docket No. 64-3 at 307. On June 11, 2019, Cecil responded by email to Plaintiff that due to the shooting schedule for the Bob Hears series, Silver would not be the Director of Photography. *See* SGD 79; Docket No. 64-3 at 307. Instead, a different Director of Photography had been hired for the Bob Hearts series that had selected her own crew, which did not include Plaintiff. *See id*.

On June 11, 2019, Plaintiff replied to Cecil by email stating that he was shocked and confused by her message. *See* SGD 80; Docket No. 64-6 at 11-12. Plaintiff told Cecil that he was available to work on Bob Hearts and included his IMDB page, requesting that Cecil send it to Lee for consideration. *See id*. Plaintiff stated he was not certain why he was singled out for refusal to hire, but rumors of diversity hiring are unconstitutional and a civil rights issue. *See id*. Plaintiff further stated that refusal to hire him would constitute a breaking of Title VII of the Civil Rights Act and violate *McDonald v. Santa Fe Trail Transpo. Co*. *See id*. Plaintiff further invited Cecil to get to know him better by looking at his Facebook. *See id*. On Facebook, Plaintiff posted a photo of Lee holding an anti-Donald Trump sign saying, "Sometimes you're

really not 'THAT' surprised when a Camerawoman ... doesn't hire you ... Cause you know, you're a Conservative, Christian Man who supports Family Values and stuff." *See* SGD 37. Plaintiff made other Facebook posts claiming he was not hired because he was too old, too white, too male, too Christian, too conservative, and about the dark side of Hollywood where wholesale firing of white, heterosexual, Christian, conservative, older men was occurring resulting in reverse discrimination. *See id*. 93-94.

Cecil did not forward Plaintiff's email on to Lee because she knew that the four camera operator positions for the Bob Hearts series had already been filled. *See id.* 83. Lee was unaware of any of Plaintiff's concerns at the time she selected camera operators. *See id*. 95. Following Plaintiff's email to Cecil on June 11, 2019, Silisha Sidell ("Sidell") and Keren Serrano ("Serrano"), WB labor relations executives, had a call with Armstrong to discuss the camera operator positions on the Bob Hearts series. *See id*. 85. Serrano's notes from the call reflect that Sidell explained to Armstrong that Lee had hired her own camera crew and asked Plaintiff if there was anything further to look into, to which Armstrong said no. *See id*. 86.

In September 2019, Plaintiff filed a charge with the EEOC stating he believed he was denied hiring on the Bob Hearts series based on his race (white), gender (male), sexual orientation (heterosexual), religion (Christian), age, and retribution. *See id*. 89. In October 2019, Plaintiff filed a suit against Defendants alleging that Defendants told him he could not be hired because of his race and gender, and they did not hire him because of his race, gender, sexual orientation, and religion. *See id*. 90.

III. Legal Standard

A. Summary Judgment

Summary judgment is proper when a movant "shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To satisfy its burden at summary judgment, a moving party *without* the burden of persuasion – which is the case for Defendants here – "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000); *see also Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (*en banc*). The moving party may meet its initial burden by establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party meets its initial burden, "the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment[, but instead] must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial." *T.W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (internal citations and quotation marks omitted). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Nat'l Steel Corp. v. Golden*

Eagle Ins. Co., 121 F.3d 496, 502 (9th Cir. 1997). And "[o]nly disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248.

At the summary judgment stage, a court does not make credibility determinations or weigh conflicting evidence. *See id.* at 249. A court must draw all inferences in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment should be entered against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Parth v. Pomona Valley Hosp. Med. Ctr.*, 630 F.3d 794, 798-99 (9th Cir. 2010). A court must determine whether a "a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

B. Section 1981

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981(a). Under Section 1981, "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). "Section

1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). Further, to prevail on a Section 1981 claim, "a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 341 (2020).

IV. Discussion

Defendants move to dismiss Plaintiff's Section 1981 claim under all theories of failure to hire, retaliation, and hostile work environment. Plaintiff argues that he has established sufficient evidence that Defendants are liable under all three theories. The Court will address each in turn.

A. Failure to Hire

Defendants argue that Plaintiff's failure to hire discrimination theory fails as a matter of law. Defendants claim that because there is no direct evidence of discrimination in this matter, Plaintiff's claim must proceed under the *McDonnell Douglas*[3] framework applicable to Section 1981 claims. *See* Mot. at 19-20. Defendants contend that Plaintiff cannot establish a prima facie case of discrimination because he did not apply for the camera operator position, and by the time he expressed interest, the positions were already filled. *See id*. Further, even if Plaintiff can make out a prima facie case, Defendants argue that

[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

there were legitimate, non-discriminatory reasons for him not to be hired, and Plaintiff has no evidence that such hiring decisions were pretextual or that but for his race he would have been hired. *See id*. at 21-26.

Plaintiff responds that there is direct evidence of race discrimination, pointing to Defendants not hiring Silver for the Bob Hearts series and that Lee made her decisions based on race. *See* Opp. at 4. Thus, Plaintiff argues the *McDonnell Douglas* framework does not apply. *See id*. Even if it did apply, Plaintiff alleges that he has shown sufficient evidence that any alleged reasons offered by Defendants for not hiring him are pretextual. *See id*. Defendants reply that Plaintiff's allegations of direct evidence of discrimination is insufficient to support his claim because there were no open camera operator positions as of June 6, 2019, which is fatal to his claim. *See* Reply at 9-10. Further, Defendants assert Plaintiff is incorrect and that there is no direct evidence of discrimination in this matter. *See id*. at 10-12. Defendants then reiterate that Plaintiff's claim fails under the *McDonnell Douglas* framework for failure to establish a prima facie case, failure to show Defendant's legitimate reasons for not hiring him were pretextual, and failure to show but for his race he would have been hired. *See id*. at 12-21.

1. Legal Standard

"When analyzing § 1981 claims, we apply the same legal principles as those applicable in a Title VII disparate treatment case." *Surrell v. California Water Serv. Co.*, 518 F.3d 1097, 1103 (9th Cir. 2008) (internal quotation marks omitted). A prima facie Section 1981 case "requires proof of intentional discrimination" where "the focus of the judicial inquiry must be whether the plaintiff has proven by a preponderance of evidence facts from which the court must infer,

absent rebuttal, that the defendant was more likely than not motivated by a discriminatory animus." *Gay v. Waiters' & Dairy Lunchmen's Union, Loc. No. 30*, 694 F.2d 531, 538 (9th Cir. 1982).

"Typically, we apply the familiar *McDonnell Douglas* burden shifting framework for Title VII and § 1981 claims." *Surrell* 518 F.3d at 1105. To establish a prima facie case of discrimination through indirect evidence, "the plaintiff must show that (1) she is a member of a protected class; (2) she applied for a job for which she was qualified; (3) she was rejected; and (4) the position remained open and the employer sought other similarly-qualified employees." *Id*. at 1105-06. "If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory or retaliatory conduct." *Id.* at 1106. "If the employer articulates a legitimate reason for its action, the presumption of discrimination drops out of the picture, and the plaintiff may defeat summary judgment by satisfying the usual standard or proof required ... under Fed. R. Civ. P. 56(c)." *Id*. (internal quotation marks and citation omitted). " The plaintiff then must produce sufficient evidence to raise a genuine issue of material fact as to whether the employer's proffered nondiscriminatory reason is merely a pretext for discrimination." *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1037 (9th Cir. 2005).

"However, nothing compels the parties to use the *McDonnell Douglas* framework." *Reynaga v. Roseburg Forest Prod.*, 847 F.3d 678, 691 (9th Cir. 2017). "For its part, *McDonnell Douglas* sought only to supply a tool for assessing claims, typically at summary judgment, when the plaintiff relies on indirect proof of discrimination." *Comcast*, 589 U.S. at 340. Alternatively, a

plaintiff may present a prima facie case by offering "direct or circumstantial evidence of discriminatory intent." *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003). "Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption." *Id*. (internal quotation marks and alteration omitted).

2. Open Position

Plaintiff is unable to establish a prima facie case of discrimination for failure to hire him as a camera operator on the Bob Hearts series because there were no open positions available at the time he expressed an interest to the persons who made that decision. "In general, showing that there was in fact a vacancy is necessary to establish an employment discrimination claim." *Palmer v. Cognizant Tech. Sols. Corp.*, No. 2:17-cv-06848-DMG-GJS, 2022 WL 18214014, at *23 (C.D. Cal. Oct. 27, 2022). This threshold requirement applies whether Plaintiff is attempting to make a prima face case using direct evidence or under the *McDonnell Douglas* framework with indirect evidence. *See Chavez v. Tempe Union High Sch. Dist. No. 213*, 565 F.2d 1087, 1091 (9th Cir. 1977) ("We note that these [*McDonnell Douglas*] four elements assume the existence of a fifth: that the position in question had not already been filled before it was sought by the complainant. Necessarily, the failure to prove the existence of a job opening is a fatal defect in a prima facie case of overt discrimination."); *Rowell v. Sony Pictures Television Inc.*, 743 F. App'x 852, 854 (9th Cir. 2018) ("[W]e have never suggested that proffering direct evidence alters the character of an adverse employment action in a retaliatory failure-to-hire claim ... such a claim is premised on an employer's rejection of a candidate *for an open position*. Indeed, it stands to reason that an

adverse employment action against a prospective employee arises only if there is employment to be had in the first place. Thus, whatever the substance of Rowell's purported direct evidence, it cannot overcome her failure to satisfy a necessary criterion for stating an actionable retaliatory failure-to-hire claim.") (internal citations and quotation marks omitted). Such a threshold requirement that there be an open position available makes sense under the Supreme Court's "but for" causation test for Section 1981 claims. "[I]f there was no vacancy, then the discriminatory purpose cannot have been the reason for the plaintiff's *rejection* – because the reason for the rejection was that there was no vacancy." *Palmer*, 2022 WL 18214014 at *23.

It is undisputed that on June 6, 2019, Lee sent an email to Green and Cecil with her choices for the camera operator positions for the Bob Hearts series. *See* SGD 60-61. It is undisputed that on that day, Green and Cecil approved Lee's selections without objections. *See id*. 61. It is therefore undisputed that on June 6, 2019, Lee, Green, and Cecil all understood that the camera operator positions had been filled for the Bob Hearts series. *See id*. at 62-63. It is undisputed that at the time Lee was selecting camera operators, no one mentioned Plaintiff to Lee and Armstrong never communicated interest directly to Lee about the position. *See id*. 74-75. Rather, it is undisputed that Plaintiff did not reach out to Cecil about a position as a camera operator on the Bob Hearts series until June 10, 2019.[4] *See id*. 78. At that time, Plaintiff asked to verify that he would be working on the show. *See id*. After being told that Plaintiff did not have a job as a

[4] Plaintiff also testified that he reached out to Steve Silver about the Bob Hearts series camera operator position on June 11, 2019. *See* 2024 Brian Armstrong Deposition Transcript 114:1516.

camera operator on the Bob Hearts series by Cecil, on June 11, 2019, Plaintiff asked for his IMDB page to be submitted to Lee for consideration. *See id*. 82. It is undisputed that Cecil did not forward Plaintiff's email on to Lee because the camera operator positions on the Bob Hearts series had all been filled by June 11, 2019. *See id*. 83. Thus, by the time Plaintiff expressed an interest or applied for a position as camera operator for the Bob Hearts series, there was no position open for him. As there was no vacancy available, Plaintiff cannot make out a prima facie case of racial discrimination in the failure to hire him for the job.

Plaintiff's opposition does not grapple with this fatal flaw. Instead, Plaintiff states that he did not apply for the position because he was not told Silver would not be the Director of Photography on the Bob Hearts series, he was not told that he would not be working on the series, and he did not find out Lee would be the Director of Photography until June 2019. *See* Opp. at 19. For Plaintiff's argument to have merit, he would need to establish that he had previously been hired (or at least had been given a binding commitment by an appropriate person that he would be hired) on to the Bob Hearts series as a camera operator, which is why he never applied for the position before June 11, 2019. Plaintiff's attempts to prove he had been previously hired are unconvincing.

Plaintiff contends that it was common for some employees working on a Lorre show to be asked to work on another Lorre show. *See* ADF 6. While that may have been true, simply pointing to past practice is not sufficient to establish Plaintiff's future employment. Especially when Plaintiff understood that he was hired as a camera operator only on a daily basis. *See* SGD 9-11. To bolster his claim, Plaintiff points to

several statements Lorre and Roth allegedly made to him and others during the last Big Bang series concerning future employment. *See* ADF 52 (Roth allegedly says, "Don't you worry. This family will never be broken up."); ADF 53 (Lorre allegedly says, "I hope you come with the rest of your guys, meaning camera people, onto the next one."); ADF 57 (Lorre allegedly says, "You're worried about the next show. You haven't let me down. I'm not going to let you down."); ADF 58 (Roth allegedly says, "You guys will always have a place here."); ADF 59 (Roth and Lorre allegedly tell people they would be with them forever); ADF 60 (Lorre allegedly says, "Don't you worry. We got other things coming for you. Army, you're gold. Why in the world would you never have as long a career as you ever want with me."); ADF 61 (Roth allegedly says, "It's not over. You'll always have a job here at Warner Bros. ... as long as Chuck and I are here."); ADF 62 (Lorre allegedly says, "We got more stuff coming up. So this isn't the end."). These statements are not sufficient to establish Plaintiff was hired on the Bob Hearts series. The statements themselves are not any type of job offer. Rather, they appear to be vague statements made with good intentions about the desire to work together in the future. Such remarks cannot reasonably be construed as an offer to work on the Bob Hearts series (which had not yet been ordered to series). It is notable that Plaintiff has not brought any breach of contract or promissory estoppel claims based on such statements.

Additionally, Lorre and Roth were not involved in the hiring of camera operators for the Bob Hearts series. Plaintiff's reliance on statements from Lorre and Roth for employment would also run afoul of his admitted past practice of working on Lorre productions. When Plaintiff was hired to work on his previous Lorre

shows, the offer never came from Lorre or Roth, but instead from the Director of Photography Silver, as Plaintiff admits is the industry practice. *See* SGD 3, 7, 29. Here, Plaintiff does not allege that Silver, or any other Director of Photography, ever reached out to him to work on the Bob Hearts series, as would have been customary from his previous experience. As Plaintiff's career shows, it would appear unusual for any type of concrete employment offer to come from the head of WBTV or Lorre. Further, Plaintiff's own testimony casts doubt on any reliance he should have made on Lorre's or Roth's vague statements. Plaintiff testified that near the end of Big Bang he congratulated Cecil on being the producer for the Bob Hearts series and told her "It's going to be great working for you, you know, on the next one." 2024 Brian Armstrong Deposition Transcript ("2024 Armstrong Trans.") 214:18-215:1. In reply, Plaintiff alleges Cecil told him, "Well, I wish that were the case," and "I wouldn't count on it." *Id*. 215:22-4. Similarly, Plaintiff testified that near the end of Big Bang, he also congratulated Green on being a producer for the Bob Hearts series and expressed excitement at working together again, to which Green told him, "Don't count on it, Army." *Id*. 220:11-20. Plaintiff alleges that these sentiments from Cecil and Green were repeated to him at the Big Bang wrap party on May 3, 2019. *See* ADF 65-66. Therefore, according to Plaintiff, he was told by the producers of the Bob Hearts series that he was unlikely to work on the show.

In sum, Plaintiff did not apply for the camera operator position for the Bob Hearts series until June 11, 2019. Plaintiff has not shown that he was hired on, or was reasonably promised to be hired on, the Bob Hearts series prior to that date. The camera operator positions were filled as of June 6, 2019. At the time Plaintiff applied for the roles, there were no openings,

meaning Plaintiff cannot make out a prima facie case of racial discrimination for Defendants' failure to hire him.

3. Direct Evidence

While the Court would find that Plaintiff has not shown a prima facie case of failure to hire for racial discrimination because there was no open position available, the Court would also find that Plaintiff has not shown direct evidence of racial discrimination regarding Defendants' failure to hire him. "Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption." *Vasquez*, 349 F.3d at 640 (internal quotation marks and alteration omitted). Plaintiff's Opposition is not clear as to exactly what direct evidence of race discrimination there is involving Armstrong's failure to be hired. Plaintiff points to Silver not being hired as Director of Photography by Green and Cecil for the Bob Hearts series, which Armstrong claims lead to him also not being hired. *See* Opp. at 4. Plaintiff also claims that there is a multitude of evidence that Lee made her decisions on the basis of race. *See id*. Neither of these examples presents direct evidence, without the need for any inferences or presumptions, of racial discrimination regarding the failure to hire Plaintiff. Even assuming for the sake of argument that Silver was not hired by Green and Cecil because of *his* race,[5]

[5] There are a multitude of inferential leaps required with respect to Plaintiff's contention that Silver was not hired based on race. Cecil and Green stated that Silver was not hired because they felt he did not have the time to commit to the show based on his position of Director of Photography on Mom (another television show) and because the Bob Hearts series was to have a hybrid aesthetic. *See* Mot. at 12. Essentially, Plaintiff tries to paint these explanations as pretextual because Lee worked on

that does not serve as direct evidence of race discrimination as to Armstrong's failure to be hired. There are multiple necessary inferences required to link Silver's not being hired due to race to Plaintiff. One would have to infer that Silver's not being hired due to race by Green and Cecil would also apply to the hiring of camera operators, even though Plaintiff admits by industry standards that producers hire the Director of Photography, but not camera operators. Then, there would also be another required leap that, even if Silver had been hired, Plaintiff would also have been chosen for the Bob Hearts series. There are simply too many links in the logical chain required to equate any supposed racial discrimination in the failure to hire Silver to be direct evidence of the failure to hire Armstrong.

Similarly, Plaintiff has not shown direct evidence that Lee – the principal decisionmaker at issue – made decisions on the basis of race. Plaintiff claims that Lee adhered to the Commitment in hiring camera operators for the Bob Hearts series. To Plaintiff, adhering to the Commitment is direct evidence of racial discrimination against white people because the Commitment is discriminatory and excludes white people. As evidence, Plaintiff quotes the Commitment in part to say "... we must all ensure there is greater inclusion of ... people of color ... in greater numbers ... behind the camera."

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another show (Mad About You) while working on the Bob Hearts series. *See* Opp. at 17. Even if Lee had similar shooting schedules to Silver, it requires many inferential leaps to conclude hiring Lee instead of Silver was then based on race. Further, even assuming that Lee was hired instead of Silver due to the Commitment, it requires additional inferences to prove that Lee was hired instead of Silver because she is a person of color, and not because she is a lesbian woman, both underrepresented groups mentioned in the Commitment.

Opp. at 8. Plaintiff mischaracterizes the Commitment through his selective quoting. The sentence at issue states: "Together with other production companies, networks, guilds, unions, talent agencies and others in the industry, we all must ensure there is greater inclusion of women, people of color, the LGBTQ+ community, those with disabilities and other underrepresented groups in greater numbers both in front of and behind the camera." Docket No. 67-2 at 2142. Read in full context, this sentence clearly is not racially discriminatory resulting in the exclusion of white people. While Plaintiff highlights the use of people of color, the Commitment also states that it seeks to ensure greater inclusion of women, the LGBTQ+ community, those with disabilities, and underrepresented groups – all of which includes white individuals from these groups. Thus, the Commitment is not racially discriminatory against white individuals as it actively seeks to include in greater numbers white people from underrepresented groups.

As additional evidence of the Commitment's discrimination, Plaintiff quotes the Commitment in part to say "in the early stages of the production process, we will engage with our writers, producers, and directors to create a plan for implementing this commitment." Opp. at 8. Again, Plaintiff's artful quoting of the Commitment in an attempt to paint it as a discriminatory hiring policy fails with proper context. Looking to the above sentence concerning creating greater inclusion, it clearly states it is a pledge "[t]ogether with other production companies, networks, guilds, unions, talent agencies and others in the industry." Docket No. 67-2 at 2142. The inclusion of such other entities shows this is an aspirational statement, not a policy specifically of Defendants. Further, when honing in on the actions Defendants (through WarnerMedia) will

take, the Commitment states in full: "For our part, WarnerMedia pledges *to use our best efforts* to ensure that diverse actors and crew members *are considered* for film, television and other projects, and to work with directors and producers who also seek to promote greater diversity and inclusion in our industry. To that end, in the early stages of the production process, we will engage with our writers, producers, and directors to create a plan for implementing this commitment to diversity and inclusion on our projects, *with the goal of providing opportunities* for individuals from underrepresented groups at all levels." *Id*. (emphasis added). The plain language shows that Defendants (through WarnerMedia) are committing to proving opportunities for underrepresented individuals (including underrepresented white people) to be considered for greater opportunities in the industry. This is far from a hiring mandate designed to exclude white individuals from future work. Moreover, these types of diversity statements have been found to be nonactionable. *See Bernstein v. St. Paul Companies, Inc.*, 134 F. Supp. 2d 730, 739 n.12 (D. Md. 2001) ("A company's (or its CEO's) commitment to 'diversity,' if expressed in terms of creating opportunities for employees of different races and both genders, or fostering workplace tolerance, is not proof of discriminatory motive with respect to any specific hiring decision. Indeed, it would be difficult to find today a company of any size that does not have a diversity policy.") (internal citation omitted); *c.f. Ocegueda on behalf of Facebook v. Zuckerberg*, 526 F. Supp. 3d 637, 651 (N.D. Cal. 2021) ("[C]ourts hold that similar [diversity] statements are non-actionable puffery or aspirational (and hence immaterial).").

Aside from Plaintiff's misreading of the Commitment, there is no evidence that Lee even considered the Commitment when she hired for the positions. In fact,

Lee declares that she "did not rely on the [Commitment] when making [her] hiring decisions on the first season of the [Bob Hearts] series. Moreover, [she] did not receive any instruction from WBTV or anyone associated with [the Bob Hearts series] to hire, or to give hiring preference to, camera operators who were not White/Caucasian or any other protected category for that matter." Declaration of Patti Lee ("Lee Decl."), Docket No. 64-4 ¶ 35. Further, in her deposition, when discussing diversity and inclusion and the Commitment, Lee consistently stated that her understanding of the Commitment, and her own principles of diversity and inclusion, is to provide opportunities for people from all backgrounds, not to exclude white individuals. *See* 2024 Patti Lee Deposition Transcript ("2024 Lee Trans.") 48:1-12 ("I have a workplace that had people from all walks of life and beliefs."); 54:16-23 ("I believe inclusivity could be people – it can be like men or women.· It can be – or gender nonbinary.· It could mean people with different beliefs.· It could mean different religious beliefs.· It could mean people of different color. ·None of these are – I think inclusivity is about having an open space for people to all have an opportunity."); 58:13-21 ("...because I have to say that reading the statement is a general aspiration for Warner Bros., and I – in my – looking for camera operators and other crew, I – I took into consideration people from many different walks of life. ·So if by doing that, did I follow the aspiration, then yes, I did.").

The actual hiring process and results supports the lack of direct evidence of racial discrimination by Lee. The majority of people that Lee considered for the available camera positions were white. *See* Lee Decl. ¶ 13. Ultimately Lee hired based on qualifications, interest, availability, and personality. *See id*. Under

that criteria, the camera operators on the Bob Hearts series that were chosen included three white males and one black woman. There is no suggestion that the single black female cameraman was less qualified than the other male hirees or the Plaintiff. Those results do not suggest any anti-white animus.

The other possible arguments Plaintiff could make for direct evidence of racial bias are similarly unpersuasive. Lorre's allegedly using a Yiddish racial slur could be probative of racial bias,[6] but Lorre was not involved in the hiring of camera operators for the Bob Hearts series. *See* SGD 67;[7] *see also Vasquez*, 349 F.3d at 640 ("The only evidence Vasquez offers are the remarks of Berglund. However, Berglund was not the decisionmaker, and Vasquez has offered no evidence of discriminatory remarks made by Leeds. Therefore, Vasquez must show a nexus between Berglund's discriminatory remarks and Leeds' subsequent employment decisions."). Thus, there are necessary inferences that

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[6] Plaintiff references Lorre's purported use of the word "schvartze" (*see* SGD 62-63), which is Yiddish slang for a black person and considered by some to be a racial slur. *See* Oxford English Dictionary, https://www.oed.com/dictionary/schvartze_n?tl=true. It is unclear how Lorre's using the word schvartze to Plaintiff (who is white) can be raised by Plaintiff to establish anti-white animus.

[7] Plaintiff attempts to dispute the fact Lorre was not involved in the hiring of camera operators for the Bob Hearts series by claiming "Lorre had also previous involvement in the selection of Brian Armstrong as a television camera operator, which establishes a practice of doing so." SGD 67. However, Plaintiff cites to nothing in the record to support this claim. Rather, in his deposition, Lorre repeatedly states that he does not get involved with the hiring of crew like camera operators. *See* 2024 Chuck Lorre Deposition Transcript 100:10-101:2.

would be needed to connect Lorre's potential racial animus with the decision not to hire Plaintiff.

Similarly, the alleged comments made by Green and Cecil on May 3, 2019, regarding diversity do not by themselves constitute direct evidence of race discrimination. Plaintiff alleges that on May 3, 2019, Cecil told him "didn't you see the DEI statement. Well, people like you are not – don't have much of a future in this business." ADF 65. Plaintiff further claims Cecil told him "It's all true Brian. You know, the things you heard about this diversity thing is true ... things you've heard . . . about the hiring of" and then listed African Americans. *See id*. Plaintiff similarly claims that Green told him "Yep. It looks like we are an endangered species," and "Well, Kristy has been ordered to follow this new diversity hiring program which includes, you know, we got to hire more Blacks." ADF 66. Defendants contest the Court relying on any of these alleged statements made by Green and Cecil, arguing they are inadmissible hearsay. The Court is unsure whether such statements are admissible. Granted, "[u]nder Federal Rule of Evidence 801(d)(2)(D), a statement is not hearsay and may be admitted against an opposing party if the statement 'was made by the party's agent or employee on a matter within the scope of that relationship and while it existed.' The Rule sets forth three elements necessary for admitting a statement that would otherwise be excluded as hearsay: (1) the statement must be made by an agent or employee of the party against whom the statement is being offered; (2) the statement must concern a matter within the scope of that employment relationship; and (3) the statement must be made while the declarant is yet employed by the party." *Weil v. Citizens Telecom Servs. Co., LLC*, 922 F.3d 993, 999 (9th Cir. 2019). Green and Cecil seemingly were agents or

employees of Defendants at the time they made these statements. However, it is unclear whether discussion of the future Bob Hearts series, which had not yet been picked up, would qualify as a matter within the scope of their employment relationship with Defendants as Big Bang producers. If Plaintiff wishes for these statements to be considered as admissible evidence, Plaintiff should explain at the hearing how they are admissible.

Regardless, assuming these statements could be admissible, they are not direct evidence of race discrimination. Cecil and Green only approved Lee's selection of camera operators, but did not select any themselves. Further, Plaintiff mischaracterizes his own deposition testimony to try and create the illusion that Cecil and Green were only discussing race. In Plaintiff's depositions, in which the account of Green and Cecil's statements differ significantly, Plaintiff makes clear Green and Cecil are discussing more than just race. For instance, Plaintiff testified that Cecil, when talking about hiring based on diversity, started with African Americans, but right away she said, "Females," and "went on to say – and, you know, all the other stuff listed in the memos." 2021 Brian Armstrong Deposition Transcript ("2021 Armstrong Trans.") 116:1-11. Similarly, Green did not just say Cecil had been ordered to hire more African Americans, but also more "Women" and "of course LGBTQ." *See id*. 118:1-12. If anything, Plaintiff has alleged that Cecil and Green followed the Commitment, which, as discussed above, involves the incorporation of multiple underrepresented groups, and does not stand only for the exclusion of white people. In sum, Plaintiff has failed to show direct evidence of race discrimination involved with Defendants' failure to hire him as a camera operator on the Bob Hearts series.

4. *McDonnell Douglas* Framework

While the Court would find that Plaintiff has not shown a prima facie case of failure to hire for racial discrimination because there was no open position available, the Court would also find that Plaintiff's claim fails under the *McDonnell Douglas* framework. Defendants claim that Plaintiff cannot make out a prima facie case for racial discrimination because he never applied for the job and it was not open at the time. *See* Mot. at 20. Defendants argue that Plaintiff never applied because he never communicated any interest to Lee in the position, and Cecil did not understand his June 11, 2019 email as an application, but merely Armstrong expressing frustration. *See id*. at 21. The Court would disagree with Defendants. While it is undisputed that Plaintiff did not ever communicate interest directly to Lee for the position, his June 11, 2019 email to Cecil can fairly be characterized as an application for the job. The subject line of the email is "My application for 'Bob [heart emoji]'s.'" Docket No. 64-6 at 11-12. Further, in the email, Plaintiff, asks Cecil to forward his IMDB page "to Patti Lee for consideration." *Id*. While Cecil may have taken this email as Plaintiff simply expressing frustration, it is clear that Armstrong was attempting to apply for the camera operator position – a position in which there was no public job posting and Lee did not accept applications. *See* Lee Decl. ¶ 11. However, for the reasons stated above, the Court would find that Plaintiff fails to make out a prima facie case of racial discrimination because there was no open position available at the time he applied on June 11, 2019.

Even if Plaintiff were to have made out a prima facie case, which he does not, the Court would find that Defendants have offered a proper justification for the

hiring decisions – Lee chose to work with other individuals she believed were qualified and did not know Armstrong was interested. Plaintiff has failed to put forward any evidence to show that such an explanation is pretextual. Plaintiff points to the Commitment, which as discussed above, is not a discriminatory hiring policy excluding white people. Plaintiff points to evidence of racial statements concerning the hiring of workers for the Bob Hearts pilot, which is not germane to the hiring of camera operators on the Bob Hearts series. Plaintiff points to statements made by Lorre, Green, and Cecil on May 2 and 3, 2019, all of which, as discussed above, do not rebut Defendants' explanation.

In sum, the Court would GRANT Defendants' motion for summary judgment as to Plaintiff's discriminatory failure to hire theory. When Plaintiff expressed interest in the camera operator position, there were no available positions as they had all previously been filled by Lee. This alone is fatal to Plaintiff's claim as there was no open position, meaning he cannot show race was the but for cause for his failure to be hired. Further, the Court would find that there was not direct evidence of racial discrimination in not hiring Plaintiff for the position, and that Defendants expressed legitimate, non-pretextual reasons for its hiring decisions. Thus, the Court would dismiss Plaintiff's failure to hire theory.[8]

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[8] While the issue was not raised by the parties, it would appear to the Court that Plaintiff's failure to hire claim would be time barred. Defendants assert that the statute of limitations for a Section 1981 claim is four years, citing to 28 U.S.C. § 1658 – the general federal four-year statute of limitations for statutes passed after December 1, 1990. However, the general four-year statute of limitations does not apply to every Section 1981 claim,

B. Retaliation

Defendants claim that Plaintiff's retaliation theory fails as a matter of law for similar reasons as his discrimination claim. Defendants argue that Plaintiff cannot make out a prima facie case of retaliation because he never made a protected complaint about race discrimination, he was not subject to an adverse action because all positions had been filled prior to his call with Sidell, and Lee was unaware of any complaint Armstrong may have made. *See* Mot. at 26-27. Further, even if Plaintiff could make out a prima facie case, Defendants argue that Plaintiff cannot prove that but for his protected complaint he would have been hired. *See id*. at 27. Plaintiff responds that retaliation claims typically require only an act that would discourage a worker from engaging in a protected activity. *See* Opp. at 4. Plaintiff claims that he did complain about race discrimination and in return Sidell threatened him

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including failure to hire claims. "Section 1981 was amended in 1990 to include a four-year limitations period for certain actions; however, this period does not apply to those actions which were cognizable under the pre-1990 version, such as plaintiffs' failure to hire claim." *Lukovsky v. City & Cnty. of San Francisco*, 535 F.3d 1044, 1048 n.2 (9th Cir. 2008). *See Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1007 (9th Cir. 2011) ("[I]t is incontestable that some § 1981 claims continue to be subject to the most analogous state statute of limitations."). Instead, it appears that Plaintiff's failure to hire claim would be subject to California's two-year statute of limitations for personal injury. *See* Cal. Civ. Proc. Code § 335.1. *See also Cole v. Lynwood Unified Sch. Dist.*, 678 F. App'x 595, 596 (9th Cir. 2017) ("Cole's racial discrimination claim under 42 U.S.C. § 1981 is also time-barred.... Because Cole did not file her complaint within two years of being denied the promotions, her § 1981 claim based on racial discrimination is untimely."). However, as the parties have not yet raised this issue, the Court would not find it appropriate to decide the matter on these grounds at this time.

not to speak of or pursue his complaint or he would never work for the studio again. *See id*. at 21. Further, Plaintiff alleges that Defendants put him on the do-no-hire list in retaliation for his complaint. *See id*. Defendants reply that any alleged direct evidence of retaliation is irrelevant as there were no open camera positions available when Plaintiff spoke to Sidell. *See* Reply at 21. Further, Defendants claim that Lee was not aware of Armstrong's complaint, and reiterate that he did not complain about racial harassment, as he stated in his deposition, and his complaint was not a but for cause for not being hired. *See id*. at 21-23.

"Section 1981 prohibits racial discrimination in taking retaliatory action." *Surrell*, 518 F.3d at 1107 (internal quotation marks omitted). "To establish a prima facie case of retaliation, a plaintiff must prove (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the two. Once established, the burden shifts to the defendant to set forth a legitimate, non-retaliatory reason for its actions; at that point, the plaintiff must produce evidence to show that the stated reasons were a pretext for retaliation." *Id*. "This standard requires a plaintiff to show that the position for which she applied was eliminated or not available to her because of her protected activities." *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir. 1986).

Plaintiff is unable to make out a prima facie case of retaliation because he cannot show any causal connection between his complaints regarding racial discrimination and an adverse employment action. The parties disagree as to whether Plaintiff made a protected complaint of race discrimination. Plaintiff claims that he did make such a complaint in his June

10, 2019 email to Cecil claiming he had been hearing about rumors that are illegally vicious, in his June 11, 2019 email to Cecil where he cited "*McDonald vs. Santa Fe Trail Transpo. Co.* (1976)" and made references to diversity hiring being unconstitutional and a violation of his civil rights, and on the phone with Sidell where he said he believed he had been discriminated against on the basis of race and color in not being selected as a camera operator for the Bob Hearts series. *See* Opp. at 20-21. Defendants claim that Plaintiff previously testified that he never made any complaints about being mistreated because of his race, and thus his self-serving declaration should be ignored. *See* Reply at 22-23. At this stage of proceedings, taking all inferences in Plaintiff's favor, Plaintiff has established a genuine dispute as to whether he did make a complaint regarding racial discrimination.

Even if Plaintiff did make a complaint, he cannot show any causal connection to an adverse employment action because of his complaint. The adverse employment action Plaintiff complains of is not being hired as a camera operator on the Bob Hearts series. However, as discussed above, the camera operator positions for the Bob Hearts series were filled as of June 6, 2019. The first instance when Plaintiff could have possibly taken action that could be considered a complaint was in his email to Cecil on June 10, 2019. Given Plaintiff's complaint came at the earliest four days after the positions had already been filled, the failure to hire Plaintiff as a camera operator for the Bob Hearts series could not be caused by Plaintiff's complaint of race discrimination. "Inherent in the standard for retaliatory failure-to-hire is the existence of an open 'position' to which the plaintiff applied." *Rowell*, 743 F. App'x at 854. Given the alleged adverse

employment action – not hiring Plaintiff – took place before Plaintiff engaged in his protected activity, there is "no evidence, direct or circumstantial, from which a jury might infer causation." *Manatt v. Bank of Am., NA*, 339 F.3d 792, 802 (9th Cir. 2003). Thus, Plaintiff has failed to establish a prima facie case of retaliation due to racial discrimination. The Court would GRANT Defendants' motion for summary judgment as to Plaintiff's retaliation theory.

C. Hostile Work Environment

Defendants argue that Plaintiff's hostile work environment theory fails as a matter of law. First, Defendants contend that the statute of limitations for Plaintiff's hostile work environment claim is four years, meaning the only applicable time period is a short window of time from April 18, 2019 to May 3, 2019. *See* Mot. at 28. In that time period, Defendants claim that Plaintiff did not allege any harassment based on race. *See id*. at 28-29. Further, Defendants maintain that no harassment in a two-week period could be so severe or pervasive as to alter the conditions of his employment. *See id.* at 29. Additionally, Defendants argue that Plaintiff cannot show that Defendants as employers were liable for any alleged harassment as they were not put on notice. *See id*.

Plaintiff argues that a large corporation instituted a discriminatory commitment to exclude white and Caucasian people, which predictably caused a very hostile work environment replete with pervasive references to race and severe comments made to Plaintiff. *See* Opp. at 4. Plaintiff claims that the statute of limitation for a hostile work environment claim is based on the last date of the last act in a continuous hostile work environment, which here was from late 2018/early 2019 to June 2019 due to Defendants

attempts to implement the Commitment. *See id*. In that time period, Plaintiff points to comments made by Miller, Higgins, Ben Steeples ("Steeples"), Silver, and many other crew members about race that he found to be offensive. *See id*. at 7-14. Even without considering those acts, Plaintiff claims that comments made about race by Lorre, Cecil, and Green on May 2 and 3, 2019, alone constitute a hostile work environment. *See id*. at 14-15. Further, Plaintiff contends that all of the statements were made on set where Defendants either knew or should have been aware of them. *See id*. at 15. Defendants reply that the continuing violation doctrine does not apply here. *See* Reply at 24. Further, Defendants argue that regardless the speech and conduct alleged in and outside of the statute of limitations is not severe or pervasive enough to constitute a hostile work environment. *See id*. at 25-26. Additionally, Defendants reiterate that Plaintiff cannot show they are liable as an employer for such actions. *See id*. at 26 27.

1. Legal Standard

"Hostile work environment claims under Title VII contain the same elements of a § 1981 hostile work environment claim and, thus, the legal principles guiding a court in a Title VII dispute apply with equal force in a § 1981 action." *Freeling v. PCX, Inc.*, No. 8:23-cv-00173-KK-KES, 2023 WL 6194259, at *4 (C.D. Cal. Aug. 15, 2023) (internal quotation marks omitted). "To succeed on a hostile work environment claim based on race, the plaintiff must demonstrate: (1) that he was subjected to verbal or physical conduct of a racial ... nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment." *Reynaga*,

847 F.3d at 686 (internal quotation marks omitted). "In assessing whether a work environment is sufficiently hostile, the court examines the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id*. "The required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct." *Id*. (internal quotation marks and citation omitted). "A hostile work environment, by its very nature involves repeated conduct." *Freeling*, 2023 WL 6194259 at *4 (internal quotation marks omitted).

"Section 1981, like Title VII, is not a general civility code." *Manatt*, 339 F.3d at 798 (internal quotation marks omitted). "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Id*. (internal quotation marks omitted). "A plaintiff must show that the work environment was both subjectively and objectively hostile." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113 (9th Cir. 2004). "Simply causing an employee offense based on an isolated comment is not sufficient to create actionable harassment under Title VII. However, the harassment need not cause diagnosed psychological injury. It is enough if such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position." *Id*. (internal citations and quotation marks omitted).

2. Statute of Limitations

The parties disagree as to the applicable statute of limitations period for Plaintiff's hostile work environment theory. Defendants claim that the four-year

statute of limitations for hostile work environment claims under Section 1981 means that the only relevant time period is April 18, 2019 (four years prior to the filing of this lawsuit) to May 3, 2019 (the last day of Plaintiff's employment). Plaintiff instead claims that the statute of limitation for a hostile work environment is based on the last date of the last act in a continuous hostile work environment, and here the hostile work environment was continuously hostile from late 2018/early 2019 to June 2019 because of the Commitment and management's attempts to implement it.

Essentially, what Plaintiff seeks is to apply is the continuous violation doctrine to his Section 1981 hostile work environment theory. "The continuing violations doctrine allows a court, in some instances, to consider alleged unlawful behavior that would otherwise be time-barred." *Lelaind v. City & Cnty. of San Francisco*, 576 F. Supp. 2d 1079, 1092 (N.D. Cal. 2008). For Title VII hostile work environment claims, "a court may consider the entire scope of unlawful behavior, including behavior outside the statutory time period, provided that all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." *Id*. Plaintiff seeks to transpose the continuing violation doctrine applicable to Title VII hostile work environment claims to Section 1981 claims, but does not cite to any case law supporting such a proposition. While Plaintiff does not point to any authority, it appears that in the Ninth Circuit the continuing violation doctrine is applicable to such claims. *See Cherosky v. Henderson*, 330 F.3d 1243, 1246 n.3 (9th Cir. 2003) ("Although *Morgan* involved Title VII of the Civil Rights Act of 1964, the Supreme Court's analysis of the continuing violations doctrine is not limited to

Title VII actions. It applies with equal force to the Rehabilitation Act and to actions arising under other civil rights laws."); *Lelaind*, 576 F. Supp. 2d at 1093 ("In the Ninth Circuit, the continuing violations doctrine applies to claims pursuant to 42 U.S.C. sections 1981 and 1983 in the same manner as the doctrine applies to claims pursuant to Title VII.").

There are "two applications of the continuing violations doctrine: first, to a series of related acts, one or more of which falls within the limitations period, and second, to the maintenance of a discriminatory system both before and during the limitations period." *Bird v. Dep't of Hum. Servs.*, 935 F.3d 738, 746 (9th Cir. 2019) (cleaned up). When considering whether pre- and post- limitations incidents are sufficiently related, courts consider whether "they involved the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers – and were not isolated, sporadic, or discrete." *Lelaind*, 576 F. Supp. 2d at 1093 (cleaned up). "[T]he systematic branch allowed the plaintiff to recover for acts that occurred prior to the limitations period as long as (1) those acts were conducted pursuant to a policy or practice that remained in effect within the statute of limitations period and (2) the plaintiff remained subject or susceptible to the policy within the limitations period.... The theory behind the systematic branch was that every day the plaintiff was subject to the policy or practice constituted a new violation sufficient to extend the statute of limitations period." *Bird*, 935 F.3d 738, 747 (9th Cir. 2019) (internal quotation marks omitted).

Here, the Court would not find that Plaintiff has proven that the continuous violation doctrine should apply to this case to bring in actions prior to April 18,

2019. For the reasons discussed above, the Court does not construe the Commitment as an employment policy of Defendant, much less a systematic, racially discriminatory system biased against white people. Next, the racial comments that Plaintiff complains about by crew members on Big Bang prior to April 18, 2019, are better seen as isolated, sporadic, or discrete, and not sufficiently related so as to form a continuous violation. The pre-April 18, 2019 comments were almost all one-off comments made by different individuals. *See* ADF 41, 46-51; 54, 56. Further, Plaintiff testified that many of these comments were made after the speakers "took [him] aside quietly, like everybody really," because "nobody can be heard talking about anything bad." 2021 Armstrong Trans. 104:11-15. Moreover, many of the comments made are not related to the Bob Hearts series, or each other, as they concerned different future shows. Silver's, Steeples', and Johnny Witmer's ("Witmer") comments were about hiring decisions being made by Miller seemingly for the Bob Hearts pilot. *See id*. 100:18-101:3, 101:24-102:14, 111:10-21. Jamie Hitchcock's ("Hitchcock"), David Pearce's ("Pearce"), T. Ryan Brennan's ("Brennan"), and Todd Slater's ("Slater") comments were about hiring decisions being made for the show Mom. *See id*. 104:11-24, 105:12-106:6, 107:2-12, 107:24-108:22. Thus, the Court would not find Plaintiff has established a continuing violation so as to include pre-limitations comments.

3. Crew Member Statements

Even if the Court were to construe this situation as a continuing violation to include the pre-limitation comments, the Court would find that those comments are not sufficient to establish a hostile work environment claim. As discussed above, the majority of these

comments were to Plaintiff in isolated situations as offhand comments speculating about future employment opportunities. Moreover, most of the comments themselves refer to diversity and the Commitment, which in and of itself is not of a racial nature given the Commitment referenced a variety of underrepresented groups, including people of color, women, LGBTQ+, disabled individuals, etc. For example, Plaintiff alleges that Silver said, "Carol has made it known that we need to work off of the Warner Brothers new diversity hiring program not only in front of the camera, but behind the camera. In other words, our employees now have to fit a certain demographic," 2021 Armstrong Trans. 100:21-101:1; Hjorth said, "Well, you know, the diversity thing ... Carol is on fire to make sure that not only is that letter followed to the T," *Id*. 103:22-24; Pearce said, "Well, Army ... I guess it's finally happened ... it looks like ... we've been diversified out of the business.," *Id*. 105:15-18; Brennan said, "You know what ... go read that diversity thing that just came out," *Id*. 107: 2-4. While Plaintiff may have construed these statements to be about race, rather than about sexuality or gender, objectively these types of general remarks about diversity, which were said to Plaintiff on sporadic isolated occasions, are reasonably viewed as not severe and within the "offhand comments category of non-actionable discrimination." *Manatt*, 339 F.3d at 798 (internal quotation marks omitted).

The same conclusion is true of the few alleged crew member statements that are explicitly racial in nature. Plaintiff testified that Slater told him something akin to "Hey, Honkie.... Didn't you see the note? You out of work, my friend." 2021 Armstrong Trans. 108:3-7. *See also* 2024 Armstrong Trans. 254:17-24 (Armstrong testifies that Slater told him "Hey, Honkie.... Looks like your days are numbered.... All of us. All of us here.

We're done, man. It's over.").[9] Plaintiff also alleges that Sean Bard ("Bard") told him "Yeah, you believe what you want to, white boy" when discussing Bard's belief Armstrong would not be hired in the future. 2024 Armstrong Trans. 253:6-25. The Court would not construe these comments to be so severe and pervasive as to alter the conditions of Plaintiff's employment and constitute a hostile work environment. These were two isolated, offhand comments. Further, these comments, placed in their proper context, are better seen as attempts at racially insensitive humor. Plaintiff testified that Slater is "a funny guy" that "was always laughing and joking," and that he had to ask Slater what he meant "because [Slater's] always joking and kidding and stuff." 2021 Armstrong Trans. 107:24-108:9. Plaintiff further stated that Slater has a "[r]eal dry sense of humor," and when he made the honkie comment, he then laughed and went off to do something else. 2024 Armstrong Trans. 254:15-25. Similarly, Plaintiff testified that he and Bard "go way back," that Bard "had a little bit of a foul mouth," that at the time he was making the comments, Bard "was getting a laugh out of this whole thing," that while making his comments, Bard "would laugh" and Plaintiff "would laugh back," and after his comments Bard laughed and got called away to do something else. *Id*. 253:6-254:5. Given that both Bard and Slater are white males, the racial comments made to Plaintiff are best seen as offhand jokes concerning future employment that are not severe or pervasive enough to alter the conditions of Armstrong's employment. *See Manatt*, 339 F.3d at 798-98 (finding

[9] The parties refer to Slater as Todd Sader in the 2024 Armstrong deposition and in ADF 50 and 56. The Court believes this is the same person, simply with a difference in spelling his last name.

no hostile environment where co-workers used jokes with the phrase "China man," used a racial accent in pronouncing "Lima," and pulled their eyes back to mock the appearance of Asians); *Vasquez*, 307 F.3d 884, 893 (9th Cir.2002) (finding no hostile environment discrimination where the employee was told that he had "a typical Hispanic macho attitude," that he should work in the field because "Hispanics do good in the field," and where he was yelled at in front of others); *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1111 (9th Cir.2000) (finding no hostile work environment where the supervisor referred to females as "castrating bitches," "Madonnas," or "Regina" in front of plaintiff on several occasions and directly called plaintiff "Medea").

Additionally, Plaintiff takes great effort to chronicle racial statements made by Higgins and Miller during the course of hiring for the Bob Hearts pilot. For the majority of these statements, Plaintiff was unaware of the statements made by Miller and Higgins as Plaintiff was not involved with the Bob Hearts pilot. As Plaintiff was unaware of the statements, he was not subjected to such statements, and they are not applicable to Armstrong's hostile work environment theory. Plaintiff alleges that Silver and Steeples made a few remarks about the Bob Hearts hiring process that were racially discriminatory. Plaintiff alleges that Silver told him "Carol has made it known that we need to work off of the Warner Brothers new diversity hiring program not only in front of the camera, but behind the camera. In other words, our employees now have to fit a certain demographic in order for us – in order for me to hire you and to take you to Bob." 2021 Armstrong Trans. 100:21-101:3. Plaintiff alleges that Steeples told him that Carol put him in charge of finding camera people for the Bob Hearts pilot and he "start with African-American people, male or female,

and then go from there." *Id*. 102:11-13. Similar to the comments discussed above, these comments were offhand, isolated comments made to Plaintiff. Plaintiff knew that he was not involved with the Bob Hearts pilot because he was not available at the time it was filmed. The comments, which only briefly touch on the issue of race (if at all), were regarding a pilot that had no connection to Plaintiff. While Plaintiff may have been offended by the comments by interpreting them to potentially apply to him in the future, they alone are not sufficiently severe or pervasive enough to alter the conditions of his employment.

4. Lorre, Cecil, and Green Statements

Putting aside pre-limitation statements, Plaintiff claims that statements made by Lorre, Cecil, and Green on May 2 and 3, 2019, which are squarely within the statute of limitations, are sufficient to establish a hostile work environment claim. Plaintiff alleges that on May 2, 2019, Lorre told Armstrong, "We got more stuff coming up. So this isn't the end. You know, something else, Army. You guys are going to be seeing a lot more schvartzes in the next couple of years." 2024 Armstrong Trans. 176:1-9. Plaintiff did not understand the term and thought it meant old people. In response, Plaintiff alleges Lorre called over another person to say, with a smile, "Army doesn't know what a schvartze is." *Id*. 176:23-24. On May 3, 2019, Plaintiff claims that Cecil told him something akin to "It's all true Brian. You know, the things you're hearing about this diversity thing is true." 2021 Armstrong Trans. 115:9-12. Then, Cecil went on to tell him about the hiring of African Americans, females, and all the other things listed in the Commitment. *See id*. 116:3-11. Similarly, on May 3, 2019, Plaintiff alleges that Green told him something like, "It looks like we are an

endangered species," and "Kristy has been ordered to follow this new diversity hiring program, which includes, you know, we got to hire more Blacks ... Women, [and] [o]f course LGBTQ." *Id*. 117:21-118:12.

As previously stated, the Court is unsure whether the statements made by Cecil and Green are admissible, given Defendants' objections. If Plaintiff wishes for the Court to consider these statements, he should explain how they are admissible at the hearing. Regardless, even accounting for these statements, the Court would not find that they are sufficient to create a hostile work environment. These comments do concern race to some degree, but also touch on other diversity factors such as gender and sexuality; the comments are not solely racial in nature and are not severe. Importantly, the statements were made as offhand remarks to Plaintiff at the wrap party for Big Bang on the last day of his employment while everyone had been drinking. Essentially, these comments were made when Plaintiff quite literally only had a few hours remaining of employment (if any). It is unlikely that these comments could have had any effect on Plaintiff's work performance, which at that time was essentially finished. Thus, these isolated, offhand comments made in the last embers of Plaintiff's employment do not alter the terms of Plaintiff's employment.

Unlike the Cecil and Green comments, the alleged Lorre comments to Plaintiff are a closer call. Plaintiff alleges that on the second-to-last day of his employment, Lorre used the term "schvartze" multiple times while in conversation with him. The word "schvartze" is defined as "a term used by some Jewish people to refer to a Black person." *Schvartze*, Dictionary.com, https://www.dictionary.com/browse/schvartze (2024).

The word is "usually disparaging and offensive." *Id*. Lorre denies having ever said "schvartze" to Plaintiff and believes it is a hateful word and could be characterized as a racial slur. *See* 2024 Chuck Lorre Deposition Transcript 55:22-56:6. At this point, Plaintiff has established a genuine dispute as to whether Lorre used the word "schvartze" multiple times on May 2, 2019. However, even if Lorre made the comments as alleged by Plaintiff, the Court is not inclined to find the remarks so severe and pervasive as to alter the conditions of his employment. It is undisputed that Plaintiff is white, not black, and therefore is not part of the racial group targeted by the term "schvartze." This is distinguishable from a case in which a supervisor directs a racial slur at an employee who belongs to the targeted racial group. However, Plaintiff being white does not absolve the potential racial hostility that may come from using a derogatory term aimed at another racial group. "If racial animus motivates a harasser to make provocative comments in the presence of an individual in order to anger and harass him, such comments are highly relevant in evaluating the creation of a hostile work environment, regardless of the identity of the person to whom the comments were superficially directed." *McGinest*, 360 F.3d at 1117. Nevertheless, there is no evidence to show that Lorre used the term "schvartze" in order to anger or harass Armstrong; Armstrong did not know what the word meant, and Lorre did not explain it to Plaintiff.

Further, the alleged incident with Lorre is an isolated event. Plaintiff does not allege any other uses of derogatory racial terms used by Lorre that were pervasive and polluted the working environment. *Compare Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1037 (9th Cir. 1990) (affirming directed verdict denying

hostile work environment claim despite allegations that the employer posted a racially offensive cartoon and used racially offensive slurs) *with Nichols v. Azteca Rest. Enters*., 256 F.3d 864, 872–73 (9th Cir.2001) (finding a hostile work environment where a male employee was called "faggot" and "fucking female whore" by co-workers and supervisors at least once a week and often several times per day). Moreover, the comments made by Lorre were made on the second to last day of Plaintiff's job. As Plaintiff would only work one more day, the one-off remarks were unlikely to severely impact his performance and alter the terms and conditions of Plaintiff's employment. Given all of these factors, at this time, the Court would find that the comments (if made by made by Lorre), while offense, are not sufficiently severe or pervasive to alter the conditions of Plaintiff's employment so as to constitute a hostile work environment. However, Plaintiff may make further arguments as to this issue at the hearing.

In sum, the Court would find that Plaintiff has not alleged racially discriminatory conduct that is so severe and pervasive so as to alter the conditions of his employment. Plaintiff has not established the application of the continuing violation doctrine, meaning the majority of offending remarks occurred outside of the limitations period. Even if the Court were to consider those pre-limitations remarks, the Court would not find that any of them are so severe or pervasive as to alter the conditions of Plaintiff's employment. The Court would come to the same conclusion with respect to the alleged comments by Cecil, Green, and Lorre within the limitations period. These isolated, offhand comments were made during the last days of Plaintiff's employment and were not so severe or pervasive as to unreasonably interfere with his work environment.

Thus, the Court is inclined to GRANT Defendants' motion for summary judgment as to Plaintiff's hostile work environment theory.

V. Evidentiary Objections

A. Plaintiff's Request for Evidentiary Rulings

Plaintiff filed a request for evidentiary rulings on specified objections. *See* Docket No. 66 2. Defendants filed a response. *See* Docket No. 68-3.

Objection No. 1: Overruled.

Objection No. 2: Overruled.

Objection No. 3: Overruled.

Objection No. 4: Overruled.

Objection No. 5: Overruled.

Objection No. 6: Overruled.

Objection No. 7: Overruled.

Objection No. 8: Overruled.

VI. Defendants' Request for Evidentiary Rulings

Defendants filed a request for evidentiary rulings on specified objections. *See* Docket No. 68-2.

Objection No. 1: The Court did not rely on this in ruling on the MSJ.

Objection No. 2: The Court did not rely on this in ruling on the MSJ.

Objection No. 3: The Court did not rely on this in ruling on the MSJ.

Objection No. 4: The Court did not rely on this in ruling on the MSJ.

Objection No. 5: The Court did not rely on this in ruling on the MSJ.

Objection No. 6: Overruled.

Objection No. 7: Overruled.

Objection No. 8: The Court did not rely on this in ruling on the MSJ.

Objection No. 9: Overruled.

Objection No. 10: Overruled.

Objection No. 11: Overruled.

Objection No. 12: Overruled.

Objection No. 13: Overruled.

Objection No. 14: Overruled.

Objection No. 15: Overruled.

Objection No. 16: Overruled.

Objection No. 17: Overruled.

Objection No. 18: Overruled.

Objection No. 19: Overruled.

Objection No. 20: Overruled.

Objection No. 21: Overruled.

Objection No. 22: Overruled.

Objection No. 23: Overruled.

Objection No. 24: Overruled.

Objection No. 25: The Court reserves judgment on this objection until after the hearing.

Objection No. 26: The Court reserves judgment on this objection until after the hearing.

Objection No. 27: Overruled.

Objection No. 28: Overruled.

Objection No. 29: Overruled.

Objection No. 30: Overruled.

Objection No. 31: Overruled.

Objection No. 32: Overruled.

Objection No. 33: Overruled.

Objection No. 34: Overruled.

Objection No. 35: Overruled.

Objection No. 36: Overruled.

Objection No. 37: Overruled.

VII. Conclusion

At the hearing, Plaintiff made a number of arguments with respect to the Court's initial tentative ruling. While the Court will not address every issue raised, overall, the Court finds the majority of arguments made by Plaintiff to be unconvincing. The Court will however address two arguments made by Plaintiff concerning the Court's interpretation of his first theory as a failure to hire, and the Court using the wrong standard when evaluating his retaliation theory.

Plaintiff attempts to now characterize his first cause of action as arising under a discriminatory termination theory and not a failure to hire theory. Plaintiff's argument is fruitless. It is undisputed that Plaintiff worked for Defendants on a daily basis under the terms of his collective bargaining agreement. The fact that Plaintiff may have worked continuously over ten years does not change that undisputed fact. Further, as the Court discussed above, the statements made by Roth and Lorre are not job offers for continual, future employment binding Defendants. Plaintiff stated that

the recent Supreme Court case *Muldrow v. City of St. Louis, Missouri*, 144 S. Ct. 967, 974 (2024), stands for the proposition that Plaintiff's employment over many years with Defendant transforms this into a termination theory because employment "is not used in the narrow contractual sense; it covers more than the economic or tangible." *Id*. (internal quotation marks and citation omitted). In reviewing *Muldrow*, the case does not stand for the proposition given by Plaintiff. *Muldrow* concerned the Supreme Court's review of whether a heightened standard should apply to evaluating Title VII cases where alleged discrimination alters the terms and conditions of employment. The Supreme Court stated that there is not a heightened requirement that the injury respecting employment terms or conditions be significant. *See id*. at 977. The phrase quoted by Plaintiff is referencing prior precedent establishing that Title VII prevents discriminatory harm that is more than just economic or contractual, but includes "the entire spectrum of disparate treatment of men and women in employment." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (internal quotation marks omitted). *Muldrow* concerns the types of changes in employment that may constitute discriminatory injury; it does not support Plaintiff's attempt to redefine the express contractual terms of his employment – governed herein by a collective bargaining agreement – to say he was terminated from, rather than not hired on, the Bob Hearts series. The undisputed facts show that Plaintiff's first theory is a failure to hire because he was never terminated, just not re-hired on May 4, 2019, at the end of the completion of the Big Bang television series, nor hired for the Bob Hearts series in June of 2019.

Plaintiff further claims that the Court did not employ the correct legal standard when evaluating Plaintiff's retaliation theory with respect to allegations made concerning Sidell. Plaintiff asserts that a retaliation claim is viable if the employer's actions "would have been materially adverse to a reasonable employee or job applicant," meaning "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). Plaintiff alleges that under this standard, he raised a genuine dispute with regard to his retaliation theory concerning the phone call he had with Sidell where he alleges Sidell threated him not to speak of his complaint regarding race discrimination, or pursue it in any manner, and if he did, Plaintiff would never work for the studio again. *See* ADF 105. Defendants stated that there is no evidence in the record that any adverse employment actions were taken following Sidell's alleged statement, and that Plaintiff did not cite this case in his opposition, which did not give them a chance to fully brief these issues.

Plaintiff stated that just the threat by Sidell is enough for his retaliation theory, but there is also circumstantial evidence that Plaintiff has been added to the do-not-hire list for Defendants. The Court would find that Plaintiff has not alleged that Plaintiff was put on the do-not-hire list by Defendants. All Plaintiff has averred is that "[i]n June 2019, Vice President Sidell administered [Defendants'] 'Do-Not-Hire List' and Sidell was able to add people to the 'Do-Not-Hire-List' including for the reasons that 'there's been an argument.'" Opp. at 21; *see* ADF 108. While Plaintiff alleges Sidell may have had the power to add individuals, he does not go so far to actually allege he was

added to the do-not-hire list, and nothing in the record supports that contention. Rather, Sidell testified that Plaintiff is eligible to work on Defendants' productions, and that if someone is placed on the do-no-hire list, a letter is sent to that person and to the union. *See* ADF 108. While neither party pointed to any specific employment that Plaintiff was denied after the alleged threat by Sidell, the Court would note that Plaintiff previously testified as to attempts he has purportedly made to apply for positions with Defendants following his June 2019 phone call with Sidell. *See* 2021 Armstrong Trans. 157:12-168:24. However, Plaintiff has not been hired by Defendants.

Based on the foregoing discussion, the Court adopts its tentative as its final and GRANTS Defendants' motion for summary judgment with regard to Plaintiff's discrimination and hostile work environment theories. However, the Court requests the parties submit supplemental briefing with respect to Plaintiff's retaliation theory concerning the alleged threat made by Sidell to Plaintiff. Each party will submit their briefs by May 21, 2024, with each brief limited to five pages.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	CV 23-3854-GW-JPRx
Date	June 6, 2024
Title	*Brian Armstrong v. WB Studio Enterprises, Inc., et al.*

Present: The Honorable GEORGE H. WU,
UNITED STATES DISTRICT JUDGE

Javier Gonzalez
Deputy Clerk

None Present
Court Reporter / Recorder

_____
Tape No.

Attorneys Present for Plaintiffs:
None Present

Attorneys Present for Defendants:
None Present

PROCEEDINGS: IN CHAMBERS - TENTATIVE RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT [64]

Attached hereto is the Court's Tentative Ruling on Defendants' Motion [64] set for hearing on June 10, 2024 at 8:30 a.m.

Initials of Preparer JG

I. Background[1]

On May 6, 2024, the Court held a hearing regarding Defendants WB Studio Enterprises, Inc.'s and Warner Bros. Entertainment, Inc.'s (collectively "Defendants" or "WB") motion for summary judgment, or in the alternative, partial summary judgment. *See* Docket No. 74. At the hearing, Plaintiff Brian Armstrong ("Plaintiff" or "Armstrong") made a number of arguments with respect to the Court's tentative opinion, including that the Court applied the wrong standard when evaluating his retaliation theory. On May 7, 2024, the Court issued an amended ruling in which it granted Defendants' motion for summary judgment with respect to Plaintiff's discrimination and hostile work environment theories under 42 U.S.C. § 1981, but requested supplemental briefing from the parties regarding Plaintiff's retaliation theory concerning the alleged threat made by then WB Vice President Silisha Sidell. *See* Docket No. 75. Both parties submitted supplemental briefs on May 21, 2024. *See* Plaintiff's Supplemental Brief ("Pl. Brief"), Docket No. 78; Defendants' Supplemental Brief ("Defs. Brief"), Docket No. 79.

[1] Prior to the May 6, 2024 hearing, the Court issued a tentative ruling (*see* Docket No. 74), and after the hearing issued an amended ruling (*see* Docket No. 75), both of which – for purposes of discussion – are incorporated herein. The Court presumes a familiarity with the facts as previously delineated in the prior rulings which will not be repeated in their entirety here, but which will be referenced.

Plaintiff argues that for close to twenty years he has had a continuity of employment with Defendants working as a camera operator on Chuck Lorre shows, such as *Two and a Half Men* and *The Big Bang Theory*. *See* Pl. Brief at 5. During this employment, Plaintiff alleges promises of further continued employment were made in the Spring of 2019, prior to his last day of work on May 3, 2019. *See id*. After Plaintiff was not hired as a camera operator on the show *Bob Hearts Abishola ("Bob Hearts"),* Plaintiff claims that he engaged in protected activities. *See id.* On June 10, 2019, Plaintiff sent an email to Kristy Cecil stating that he heard very unfortunate rumors about the new *Bob Hearts* series and asked to verify whether he would be working on the series. *See* Defendants' Response to Statement of Genuine Disputes ("SGD"), Docket No. 68-1 at 78; Docket No. 64-3 at 307. Additionally, in the email, Plaintiff asked for Cecil to respond "ASAP" because he heard the rumors were "illegally vicious." Docket No. 64-3 at 307. Further, on June 11, 2019, Plaintiff replied to Cecil by email stating that he was shocked and confused by her message that he was not being hired for *Bob Hearts*. *See* SGD 80; Docket No. 64-6 at 11-12. Plaintiff told Cecil that he was available to work on *Bob Hearts* and included his IMDB page, requesting that Cecil send it to Patti Lee for consideration. *See id*. Plaintiff stated he was not certain why he was singled out for refusal to hire, but rumors of diversity hiring are unconstitutional and a civil rights issue. *See id*. Plaintiff further stated that refusal to hire him would constitute a breaking of Title VII of the Civil Rights Act and violate *McDonald v. Santa Fe Trail Transpo. Co*. *See id*.

Following Plaintiff's email to Cecil on June 11, 2019, Silisha Sidell ("Sidell") and Keren Serrano

("Serrano"), WB labor relations executives, had a call with Armstrong to discuss the camera operator positions on the *Bob Hearts* series. *See* SGD 85. On that call, Plaintiff alleges that he "told Sidell that [he] believed [he] was discriminated against on the basis of race and color." Declaration of Brian Armstrong ("Armstrong Decl."), Docket No. 66-4 at ¶ 38. Additionally, Plaintiff told Sidell during the call that he "was not selected for *Bob Hearts Abishola* because [he is] white and Caucasian." *See id*. ¶ 39. In response, Plaintiff claims "Sidell threatened [him] by stating, 'not to speak of this or pursue it in any manner' and if [he] did [he] would never work for the studio again." *See id*. ¶ 40. Plaintiff alleges that for the first time in close to twenty years, Defendants stopped hiring him to positions on their television shows despite Plaintiff consistently applying for jobs. *See id*. ¶ 41; Pl. Brief at 7.

II. Legal Standard

A. Summary Judgment

Summary judgment is proper when a movant "shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To satisfy its burden at summary judgment, a moving party *without* the burden of persuasion – which is the case for Defendants here – "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000); *see also Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (*en banc*). The moving party may

meet its initial burden by establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party meets its initial burden, "the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment[, but instead] must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial." *T.W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (internal citations and quotation marks omitted). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Nat'l Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 502 (9th Cir. 1997). And "[o]nly disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248.

At the summary judgment stage, a court does not make credibility determinations or weigh conflicting evidence. *See id.* at 249. A court must draw all inferences in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment should be entered against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

Parth v. Pomona Valley Hosp. Med. Ctr., 630 F.3d 794, 798-99 (9th Cir. 2010). A court must determine whether a "a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

B. Section 1981

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981(a). Under Section 1981, "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). "Section 1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). Further, to prevail on a Section 1981 claim, "a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 341 (2020).

C. Retaliation

When analyzing Section 1981 claims, courts "apply the same legal principles as those applicable in a Title VII disparate treatment case." *Surrell v. California Water Serv. Co.*, 518 F.3d 1097, 1103 (9th Cir. 2008) (internal quotation marks omitted). "Section 1981 prohibits racial discrimination in taking retaliatory action." *Id.* at 1107 (internal quotation marks omitted). "To establish a prima facie case of retaliation, a plaintiff must prove (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the two. Once established, the burden shifts to the defendant to set forth a legitimate, non-retaliatory reason for its actions; at that point, the plaintiff must produce evidence to show that the stated reasons were a pretext for retaliation." *Id*. In the failure to hire context, the standard is similar. "[I]n the failure-to-hire context involving a claim of retaliation, the plaintiff meets her prima facie burden by showing that 1) she engaged in protected activities, 2) the position was eliminated as to her, and 3) the position was eliminated as to her because of the protected activities. At this point, consistent with the *McDonnell Douglas* analysis, the burden of production shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse employment decision. If the defendant is successful, the plaintiff must then prove by a preponderance of the evidence that the proffered reasons are pretexts for retaliation or that a discriminatory reason more likely motivated the employer's action." *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir. 1986) (internal quotation marks omitted).

In describing Title VII anti-retaliation actions, the Supreme Court has held Title VII's anti-retaliation provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). "The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *Id*. at 67. "We speak of *material* adversity because we believe it is important to separate significant from trivial harms. . .. normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence." *Id*. at 68. "We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective." *Id*. Further, "[w]e phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *Id*. at 69. "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination." *Id*. (internal citation omitted). "[T]he standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the

Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination." *Id*. at 69-70.

III. Discussion

Plaintiff argues that he made a race discrimination complaint to Cecil, which was escalated to Sidell. *See* Pl. Brief at 8. Plaintiff claims that on the phone call between him and Sidell, he complained about race discrimination, and in return, Sidell threatened Plaintiff that he would never work for Defendants again if Plaintiff were to exercise his Section 1981 rights. *See id*. Under the circumstances of this case, Plaintiff contends that this threat was objectively likely to deter a reasonable worker or job applicant from exercising his rights. *See id*. Further, Plaintiff states that previously he has continuously worked for Defendants, and was promised future work, but his employment ceased close in time to when he made his complaints. *See id*. In sum, Plaintiff states that where an employee who works for an employer as long as Plaintiff did, and receives the promises of continued employment, engages in a protected activity to a manager who then escalates the complaint to a Vice President who threatens the worker that he will never work for the employer again, the threat on its own and/or combined with the entire circumstances is sufficient for a retaliation claim. *See id*.

In response, Defendants claim that Plaintiff cannot establish a prima facie case of retaliation because he has not suffered any adverse action. *See* Defs. Brief at 4. Defendants first argue that Plaintiff's own

testimony contradicts his claim that Sidell threatened him on a phone call in June 2019. *See id*. at 5. Assuming that Sidell did threaten Plaintiff, Defendants contend that a threat alone cannot constitute an adverse employment action under Title VII or Section 1981. *See id*. at 6. Further, Plaintiff has not identified any specific productions that he has sought employment from Defendants, and testified that he spoke to people that may or may not work for Defendants. *See id*. Moreover, Defendants claim there is no evidence that Sidell or anyone else associated with Defendants has interfered with his ability to obtain employment. *See id*. Defendants additionally make the point that a reasonable worker would not have been discouraged from making a complaint after Sidell's alleged threat, as evidenced by Plaintiff's own course of action in which he filed an EEOC charge three months later, then a month after that filed the first of three ensuing lawsuits. *See id*. at 7. Finally, Defendants assert that Sidell's call was to follow up on Plaintiff's emails to Cecil and posts online, which contained broad complaints about various forms of discrimination, including sex, age, sexual orientation, and religion. *See id*. at 8. Because the call was following up on all of these complaints, Defendants claim that Plaintiff cannot prove that "but for" his complaint about race Sidell would not have made the alleged threat. *See id*.

The Court is not persuaded by Defendants' arguments concerning Plaintiff's prior testimony or his ability to prove that "but for" his race complaint Sidell would not have made the alleged threat. Under the facts as alleged by Plaintiff, he spoke on the phone with Sidell about not being hired for *Bob Hearts.* On that phone call, he states that he made a complaint to Sidell that he was being discriminated

against on the basis of race and color, and that he was not selected as a camera operator on *Bob Hearts* because he is white and Caucasian. In response to these statements and complaints about race, Plaintiff alleges that Sidell threatened him not to speak of this or pursue it in any manner or he would never work for Defendants again. Defendants are suspicious of Plaintiff's testimony regarding the threat given his previous deposition testimony did not indicate Sidell threatened him, and alluded to him and Sidell having a very nice conversation.

However, Plaintiff's prior testimony not including or alluding to the alleged threat by Sidell does not foreclose the possibility that it happened, and Defendants' arguments are in fact attacks on the credibility of Plaintiff's declaration, which is not appropriate to resolve at the summary judgment stage. Further, while Defendants allege the call with Sidell covered a number of complaints about discrimination, under the facts as alleged by Plaintiff, Sidell's threat came in response to his complaints on the phone about only race discrimination. This raises a triable issue of fact as to whether Plaintiff's complaints about race were a "but for" cause of Sidell's alleged threat.

As to whether Plaintiff experienced a materially adverse employment action, the Court finds it to be a closer call. The parties disagree as to whether Sidell's alleged threat constitutes a materially adverse employment action. Plaintiff cites the Supreme Court's broad articulation of the standard in which "a plaintiff must show that a reasonable employee [or job applicant] would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker [or

job applicant] from making or supporting a charge of discrimination." *White*, 548 U.S. at 68 (internal quotation marks and citation omitted). While the Supreme Court notes that this does not include "petty slights, minor annoyances, and simple lack of good manners," the standard is purposely broad to allow particular circumstances and context to dictate when an adverse action is material. *Id*.

In response, Defendants cite to a number of cases following *White* that appear to have considerably narrowed its holding by finding that a threat alone cannot constitute an adverse employment action. *See Hellman v. Weisberg*, 360 F. App'x 776, 779 (9th Cir. 2009) ("[T]he fact that Hellman was informed that Judge Weisberg wanted to fire her and have her criminally prosecuted is insufficient to support her Title VII claims. It is undisputed that Hellman was never fired or prosecuted, and the mere threat of termination does not constitute an adverse employment action."); *Hardage v. CBS Broad. Inc.*, 427 F.3d 1177, 1189 (9th Cir.2005) (finding that "snide remarks" about harassment claim and thinly veiled threats were not enough to constitute retaliation); *Mendoza v. DeJoy*, No. 3:21-cv-00991-H-JLB, 2022 WL 18832234, at *11 (S.D. Cal. Dec. 20, 2022) ("Plaintiff asserts that Williams telling two other employees that he would 'fire' Plaintiff constitutes an adverse employment action. But making threats does not rise to the level of an adverse employment action."). *See also Noonan v. Consol. Shoe Co., Inc.*, 84 F.4th 566, 575 (4th Cir. 2023) ("Considering the context of Petrick's one-off statement to Noonan, no reasonable juror would conclude that the threat was a significant harm that would have dissuaded a reasonable worker from making a charge of discrimination. There were no special circ-

umstances such as a unique interpersonal relationship between the supervisor and employee for us to determine that this unrealized threat of termination was sufficiently adverse.") (cleaned up).

Under the terms of the Supreme Court's generalized statement, Plaintiff argues that a reasonable job-applicant/employee would be dissuaded from making a complaint about race discrimination in the future if threated by a supervisor that continuing to pursue the complaint would result in never working for the employer again. However, Defendants point to seemingly more extreme situations in which threats of termination (and even criminal prosecution), though ultimately unrealized, were found to not be material enough to qualify as an adverse employment action. Further research into the standard only muddies the waters. The Ninth Circuit has found "the following conduct may constitute an adverse employment action: [1] forcing an employee to use a grievance procedure to get overtime work assignments that were routinely awarded to others, *Fonseca v. Sysco Food Servs. of Ariz., Inc*., 374 F.3d 840, 848 (9th Cir. 2004); [2] assigning an employee more hazardous work than her co-workers, *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089-90 (9th Cir. 2008); [3] transferring away an employee's job duties and assigning undeserved poor performance ratings, *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987); [4] resigning as a Ph.D. candidate's dissertation chair, *Emeldi v. Univ. of Oregon*, 673 F.3d 1218, 1225 (9th Cir. 2012); and [5] intentionally assigning a teacher a subject that the teacher disliked, *Campbell v. Hawaii Dep't of Educ.*, 892 F.3d 1005, 1022 (9th Cir. 2018)." *MacIntyre v. Carroll Coll.*, 48 F.4th 950, 955 (9th Cir. 2022). Additionally, the Ninth Circuit has also held that "[t]he nonrenewal of an employ-

ment contract is comparably likely to deter a reasonable employee from reporting discrimination. Indeed, common sense suggests that an employee may be dissuaded from alerting the company of discrimination if his or her contract may not be renewed as a result of it." *Id*. In coming to this conclusion, the Ninth Circuit reiterated that "employment actions can be adverse for retaliation claims even if they relate to purely discretionary decisions. For example, the decisions to hire a new employee, terminate an at-will employee, or promote someone are discretionary. But we have long held that any of those actions may be adverse actions if an employer takes them for discriminatory reasons or in retaliation for reporting discrimination." *Id*.

At this time, given the facts of the case, the Court is slightly inclined to find that Sidell's threat constitutes a materially adverse employment action. Given the wide-range of interpretations courts have come to regarding what constitutes a materially adverse employment action, the Court finds it useful to return to the baseline principle laid out by the Supreme Court in which an action is materially adverse if "it well might have dissuaded a reasonable worker [or job-applicant] from making or supporting a charge of discrimination." *White*, 548 U.S. at 68 (internal quotation marks and citation omitted). As the parties have previously discussed, jobs in this industry usually are based on relationship and word-of-mouth hiring. Plaintiff typically did not submit a job application for his previous positions, but was hired by people who knew him and had worked with him in the past. Through that informal process, Plaintiff had worked on a daily contract with Defendants that had been renewed each season for over a decade. Further, the parties appear to agree that at

the time Sidell allegedly made the threat, she was one of the administrators of Defendants' do-not-hire list. While Plaintiff has not produced any evidence to show that he was ever placed on the do-not-hire list, the existence of the list, as well as Sidell's administering of it, adds greater weight to the severity and materiality of her alleged threat. The alleged threat made by Sidell could fairly be characterized as a threat to fail-to-hire Plaintiff or fail-to-renew Plaintiff's contract. The Ninth Circuit has found failure to hire and failure to renew an employment contract both can constitute an adverse employment action if done in retaliation for reporting discrimination. *See MacIntyre*, 48 F.4th at 955.

Defendants' essential point appears to be that the threat to do these actions – rather than actually doing these actions – is distinguishable and not actionable. The Court acknowledges the point and supporting case law cited by Defendants on this issue, but is not sure the distinction is persuasive in this context. Part of the reason why threats were not found to be materially adverse in Defendants' cases was because the threat was never consummated. *See Hellman*, 360 F. App'x 776, 779 (9th Cir. 2009) ("It is undisputed that Hellman was never fired or prosecuted, and the mere threat of termination does not constitute an adverse employment action."). Here, it remains unclear whether Sidell's alleged threat was carried out, given Plaintiff did continue to pursue his complaint regarding race discrimination and has subsequently not worked for Defendants. Given the varying interpretations and approaches courts have taken with respect to this issue, the parties are encouraged to further argue this issue at the hearing. But at this time, the Court would have a slight inclination to find that Sidell's alleged threat could

dissuade a reasonable employee/job-applicant from making a charge of discrimination, and thus qualifies as a materially adverse employment action. If the Court finds that Plaintiff has established a prima facie case of retaliation based on Sidell's alleged threat, Defendants will have the opportunity to provide legitimate, non-retaliatory reasons for its actions. If Defendant wishes to offer such explanation, they may do so at the hearing, with Plaintiff permitted to offer evidence and explain why such reasons are pretextual.

In addition to Sidell's alleged threat, Plaintiff appears to argue that Defendants ceasing to employ him after a continued history and promises of future employment, in close proximity to his race discrimenation complaint, also qualifies as retaliation. "The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *White*, 548 U.S. at 67. Under such an argument, Plaintiff would need to sufficiently establish the injury or harm, as well as causation, related to Defendants ceasing to employ him. Plaintiff alleges that he has consistently applied to shows with Defendants, but has not been hired. *See* Pl. Brief at 7. Defendants respond that Plaintiff did not identify any specific production that he applied to, and testified that he spoke to individuals that he wasn't sure were working on Defendants' productions. *See* Defs. Brief at 6. If Plaintiff wishes to establish a prima facie case of retaliation based on Defendants' failure to hire him to positions that he has applied to, Plaintiff will have to provide greater detail as to which shows he applied and when. Without such information, Defendants would be unable to offer legitimate, non-retaliatory reason for its actions.

IV. Conclusion

Based on the foregoing discussion, the Court will reserve adopting a final decision as to Defendants' motion for summary judgment with respect to Plaintiff's retaliation theory concerning the alleged threat made by Sidell to Plaintiff until after the hearing.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	CV 23-3854-GW-JPRx
Date	July 12, 2024
Title	*Brian Armstrong v. WB Studio Enterprises, Inc., et al.*

Present: The Honorable GEORGE H. WU,
UNITED STATES DISTRICT JUDGE

Javier Gonzalez
Deputy Clerk

None Present
Court Reporter / Recorder

_____
Tape No.

Attorneys Present for Plaintiffs:
None Present

Attorneys Present for Defendants:
None Present

PROCEEDINGS: IN CHAMBERS - TENTATIVE RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT [64]

Attached is the Court's Tentative Ruling on Defendants' Motion [64] set for hearing on July 15, 2024 at 8:30 a.m.

Initials of Preparer JG

I. Background[1]

On June 10, 2024, the Court held a second hearing regarding Defendants WB Studio Enterprises, Inc.'s and Warner Bros. Entertainment, Inc.'s (collectively "Defendants" or "WB") motion for summary judgment, or in the alternative, partial summary judgment. *See* Docket No. 85. At the hearing, the parties discussed Plaintiff Brian Armstrong's ("Plaintiff" or "Armstrong") remaining retaliation theory concerning the alleged threat made by then WB Vice President Silisha Sidell. *See id.* Plaintiff has alleged that on a June 11, 2019 call, he "told Sidell that [he] believed [he] was discriminated against on the basis of race and color." Declaration of Brian Armstrong, Docket No. 66-4 at ¶ 38. Additionally, Plaintiff told Sidell during the call that he "was not selected for *Bob Hearts Abishola* because [he is] white and Caucasian." *See id*. ¶ 39. In response, Plaintiff claims "Sidell threatened [him] by stating, 'not to speak of this or pursue it in any manner' and if [he] did [he] would never work for the studio again." *See id*. ¶ 40. Plaintiff alleges that for the first time in close to twenty years, Defendants stopped hiring him to posi-

[1] The Court has previously issued multiple rulings (*see* Docket Nos. 73, 74, 75, 84) all of which – for purposes of discussion – are incorporated herein. The Court presumes a familiarity with the facts as previously delineated in the prior rulings which will not be repeated in their entirety here, but which will be referenced as needed.

tions on their television shows despite Plaintiff consistently applying for jobs. *See id*. ¶ 41.

Defendants argued that Plaintiff had alleged only a threat, but no harm because he has not specified any job position that he applied to and was denied due to retaliation. Defendants claimed the lack of specificity would render trial impossible given Plaintiff is unable to point to any job he applied to but was denied due to his race-based complaint to Sidell. The Court agreed with Defendants that there needed to be some showing of retaliation: (1) where Armstrong identified what positions he applied to, but did not receive; (2) that the person making decision was aware of the complaint; and (3) the reason he wasn't hired was because of retaliatory animus. The Court then ordered supplemental briefing on the topic and specifically stated "[b]oth parties must cite to the record" in their briefs. Docket No. 85.

Plaintiff filed his supplemental brief on June 24, 2024 ("Pl. Brief"), *see* Docket No. 86; and Defendants submitted their supplemental response brief ("Defs. Brief") on July 8, 2024, *see* Docket No. 92.

II. Legal Standard

A. Summary Judgment

Summary judgment is proper when a movant "shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To satisfy its burden at summary judgment, a moving party *without* the burden of persuasion – which is the case for Defendants here – "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential ele-

ment to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000); *see also Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (*en banc*). The moving party may meet its initial burden by establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party meets its initial burden, "the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment[, but instead] must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial." *T.W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (internal citations and quotation marks omitted). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Nat'l Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 502 (9th Cir. 1997). And "[o]nly disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248.

At the summary judgment stage, a court does not make credibility determinations or weigh conflicting evidence. *See id.* at 249. A court must draw all inferences in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,

475 U.S. 574, 587 (1986). Summary judgment should be entered against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Parth v. Pomona Valley Hosp. Med. Ctr.*, 630 F.3d 794, 798-99 (9th Cir. 2010). A court must determine whether a "a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

B. Section 1981

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981(a). Under Section 1981, "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). "Section 1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). Further, to prevail on a Section 1981 claim, "a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a

legally protected right." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 341 (2020).

C. Retaliation

When analyzing Section 1981 claims, courts "apply the same legal principles as those applicable in a Title VII disparate treatment case." *Surrell v. California Water Serv. Co.*, 518 F.3d 1097, 1103 (9th Cir. 2008) (internal quotation marks omitted). "Section 1981 prohibits racial discrimination in taking retaliatory action." *Id.* at 1107 (internal quotation marks omitted). "To establish a prima facie case of retaliation, a plaintiff must prove (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the two. Once established, the burden shifts to the defendant to set forth a legitimate, nonretaliatory reason for its actions; at that point, the plaintiff must produce evidence to show that the stated reasons were a pretext for retaliation." *Id*. In the failure to hire context, the standard is similar. "[I]n the failure-to-hire context involving a claim of retaliation, the plaintiff meets her prima facie burden by showing that 1) she engaged in protected activities, 2) the position was eliminated as to her, and 3) the position was eliminated as to her because of the protected activities. At this point, consistent with the *McDonnell Douglas* analysis, the burden of production shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse employment decision. If the defendant is successful, the plaintiff must then prove by a preponderance of the evidence that the proffered reasons are pretexts for retaliation or that a discriminatory reason more likely motivated the employer's action." *Ruggles v. Cali-*

fornia Polytechnic State Univ., 797 F.2d 782, 786 (9th Cir. 1986) (internal quotation marks omitted).

In describing Title VII anti-retaliation actions, the Supreme Court has held Title VII's anti-retaliation provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). "The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *Id*. at 67. "We speak of *material* adversity because we believe it is important to separate significant from trivial harms. . .. normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence." *Id*. at 68. "We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective." *Id*. Further, "[w]e phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *Id*. at 69. "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination." *Id*. (internal citation omitted). "[T]he standard

is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination." *Id*. at 69-70.

III. Discussion

Plaintiff stated that he applied to, but was denied selection, for the following positions: (1) *Young Sheldon* on September 5, 2019, (2) *The Kominski Method* on October 10, 2019, (3) *Mom* on March 22, 2020, (4) *Fuller House* on October 22, 2020, (5) *The United States of Al* on February 7, 2022, (6) *The Conners* on March 4, 2022, (7) *Call me Kat* on October 12, 2022, and (8) *Night Court* on April 5, 2023 (the "Shows"). *See* Pl. Brief at 2. In addition, Plaintiff states that he filled out and completed Union Availability List forms, which he claims Defendants generally use to search for available camera operators, each week from June 2019 to December 2021. *See id*.

Defendants respond that Plaintiff's brief and supporting declaration violate the Court's order as they do cite to evidence regarding positions he applied to and was denied after his alleged complaint to Sidell that is not contained in the record. *See* Defs. Brief at 5. Defendants argue the Court should disregard Plaintiff's new declaration for violating the Court's order, and because fact discovery has closed, making it highly prejudicial. *See id*. Additionally, Defendants claim that Plaintiff's declaration is inadmissible as it only offers unsupported conclusions. *See id*. at 5-6. If Plaintiff's declaration is considered, Defendants con-

tend that Armstrong still cannot establish retaliation because none of the Shows had open positions at the time he applied, and Plaintiff fails to present any evidence that the Shows' decisionmakers were aware of his purported complaint to Sidell and did not select him due to retaliatory animus. *See id*. at 6-11.

At the outset, the Court would agree with Defendants that Plaintiff's supplemental brief ignores the Court's explicit instructions to cite to the record. Plaintiff makes no attempt to cite to any evidence in the record when identifying the Shows that he claims he applied to, or describing his use of Union Availability List forms. *See* Pl. Brief at 2. Instead, Plaintiff relies entirely on a supplementary declaration that additionally does not cite to anything in the record, and erroneously identifies Armstrong as an attorney. Defendants' argument that it would be prejudicial to allow Plaintiff to rely on this new supplemental declaration months after fact discovery has closed is compelling. Given that Plaintiff violated the Court's instructions regarding supplemental briefing and is attempting to introduce evidence not in the record following the close of fact discovery, the Court would be within its rights to disregard Plaintiff's supplemental briefing and dismiss Plaintiff's retaliation theory on this basis alone.[2]

Nonetheless, if the Court were to consider Plaintiff's improper supplemental briefing and supporting declaration,[3] the Court would still side with Defend-

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[2] The Court would overrule Defendants' requests for evidentiary objections regarding Plaintiff's supplemental declaration. *See* Docket No. 92-7.

[3] In his 2021 deposition, Plaintiff stated that he had applied as a camera operator for a number of Defendants' shows. *See*

ants. "The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *White*, 548 U.S. at 67. As the Court stated in its prior tentative ruling – even accepting Sidell's threat as an adverse employment action) – to show retaliation, Plaintiff would need to sufficiently establish the resulting injury or harm, as well as causation, related to Defendants' failure to employ him. *See* Docket No. 84 at 11. Plaintiff's supplemental briefing does not show either of these. Plaintiff does not present any type of causation between his race-based complaint to Sidell and De-

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2021 Brian Armstrong Deposition Transcript ("2021 Armstrong Depo.") 163:5-19. When pressed for details on which shows and positions he applied to, Plaintiff stated that he had submitted his IMDB resume to Defendants' website in the spring of 2021. *See id*. 162:19-22. When asked which productions specifically he applied to, Plaintiff was unable to recall any. *See id*. 164:6-9. Plaintiff clarified that his application process was making phone calls to camera personnel who may or may not have been on Warner Bros. productions, and downloading lists of Defendants' shows and contacting anyone on them he knew. *See id*. 164:15-168:24. Additionally, in his 2024 deposition, Plaintiff stated that as of September 6, 2019, he had applied to four pilots that he was ultimately rejected from, but he did not know whether they were affiliated with Defendants as they were not yet connected to a studio. *See* 2024 Brian Armstrong Deposition Transcript ("2024 Armstrong Depo.") 141:18-143:13. Given Plaintiff had previously testified that he applied to various of Defendants' shows, but at the time could not recall specifically which productions as he contacted individuals primarily, it is possible to interpret at least some of Plaintiff's supplemental declaration as clarifying which shows he was then testifying about. However, given Plaintiff did not attempt to make this argument, it is unclear – and strains credibility – that this was Plaintiff's intent when filing his supplemental declaration. Even if it was, the shows after 2021 that Plaintiff claimed he applied to would be unsupported by anything in the record.

fendants' failure to hire him on any of the Shows. In his supplemental declaration, Plaintiff merely avers that he applied to work on the Shows, but was denied selection. *See* Supplemental Declaration of Brian Armstrong ("Armstrong Decl."), Docket No. 86-1. However, in his declaration, Plaintiff never established that he was denied selection for any of the Shows due to retaliatory animus. *See id*. Further, Plaintiff does not establish that any of the decisionmakers on these Shows, or those who looked at the Union Availability List, were aware of the complaint he made to Sidell such that the failure to hire Armstrong could be due to retaliatory animus. In contrast, Defendants offer declarations from the Shows' decisionmakers stating that they were unaware of any complaint by Plaintiff or related statements by Sidell. *See* Defs. Brief at 10. Given Plaintiff fails to produce evidence of causality, he has failed to make out a prima facie case of retaliation.

Additionally, Defendants claim that Plaintiff cannot establish retaliation because he cannot show that there were any open positions on the Shows at the time that he applied. Defendants go through each Show and offer explanations and declarations from the relevant decisionmakers attesting to the fact that none of the Shows had open positions at the time Plaintiff alleges he applied because: (1) certain shows were not affiliated with Defendants; (2) some had ceased production; (3) others had not yet been renewed, or were on hiatus; or (4) the camera operator positions had already been filled. It is slightly unclear whether Defendants' argument should be stylized as attacking Plaintiff's prima facie case, or offering a legitimate, non-discriminatory reason for denying his selection. Under either understanding, Plaintiff's claim fails. The Ninth Circuit has stated that

"[i]nherent in the standard for retaliatory failure-to-hire is the existence of an open position to which the plaintiff applied." *Rowell v. Sony Pictures Television Inc.*, 743 F. App'x 852, 854 (9th Cir. 2018) (internal quotation marks omitted). "Indeed, it stands to reason that an adverse employment action against a prospective employee arises only if there is employment to be had in the first place." *Id*. This conception of an open position being a necessary criterion for stating an adverse employment action in a retaliatory failure-to-hire case is not incompatible with the Supreme Court's broad definition of adverse employment action in *White*. In *MacIntyre v. Carroll Coll.*, 48 F.4th 950, 955 (9th Cir. 2022), the Ninth Circuit examined the *White* standard for what may constitute an adverse employment action and noted that discretionary employment actions, including the decision to hire a new employee or renew an employment contract, may qualify "if an employer takes them for discriminatory reasons or in retaliation for reporting discrimination." *Id*. If there was no open position when Plaintiff applied, then the failure to hire him would not be for a retaliatory reason, meaning it would not qualify as an adverse employment action and Armstrong cannot show an injury or harm or the necessary causation.

Alternatively, Defendants' argument that Plaintiff was not hired on any of these Shows because there were no open positions is a legitimate, non-discriminatory reason for the actions. Plaintiff may rebut this claim by presenting evidence that these reasons are pretextual, or that it is more likely than not that he was not hired for retaliatory reasons. Given Plaintiff has not put forth any evidence showing that the decisionmakers knew about his complaint to Sidell, the Court would not find it more likely than not the

decision not to hire him was due to retaliatory animus. If Plaintiff believes Defendants' explanation that there were no open positions is pretextual, he should present evidence to such effect at the hearing.

In sum, the Court would find that Plaintiff has failed to establish that he was not hired for the Shows by Defendant due to retaliation after his race-based complaint made to Sidell.

IV. Conclusion

Based on the foregoing discussion, the Court would **GRANT** Defendants' motion for summary judgment as to Plaintiff's retaliation theory under Section 1981.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 23-3854-GW-JPRx
Date July 15, 2024
Title *Brian Armstrong v. WB Studio Enterprises, Inc., et al.*

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez
Deputy Clerk

Terri A. Hourigan
Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs: Michael J. Freiman
Attorneys Present for Defendants: Adam Levin
Corey G. Singer

PROCEEDINGS: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT [64]

The Court's Tentative Ruling on Defendants' Motion [64] was issued on July 12, 2024 [93]. Further argument is held. The Tentative Ruling is adopted as the Court's Final Ruling. Defendants' Motion is GRANTED. Defendants are to prepare and file a proposed order and judgment forthwith.

: 20
Initials of Preparer JG

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 23-3854-GW-JPRx

BRIAN ARMSTRONG,
Plaintiff,
v.
WB STUDIO ENTERPRISES, INC.; WARNER BROS. ENTERTAINMENT INC.; and DOES 1 through 20,
Defendants.

Honorable George H. Wu

ORDER AND JUDGMENT GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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ORDER AND JUDGMENT

Defendants WB Studio Enterprises Inc. and Warner Bros. Entertainment Inc.'s (collectively, "Defendants") Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment (the "Motion") came on for hearing on May 6, June 10, and July 15, 2024, at 8:30 a.m., in Department 9D of the above-entitled Court, the Honorable George H. Wu presiding. *See* ECF No. 64. The appearances of the parties are reflected in the transcript.

The Court, having considered all of the papers filed and evidence submitted in conjunction with the Motion, as well as any oral argument presented at the hearing on the Motion, excepting evidence to which the Court specifically sustained objections, HEREBY ORDERS AND ADJUDGES AS FOLLOWS:

Summary judgment as to Plaintiff Brian Armstrong's ("Plaintiff") Second Amended Complaint is hereby GRANTED in favor of Defendants. The Court hereby finds there are no triable issues of material fact as to the sole Cause of Action for violation of 42 U.S.C. § 1981 *et seq*. asserted in Plaintiff's Second Amended Complaint, and Defendants are entitled to summary judgment as a matter of law. The Court's previous rulings regarding Defendants' Motion are incorporated by reference herein. *See* ECF Nos. 73, 74, 75, 84, 93, 94.

IT IS SO ORDERED.

DATED: July 16, 2024

/s/ George H. Wu
HON. GEORGE H. WU,
United States District Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

———

No. 24-5049

———

BRIAN ARMSTRONG,

Plaintiff-Appellant,

v.

WB STUDIO ENTERPRISES, INC.;
WARNER BROS. ENTERTAINMENT INC.

Defendants-Appellees,

———

On Appeal from the United States District Court
for the Central District of California
No. 2:23-cv-03854
Hon. George H. Wu

———

APPELLANT'S OPENING BRIEF

———

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JURISDICTIONAL STATEMENT

The basis for jurisdiction for the lower court is federal question jurisdiction. 28 U.S.C. § 1331. The basis for jurisdiction for the Court of Appeals is 28 U.S.C. § 1291. The date of entry of the judgment and order that disposed of all Plaintiff's claims is July 16, 2024. 1-ER-3. The date of the notice of appeal is August 15, 2024. 15-ER-3215. The time to file a notice of appeal is 30 days from the date of entry of judgment. FRAP 4.

STATUTORY AUTHORITIES

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981

ISSUE(S) PRESENTED

Whether the district court erred in granting Defendants' Motion for Summary Judgment on Plaintiff's 42 U.S.C. § 1981 Cause of Action

STATEMENT OF THE CASE

I. Factual Circumstances

Defendants continuously employed Plaintiff as a Television Camera Operator on various television shows (including Two and a Half Men and Big Bang Theory) from 2007 to 2019 as during which time Plaintiff earned eight (8) Emmy nominations and an Emmy award win. 4-ER-629-631 (Plaintiff's Additional Disputed Facts ("ADF") 9-13).

It was important for Defendant's Executive Producer Chuck Lorre to keep the crew together from show to show because Lorre "like[s] keeping people employed," "took pride in the ability to keep as many people as possible employed," and likes to work with people he's worked with before. 4-ER-628 (ADF 5). Lorre explains, "television shows very often get cancelled, sometimes quickly," "you have a large group of people working together and then suddenly, they're sent home. The show is over. That did not happen with these shows. We kept going and that's continuity." "[C]ontinuity, that we were fortunate enough to continue for many, many years on these shows." 4-ER-627-628 (ADF 4)

In 2019, Defendants – through their President Peter Roth and Executive Producer Chuck Lorre – repeatedly acknowledged to Plaintiff that Plaintiff's employment was continuing to the next show in accordance with the parties' past practices. 4-ER-625-

627 (ADF 1-3); 4-ER-647-648 (ADF 53); 4-ER-649-652 (ADF 57-64).

A. The Commitment

In September, 2018, Defendants began to include Warner Bros. Commitment to Diversity and Inclusion's (referred to herein as "Commitment") in all new hire paperwork, which Plaintiff became aware of when it was posted on the camera door of the set of The Big Bang Theory. Plaintiff took a picture of the Commitment. 4-ER-632-633 (ADF 17, 18).

The Commitment states in relevant part: ". . .we must all ensure there is greater inclusion of . . . people of color . . .in greater numbers . . . behind the camera." The sign went on to say, "in the early stages of the production process, we will engage with our writers, producers, and directors to create a plan for implementing this commitment . . ." 4-ER-633 (ADF 19).

Plaintiff was offended by the Commitment because it excludes white and Caucasian people. 4-ER-634 (ADF 20). Defendants deny there was any problem with race discrimination that had to be remedied by diversity, equity, and inclusion initiatives. 4-ER-634 (ADF 21).

B. Defendants Apply The Commitment to Plaintiff's Workplace

Defendants' President agreed with The Commitment's effort to increase the amount of people of color behind the camera and acknowledges the "conceit of the show" Bob Hearts Abishola involving a principal cast member from Nigeria adheres to the value of the Warner Bros. Commitment to Diversity and Inclusion. 4-ER-634 (ADF 22).

Lorre believes, and has always believed, the Commitment is a "moral obligation" always agreeing with the Commitment's statement to ensure greater numbers of people of color behind the camera including at the time of the last season of The Big Bang Theory and "surely hope[s]" he has done something to ensure there are greater numbers of people of color behind the camera. Lorre admits the Commitment is not inclusive of white people, but has a good intent very clearly focused on underrepresented groups. Lorre follows the Commitment in connection with his work as an executive producer producing shows for Warner Bros because Lorre thinks "the intent and promise of this commitment is one worth pursuing for me." 4-ER-635 (ADF 23).

Consistent with the Commitment, Defendants' producers tried to find African-American crew members for Bob Hearts Abishola show to try to make the cast feel comfortable. 4-ER-636-637 (ADF 26, 27, 28). Defendants' Executive Producer Al Higgins writes in an e-mail, "[a]re their any other department heads we have to fill? I don't want them all white." 4-ER-637 (ADF 29). Lorre understood that Higgins "was probably trying to do the right thing . . . " because "he was trying to be inclusive" as "he wanted rainbow colored employees, a crew that represented our world." 4-ER-638 (ADF 30). Lorre, who continues to work for Warner Bros and who still works with Al Higgins, who continues to be a producer on Bob Hearts Abishola, stated he doesn't think he will take any steps to communicate to Al Higgins its not appropriate to make such statements as "I don't want them all white." 4-ER-638 (ADF 31).

In another e-mail regarding selection of crew for Bob Hearts Abishola, Higgins states, "I hate to put it

bluntly but how many African Americans are on your list." 4-ER-638-639 (ADF 32). Lorre understands Higgins statement, "I hate to put it bluntly, but how many African-Americans are on your list" arises from an "honorable" intent to be inclusive and to be " . . . something written by someone trying to do the right thing" because "[h]e's trying to adhere to diversity, inclusivity . . ." which Lorre supports. 4-ER-639 (ADF 33).

In response to the e-mail, Defendant's producer Carol Anne Miller states, "These are our African Americans as of now. This does not touch upon our other minorities." 4-ER-639 (ADF 34). Defendants' President Roth believes that the producer's reference to "these are our African Americans as of now. This does not touch upon our other minorities" not to be discriminatory, to not pose a risk of discriminating against white people, and is actually consistent with the Warner Bros Statement to Diversity and Inclusion. 4-ER-640 (ADF 35).

In a text message exchange between Miller and another crew member, Steeples, Miller asked Steeples if a potential crew member is "African-American" because Miller "wanted to make the cast comfortable, and by hiring a camera utility, that was the least disruption to the unity of the crew. It wasn't a camera operator. It wasn't a first AC. It wasn't a dolly grip. It was a camera utility who was not a part of the team." Miller elaborated, "camera operators work as a team. They work as a camera operator, a first AC, and a dolly grip. And that's a unit that works together, and they know their language and their queues . . . You don't want – you don't break that up. They're a unit." 4-ER-643-644 (ADF 42).

In the text message Miller asks, "Is Selvin African American" and Steeples replies, "Yes ma'am." 4-ER-644 (ADF 43). Defendants' President considers a Unit Production Manager asking a subordinate if a potential crew member is African American to be a "reasonable question" as "an attempt to ensure a crew that has diversity." 4-ER-644 (ADF 44).

Miller admits she was trying to find crew to work on the basis of race and likened finding African-American crew to match the race of the cast as part of doing "everything to make sure that your cast are happy. You make sure they have the foods they want to eat in Craft Service. You make sure they're happy with their dressing rooms. . . it's all about making the cast happy and comfortable so they can perform well on camera so you get your pilot." 4-ER-645 (ADF 45).

Lorre understands Carol Miller's statement, "these are our African-Americans as for now" to be ". . . people trying to do the right thing" because "they're trying to honor the effort toward inclusivity." To the extent Lorre has an issue with the statement, it is only because Lorre believes the statement "speaks to white privilege." 4-ER-640 (ADF 36).

Lorre acknowledged the phrase "these are our African-Americans as of now" didn't cast a "wide enough" net because "it should be embracing all minorities and groups that have in the past been excluded." When asked, "what about white people," Lorre responded, "What about them? You're seriously asking me that question. Oh, my goodness. Good for you." 4-ER-641 (ADF 37).

Lorre specifically believes the concept of including white people in the definition of inclusive is "preposterous." "Inclusivity is to encourage and make up,

create opportunity for everyone else." Lorre even described a person advocating a discrimination case on behalf of a white person as "hateful," going further to say, "you should be ashamed of yourself." 4-ER-672 (ADF 113).

Lorre admits he believes that "trying to prove discrimination against a white person" is "ridiculous" and "foolish." Lorre laughed when he said "discrimination against a white man" because Lorre believes the phrase is "ridiculous." 4-ER-672 (ADF 113).

C. Defendants' Implementation of The Commitment Creates an Hostile Work Environment for Plaintiff

Plaintiff's supervisor, Department Head Director of Photography Steve Silver, asked his subordinate, Ben Steeples, to check for crew who are African-American in connection with staffing the next new show, Bob Hearts Abishola. 4-ER-641 (ADF 38). When Silver asked Steeples to find African-American crew, Steeples understood Silver as communicating it was something he felt he had to do as a responsibility to carry out a higher aspiration to find additional African-American crew, communicating to Steeples, "we're being asked." 4-ER-642 (ADF 39).

Steeples then told Plaintiff that Steeples was told to begin the search in the camera department with any and all African-American technicians that are available. Steeples told Plaintiff about Miller's directive in which "she demands that I, having put me in charge, start with African-American people, male or female, and then go from there." 4-ER-642 (ADF 40).

Silver put his arm around Plaintiff and said, "You know, you got to understand this, Brian, that Carol

has made it known that we need to work off of the Warner Brothers new diversity hiring program not only in front of the camera but behind the camera. In other words, our employees now have to fit a certain demographic to take you to Bob." 4-ER-642-643 (ADF 41).

During this time, Defendant's employees further stated to Plaintiff:

- "I believe I'm pretty sure this is where we part ways" based on "the diversity thing," "Carol is on fire to make sure that not only is that letter followed to the T, that statement . . ." 4-ER-645 (ADF 46).
- "Army, looks like we're both kind of screwed here" and "you know this new diversity thing . . . Carol is in charge of it." 4-ER-646 (ADF 47).
- "Well, Army, I guess it's finally happened. It looks like we've been diversified out of the business. Didn't you see the memo? Didn't you see it? None of us." 4-ER-646 (ADF 48).
- "You know what. Go read that diversity thing that just came out. You think I'm happy about that? You think people like you and I are ever going to work in this industry again because of that?" 4-ER-646 (ADF 49).
- "Honkie. Didn't you see the note? You out of work my friend. You and me and people like us." "Dude, the new hiring program . . . certain people on the list have no chance of not only working on Mom but of never working again." 4-ER-646-647 (ADF 50).

- "We knew this shit was going to happen" and "We'll probably never work another day in this business in our life." 4-ER-647 (ADF 51).

On May 2, 2019, Lorre told Plaintiff, "We got more stuff coming up. So this isn't the end." Plaintiff responded, "Well it's so nice to know that, you know, I won't be looking for other work . . ." Lorre responded, "You know something else, Army. You guys are going to be seeing a lot more schvartzes in the next couple of years." When Plaintiff misunderstood what schvartze meant, Lorre responded to another showrunner, "Army doesn't know what a shvartze," and the other showrunner smiled and said "really you don't know what that is." 4-ER-650-651 (ADF 62). Lorre admits schvartze is a hateful word and hateful words would create a hostile work environment. 4-ER-651 (ADF 63).

The "schvartze" comment offended Plaintiff because it appeared to Plaintiff to be an affirmation that race and color would be the cause of who would continue to work with Defendants on their next show, Bob Hearts Abishola, and this issue troubled Plaintiff for some time as a result of the constant discussion about that topic on the set. 4-ER-654 (ADF 70).

On May 3, 2019, Plaintiff and Defendant's supervising producer Kristy Cecil were discussing the next show and Cecil told Plaintiff, "didn't you see the DEI statement. Well, people like you are not – don't have much of a future in this business . . . " Cecil further told Plaintiff, "It's all true Brian. You know, the things you heard about this diversity thing is true. I had to hand over the hiring process for Bob to Carol Miller." Cecil further reiterated the "things you've heard . . . about the hiring of" and then partially went

down the list starting with African-Americans. 4-ER-652 (ADF 65).

On May 3, 2019, Defendant's supervising producer Robinson Green told Plaintiff, "Yep. It looks like we are an endangered species." "Well, Kristy has been ordered to follow this new diversity hiring program which includes, you know, we got to hire more Blacks." "Hey, it's Chuck Lorre's world." When Plaintiff asked Green what he meant by the species comment, Green said, "you'll understand soon enough." 4-ER-652-653 (ADF 66).

The aforementioned comments were made in the open on the set that was frequently traversed by Defendants' supervisors including without limitation Kristy Cecil, Robin Green, Steve Silver, Chuck Lorre and Peter Roth. 4-ER-653-654 (ADF 68). Plaintiff was offended but believed that if you complained you would be fired as he had observed prior individuals doing such and being retaliated against for it. 4-ER-653-654 (ADF 67, 69).

D. Plaintiff's Opposition to the Discrimination and Defendants' Following Through on its Threat Plaintiff Will Never Work for Warner Bros Again

After Plaintiff discovered that Defendants were not continuing Plaintiff's employment to the next new show (in violation of their earlier assurances they were doing exactly that) following the issuance of the Commitment, Plaintiff e-mailed his producer supervisor Kristy Cecil stating he has heard "**illegally** vicious" rumors and wanted to verify that he was still on track to work on the next show. 4-ER-665-666 (ADF 99) (emphasis added).

Cecil replied, "**Sadly what you hear is true.** Due to the nature of the shoot schedule of our new show (three day block and shoot M-W) we had to bring in a new DP. (And other various department heads as well.) **It was unfortunate to lose Steve because we knew we would lose some camera crew as well.** The new DP has a crew she's selected to do the show. Unfortunately, we weren't able to just roll everyone onto the new show. . ." 4-ER-666 (ADF 100) (emphasis added).

Steve Silver was the White/Caucasian Department Head who Plaintiff was working under on Two and a Half Men and Big Bang Theory. 4-ER-629-630 (ADF 8-11).

Defendant, through Lorre, Higgins, and Cecil, replaced Silver with a person of color department head, Patti Lee. 4-ER-655 (ADF 73). Cecil states "[i]t was unfortunate to lose Steve because we knew we would lose some camera crew as well" because television camera operators typically stay together with their crew. 4-ER-643-644 (ADF 42). Therefore, with Silver being replaced by Lee, Cecil is essentially communicating to Plaintiff that Defendants "lost" Plaintiff as a television camera operator because Defendants replaced Silver with Lee.

Cecil does not deny that Plaintiff was not assigned work on Bob Hearts Abishola due to the Commitment. 4-ER-656 (ADF 75).

Plaintiff responds by disclosing that this is a violation of "the Supreme Court Decision known as "McDonald vs. Santa Fe Trail Tranpo Co." (1976) #75-60 as decided by Justice Thurgood Marshall . . ." 4-ER-666-667 (ADF 101). Cecil reviewed Plaintiff's disclosure of alleged race discrimination soon after

receiving the June 11, 2019 e-mail from Plaintiff and in response called Lisa Jackson (production executive) and said, "I've received a very uncomfortable, disturbing email . . ." Lisa Jackson told Cecil that they would talk to Silisha, Warner Bros. Vice President of Labor Relations. Jackson then told Cecil to e-mail Jackson and Bob Jensen (Labor Relations) the link to the Facebook post where Plaintiff complains about race discrimination, and Cecil reported it to Warner Bros. Labor Relations. 4-ER-666-668 (ADF 101-102). Within three days of Plaintiff's complaint to Cecil about race discrimination, Cecil forwarded to Warner Bros. Labor Relations another Facebook post by Plaintiff that Cecil considered to be negative information. 4-ER-668 (ADF 103).

During Plaintiff's June, 2019, call with Vice President for Labor Relations, Silisha Sidell, Plaintiff told Sidell he believed he was discriminated against on the bases of race and color; and that he was not continued on to the next show because he is white and Caucasian. 4-ER-668-669 (ADF 104).

Sidell responded by threatening Plaintiff, not to speak of this or pursue it in any manner, and if Plaintiff did then he would never work for the studio again. 4-ER-669 (ADF 105). In June, 2019, Vice President Sidell administered Warner Bros' "Do-Not-Hire List" and Sidell was able to add people to the "Do-Not-Hire List" including for the reason that "there's been an argument." 4-ER-670 (ADF 108). Defendants stopped assigning Plaintiff positions on their television shows. 4-ER670671 (ADF 110).

No one from Warner Bros has contacted Miller to investigate. 4-ER-673 (ADF 114). Nobody from Warner Bros. contacted Cecil to investigate whether or not Plaintiff was not selected to the next show on

the basis of race and color. 4-ER-673 (ADF 115). Miller cannot recall any race discrimination prevention training by Warner Bros. prior to her work on the Bob Hearts Abishola show. 4-ER-673 (ADF 116). Warner Bros has not provided any race discrimination training to Lee. 4-ER-673 (ADF 117). Sidell did not take any steps to investigate any potential race discrimination toward Brian Armstrong. 4-ER-673 (ADF 118).

II. RELEVANT PROCEDURAL HISTORY

On May 6, 2024, the trial court held a motion for summary judgment hearing, adopted its tentative ruling in part, and granted Defendant's motion for summary judgment on the issues of discrimination and hostile work environment. The Court ordered supplemental briefing on the issue of retaliation. 1-ER-14-47. On June 10, 2024, the Court heard further argument and ordered further supplemental briefing on the issue of retaliation. 2-ER-150. On July 15, 2024, the Court heard further argument and adopted its tentative ruling granting Defendant's motion for summary judgment on retaliation. 1-ER-4-13.

SUMMARY OF THE ARGUMENT

Plaintiff presented direct evidence of discrimination, harassment, and retaliation in violation of Section 1981. However, the Court disposed of the case in reliance upon the *McDonnell Douglas* factors (that is not to be used in cases involving direct evidence) when Plaintiff did in fact satisfy such factors in showing Defendants' proffered reasons for its actions were a pretext for ending Plaintiff's continuous employment and otherwise subjecting Plaintiff to a discriminatory course of conduct the terms, conditions, and privileges of employment. Rather than limiting its

analysis to failure to hire, the Court should have considered the totality of the circumstances showing the end of a continuous employment relationship coupled with Defendants' assurances of further continued employment as constituting an adverse employment action under *Muldrow*, which goes beyond labels to look at the underlying difference in the conditions before and after the inclusion of an unlawful criterion.

The Court's reasons for dismissing the hostile work environment claim – that the comments were simply generalized comments about a lawful diversity policy – do hold up when compared with the actual comments made and the actual discriminatory policy Defendants subjected Plaintiff to. A plain reading of the policy and the comments make clear the hostile work environment was based on severe and pervasive slurs, tropes, and stereotypes all caused by an unlawful policy.

STANDARD OF REVIEW

A district court's decision to grant summary judgment is reviewed de novo. *Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1259 (9th Cir.) (grant), *cert. denied*, 142 S. Ct. 343 (2021).

ARGUMENT

II. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE IS A TRIABLE ISSUE OF FACT WHETHER DEFENDANTS SUBJECTED PLAINTIFF DISCRIMINATORY TERMS, CONDITIONS, AND PRIVILEGES OF THE EMPLOYMENT RELATIONSHIP ON THE BASES OF RACE AND COLOR

A. THE COURT ERRED BECAUSE THE FACTUAL CIRCUMSTANCES PROVE DEFENDANTS' DISCRIMINATION TOWARD PLAINTIFF

"The Civil Rights Act of 1866 was enacted in context with the legal background providing that "in all cases where [the laws of the United States] are not adapted to the object [of carrying the statute into effect] the common law ... shall ... govern said courts in the trial and disposition of such cause." And, while there were exceptions, the common law in 1866 often treated a showing of but-for causation as a prerequisite to a tort suit. *Hayes v. Michigan Central R. Co.*, 111 U.S. 228, 241, 4 S.Ct. 369, 28 L.Ed. 410 (1884)." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 335, 140 S. Ct. 1009, 1016 (2020).

In *Hayes*, the Court overruled a lower court safeguarding the right to trial by jury brought by a boy who was injured by the negligence of a railroad. In doing so, the Court held the lower court erred by not allowing the boy's case to go to a jury trial where there was evidence of the circumstances showing the legal cause of the injury to the plaintiff. Like *Hayes*, the lower court in the instant case likewise has not fully accepted the factual circumstances giving rise to the causation of the injury in this case and has instead disposed of the case before a jury trial.

B. THE COURT ERRED BY RELYING UPON THE MCDONNELL DOUGLAS FACTORS TO DISMISS A CASE BASED ON DIRECT EVIDENCE OF RACE AND COLOR DISCRIMINATION

"*McDonnell Douglas* sought only to supply a tool for assessing claims, typically at summary judgment,

when the plaintiff relies on **indirect proof** of discrimination. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020) (emphasis added). Because Plaintiff has established direct evidence of race discrimination, the lower could should not have relied upon the *McDonell Douglas* factors to dispose of Plaintiff's 1981 claim.

C. EVEN IF THE MCDONNELL DOUGLAS FACTORS APPLY PLAINTIFF HAS ESTABLISHED A TRIABLE ISSUE OF FACT AS TO WHETHER DEFENDANT'S PROFFERED REASONS FOR ITS ACTIONS ARE PRETEXTUAL

Defendants' proffered reason for the end of Plaintiff's continued employment and the violation of Defendants' promise to Plaintiff he would continue to be employed on a future show – that Patti Lee replaced Steve Silver due to a scheduling issue (not race or color) and Patti Lee did not rely upon race or color in her decisions to assign television camera operators – was shown to be pretextual before the lower court both because Defendants' acknowledged to Plaintiff he would continue his employment on the next show ((4-ER-625-627 (ADF 1-3); 4 ER-647-648 (ADF 53); 4-ER-649-652 (ADF 57-64)) and also because Plaintiff established there is a triable issue as to whether the scheduling reason was false and Lee's self-serving explanation for her actions is also false.

3. Defendants Replaced Steve Silver Because of Race and Color; Not Due to Scheduling

Lorre admits the last season of The Big Bang Theory was an excellent season, the show looked great, and "the crew was a talented crew." 4-ER-660 (ADF 86). Lorre denies Silver's performance on the last

season of The Big Bang Theory was sub par and confirms that if anyone said his performance was sub par that person would be wrong. 4-ER-660 (ADF 87).

Lorre and Higgins approved of the names of the department heads as brought to them from Cecil and Green. 4-ER-655 (ADF 73). Patti Lee is a person of color. 4-ER-656 (ADF 76). Lorre understands Patti Lee to be a person of color. 4-ER-656 (ADF 77).

When asked if Silver wasn't selected to be Department Head Director of Photography for the Bob Hearts Abishola series because there was an effort to increase the amount of people of color behind the camera, Lorre responded no because Silver was "spread out pretty thin," "on several shows at the same time," and "there were so many hours in the day and he was already committed to other shows." Lorre claims "there were probably at least three shows" but couldn't name another show Silver was working on beside Mom. 4-ER-658 (ADF 82).

Cecil and Green claim they did not ask Silver to be Director of Photography for Bob Hearts Abishola because Silver was working on another show and "we didn't believe that a director of photography could do that and another show, because we would need the director of photography to be available on Monday, Tuesday, Wednesday of our shoot . . ." 4-ER-658-659 (ADF 83).

Cecil stated Silver couldn't have been rolled over from The Big Bang Theory to Bob Hearts Abishola because Silver "wouldn't be available to do both shows . . ." because at the time Cecil was selecting the Director of Photography for Bob Hearts Abishola, Silver's shoot schedule for his other show was Thursday and Friday and Bob Hearts Abishola was Mon-

day-Wednesday. 4-ER-659 (ADF 84). Green claims they couldn't have a Director of Photography on Bob Hearts Abishola that also shot another show on Thursdays and Fridays. 4-ER-660 (ADF 85).

However, Lee maintains there is nothing abnormal about a Director of Photography working on two shows at the same time. 4-ER-656 (ADF 78). In fact, prior to becoming Director of Photography for Bob Hearts Abishola, Lee actually informed Cecil and Green that Lee would be working on another show, Mad About You, while also working on Bob Hearts Abishola, and neither Cecil nor Lee made any negative comments in response. 4-ER-657 (ADF 79).

It wasn't an issue for Cecil that Patti Lee was Director of Photography on Mad About You, which shot Thursdays and Fridays (the same days as Mom the show Steve Silver was also on) and also on Bob Hearts Abishola which shot on Monday through Wednesday; and it didn't cause any problem on the show. 4-ER657-658 (ADF 80, 81).

4. Lee Also Admits to Following the Commitment in Connection with Television Camera Operators

Defendants' producers, including Robin Green, approved of Lee's assignments for the Television Camera Operators positions. 4-ER-664 (ADF 94). Lee adhered to the Commitment in selecting television camera operators for Bob Hearts Abishola and will continue to adhere to the commitment in her future work with Defendants continuing ensure that there are greater numbers of people of color working behind the camera in addition to other underrepresented groups. 4-ER660-661 (ADF 88).

At the time Lee selected television camera operators for Bob Hearts Abishola, Lee believed that she must ensure there is greater numbers of people of color behind the camera and has "been pushing for all [of her] sets to look more like the world at large" including the set of Bob Hearts Abishola by including more people of color behind the camera at the time she was selecting television camera operators for Bob Hearts Abishola. 4-ER-661 (ADF 89).

The selection of Patti Lee as Director of Photography caused Michelle Crenshaw, to work on the recurring camera crew of the first season of Bob Hearts Abishola than on the last season of The Big Bang Theory. 4-ER-661-662 (ADF 90). Lee understood Michelle Crenshaw to be a person of color and at the time Lee selected Michelle Crenshaw to become Camera Operator X for Bob Hearts Abishola, Lee felt good about her belief she was increasing the amount of people of color behind the camera because Lee "like[s] to have a diverse and inclusive workplace." By selecting Michelle Crenshaw, Lee was helping to create a more inclusive set. 4-ER-662 ADF 91.

Chris Hinojosa is a person of color with non-Caucasian heritage. At the time Lee selected Chris Hinojosa to be a television camera operator for Bob Hearts Abishola, Lee believed Hinojosa to appear to be racially ambiguous. Prior to selecting Chris Hinojosa as television camera operator for Bob Hearts Abishola, Lee had only spoken to Hinojosa for a total of ten (10) minutes total in two (2) five (5) minute conversations. 4-ER-662-663 (ADF 92).

While Lee had worked with many of the people she selected for her crew on Bob Hearts Abishola, Lee did not previously work with the two (2) television camera operators, Michelle Crenshaw and Chris Hino-

josa. At the time Lee selected Chris Hinojosa and Michelle Crenshaw, Lee had never worked with them and Lee had no personal knowledge as to their work performance. 4-ER-663-664 (ADF 93).

D. MULDROW SHOULD GOVERN THE ISSUE OF ADVERSE EMPLOYMENT ACTION BASED ON THE TOTALITY OF THE CIRCUMSTANCES

The Court erred by limiting Plaintiff's claim to solely a *McDonnell Douglas* failure to hire analysis. As explained in the Factual Circumstances portion of the Statement of Case, the loss in this case is really premised on the loss of Plaintiff's continuous employment relationship, which is closer to a termination than it is to a failure to hire. *See* 4-ER-625-627 (ADF 1-3); 4-ER-627-628 (ADF 4); 4-ER-628 (ADF 5); 4-ER-647-648 (ADF 53); 4-ER-649-652 (ADF 57-64).

Defendant argues that Defendant can evade the reach of the amended Section 1981 statute by simply categorizing its employees as being "terminated" as of the last date of each show, but *Muldrow v. City of St. Louis, Missouri*, 601 U.S. 346 (2024), would urge the Court to look past mere labels and instead look to the totality of the circumstances, which in this case, involves perhaps the most prized privilege in all of the entertainment industry – continuity. In this case, it is undisputed Plaintiff's continuous employment, which Defendant's President and Executive Producer acknowledged as continuing past the Big Bang Theory, abruptly ended and was terminated with the implementation of the Commitment.

It's the termination of that privilege that gives rise to the claim, which is broader than the *Mcdonnell Douglas* factors.

E. THE LOWER COURT ERRED BY LIMITING PLAINTIFF'S RETALIATION CLAIM TO SOLELY A FAILURE TO HIRE ANALYSIS; EVEN STILL PLAINTIFF SHOWS A RETALIATORY FAILURE TO HIRE

Here, following Plaintiff's supervisor's reporting Plaintiff's "troubling" race discrimination complaint along with negative information about the Plaintiff, Defendant's Vice President (in control of the do not hire list) threatened Plaintiff he would never work for Warner Bros again. These acts alone are sufficient to constitute retaliation in violation of Section 1981. 4-ER-666-667 (ADF 101); 4-ER-666-668 (ADF 101-102); 4-ER-668 (ADF 103); 4-ER-668-669 (ADF 104); 4-ER-669 (ADF 105); 4-ER-670 (ADF 108); 4-ER-670671 (ADF 110).

However, to the extent Plaintiff need show more, Defendant's President and Executive Producer repeatedly acknowledged Plaintiff's employment would continue past the Big Bang Theory to the next show, which makes Defendants' subsequent exclusion of Plaintiff from all of Chuck Lorre's future shows to constitute retaliation. *See* 4-ER-625-627 (ADF 1-3); 4-ER-627-628 (ADF 4); 4 ER-628 (ADF 5); 4-ER-647-648 (ADF 53); 4-ER-649-652 (ADF 57-64).

Combined with Defendants' Vice President's threat to Plaintiff, these circumstances are sufficient to show actionable retaliation following Plaintiff's complaints about the violation of Section 1981.

F. THE LOWER COURT ERRED BY FINDING NO ISSUE OF TRIABLE FACT AS TO A HOSTILE WORK ENVIRONMENT

The Commitment on its face is discriminatory. The voluminous amount of offensive comments about

such – and its implementation – is not general discussion about diversity but instead hostile comments predictably flowing from a discriminatory sign and personnel policy.

Plaintiff's supervisors' statements telling Plaintiff he was an "endangered species," "is going to see a lot of "schvartzes," or any of the other myriad of tropes and stereotypes leveled in this hunger-games mentality of which white people would stay or go in this new corporate DEI policy was not general discussion about diversity. See 4-ER-641 (ADF 38); 4-ER-642 (ADF 39); 4-ER-642 (ADF 40); 4-ER-642-643 (ADF 41); 4-ER-645 (ADF 46); 4-ER-646 (ADF 47); 4-ER-646 (ADF 48); 4-ER-646 (ADF 49); 4-ER-646-647 (ADF 50); 4-ER-647 (ADF 51); 4-ER-650-651 (ADF 62); 4-ER-651 (ADF 63); 4-ER-654 (ADF 70); 4-ER652 (ADF 65); 4-ER-652-653 (ADF 66).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case remanded for trial on the merits of Plaintiff's Section 1981 cause of action.

Date: December 9, 2024

Law Office of Michael Freiman

/s/ Michael Freiman, Esq.
Michael Freiman, Esq.

Attorney for Appellant Brian Armstrong

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:23-cv-3854 GW (JPRx)

BRIAN ARMSTRONG,

Plaintiff,

v.

WB STUDIO ENTERPRISES, INC.;
WARNER BROS. ENTERTAINMENT INC.;
AND DOES 1 through 20, inclusive

Defendants.

Hon. George H. Wu
Courtroom: 9D
Date: April 22, 2024
Time: 8:30 a.m.

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

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[Filed Concurrently with Statement of Genuine Disputes, Supporting Declarations, and Objections]

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I. INTRODUCTION

A large corporation instituted a discriminatory commitment to exclude white and Caucasian people, which predictably caused a very hostile work environment replete with pervasive references to race and severe comments made to the Plaintiff. The statute of limitations for a hostile work environment is based on the last date of the last act in a continuous hostile work environment. Here, the hostile work environment was continuously hostile from late 2018/early 2019 to June, 2019, for a common reason – the Commitment and management's attempts to implement it – and for that reason the hostile work environment is also properly attributed to Defendants. Even without a continuous hostile work environment, Defendants' conduct on May 3, 2019, itself is sufficiently hostile to support a hostile work environment claim.

Defendants' conduct also constitutes a discriminatory course of conduct whether or not Plaintiff can prove there was a final employment action, although he does prove such here. Specifically, Plaintiff shows that race and color caused Defendants to replace Steve Silver, which Defendants' Supervisor Kristy Cecil admits caused television camera operators such as Plaintiff to also lose their job. Additionally, there is a multitude of evidence that Patti Lee also made her decisions on the basis of race. Because there is direct evidence of race discrimination. *McDonnell Douglas* burden shifting test does not apply. Even if it did apply, Plaintiff adduces sufficient evidence to overcome such burdens by showing the proffered reasons to be pretextual.

Federal retaliation claims typically require only an act that would discourage a worker from engaging in such a protected activity. Here, the Vice President threatened Plaintiff that he would never work again if he asserted his rights. That alone is sufficient to sustain a retaliation claim. However, in this case, there is also circumstantial evidence that Supervisor Kristy Cecil caused the Vice President to put Plaintiff on a Do Not Hire list, and Plaintiff has not worked for Defendants since.

II. LEGAL STANDARDS

To prevail on a Section 1981 cause of action, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media,* 140 S. Ct. 1009, 1019 (2020). "*McDonnell Douglas* sought only to supply a tool for assessing claims, typically at summary judgment, when the plaintiff relies on indirect proof of

discrimination. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media,* 140 S. Ct. 1009, 1019 (2020).

FACTS AND ARGUMENT

A. Parties and the Nature of the Employment Relationship

Defendant Warner Bros. Entertainment Inc., often referred to as Warner Bros., employed Peter Roth ("Roth") as President of Warner Bros. Television Group ("WBTV"), a division of Defendant Warner Bros. Entertainment Inc., with responsibilities for oversight of the production of television series with the executive producers (who oversee the department heads who oversee their crew) reporting up to Roth, who retained oversight over the maintenance and production of the shows including without limitation The Big Bang Theory and Bob Hearts Abishola. *Plaintiff's Statement of Genuine Disputes – Statement of Additional Disputed Facts ("ADF") 1.*

While all WBTV copresidents reported to Roth and the WBTV copresidents' title permitted them with oversight of television production, Roth's relationship with Executive Producer Chuck Lorre ("Lorre") was much more of direct communication and direct oversight with Roth "involved in all discussions about creating and producing television." In his capacity as President, Roth "empowered" Chuck Lorre with complete discretion over the television production and Chuck Lorre has made more money for WBTV than any other showrunner. ADF 2.

Roth "vested" Lorre – and all other executive producers – with authority to decide which of the crew from one show would continue to work for another show with Lorre being required to carry out and abide by Warner Brothers' personnel policies. ADF 3. Lorre

explains the term "family" is used to describe the crew that work on his shows because of the "continuity, that we were fortunate enough to continue for many, many years on these shows. And that continuity allowed for a feeling of family, relationships, and friendships to occur." Lorre explained the use of the term "family" of crew with regard to Two and a Half Men, The Big Bang Theory, and Bob Hearts Abishola, as "television shows very often get cancelled, sometimes quickly," "you have a large group of people working together and then suddenly, they're sent home. The show is over. That did not happen with these shows. We kept going and that's continuity." ADF 4.

It was important for Lorre to keep the crew together from Two and a Half Men to The Big Bang Theory because Lorre "like[s] keeping people employed," "took pride in the ability to keep as many people as possible employed," and likes to work with people he's worked with before. ADF 5. Cecil acknowledges that in Chuck Lorre world, it's often that people roll on to the next show produced by Chuck Lorre. ADF 6.

Lorre approved of Steve Silver as Director of Photography for the Bob Hearts Abishola pilot because Lorre preferred to have a crew member he worked with before and had faith in Silver due to Lorre's experience working with Silver in the past. ADF 7. Lorre selected Steve Silver to be Director of Photography for Two and a Half Men because Silver had been the Director of Photography for his previous show, Dharma & Greg and "he did a good job." Because Silver "did a very good job" on Two and a Half Men, Lorre selected Silver to work on The Big Bang Theory. ADF 8.

Silver, Plaintiff's boss on Dharma and Greg, called Plaintiff and asked if he would be interested in

working on Two and a Half Men. Lorre also asked Plaintiff if he would do the new Two and a Half Men Show. Steve said let's keep this family together because Two and a Half Men seems to be doing pretty well as did Dharma & Greg. ADF 9.

While working on Two and a Half Men, Lorre told Plaintiff "hope you all are coming along with us on our next show. We want to keep this family together" right before The Big Bang Theory began. ADF 10. Plaintiff worked as Camera Operator X on The Big Bang Theory and Two and a Half Men. ADF 11. Plaintiff won an Emmy award in 2013 for outstanding camerawork on The Big Bang Theory. ADF 12.

Plaintiff was not aware of any job postings for the aforementioned positions and did not submit an official job application for them. Instead, Plaintiff was asked to work on the shows by his higher ups. ADF 13. Plaintiff worked on Stage 25 of Defendants' television studio in the position of Camera Operator X for approximately twelve (12) years from 2007 to 2019 earning eight (8) Emmy nominations and an Emmy award win. ADF 14. Roth admits the winning of an Emmy award is an affirmation of excellence. ADF 15. Lorre believes Plaintiff was a qualified and talented television camera operator on Two and a Half Men and The Big Bang Theory. ADF 16.

B. Hostile Work Environment and Discrimination Based on Race and Color

WBTV includes now and in September, 2018, began to include, Warner Bros. Commitment to Diversity and Inclusion's (referred to herein as "Commitment") in all new hire paperwork. ADF 17. In late 2018/early 2019, Plaintiff became aware of the Commitment when it was posted on the camera door of the set of The

Big Bang Theory. Plaintiff took a picture of the Commitment. ADF 18.

The Commitment states in part: ". . .we must all ensure there is greater inclusion of . . . people of color . . .in greater numbers . . . behind the camera." (emphasis added). The sign went on to say, "in the early stages of the production process, we will engage with our writers, producers, and directors to create a plan for implementing this commitment . . . " The sign further said Defendants "have a historic and proven commitment to diversity and inclusion. But there is much more we can do . . . " ADF 19. Plaintiff was offended by the Commitment because it excludes white and Caucasian people. ADF 20.

Roth understood he had a duty to help prevent race discrimination and denies he was aware of any problem with race discrimination that had to be remedied by diversity, equity, and inclusion initiatives. ADF 21. As President, Roth agreed with The Commitment's effort to increase the amount of people of color behind the camera and acknowledges the "conceit of the show" Bob Hearts Abishola involving a principal character from Nigeria adheres to the value of the Warner Bros. Commitment to Diversity and Inclusion. ADF 22.

Lorre believes, and has always believed, the Commitment is a "moral obligation" always agreeing with the Commitment's statement to ensure greater numbers of people of color behind the camera including at the time of the last season of The Big Bang Theory and "surely hope[s]" he has done something to ensure there are greater numbers of people of color behind the camera. Lorre admits the Commitment is not inclusive of white people, but has a good intent very clearly focused on underrepresented groups.

Lorre follows the Commitment in connection with his work as an executive producer producing shows for Warner Bros because Lorre thinks "the intent and promise of this commitment is one worth pursuing for me." ADF 23.

1. The Commitment and Carol Miller's Actions Create a Hostile Work Environment for Plaintiff

Carol Miller was a Unit Production Manager on the Bob Hearts Abishola responsible for managing the production and supervising the crew. ADF 24. Miller and Michael Collier were responsible for staffing the crew for the Bob Hearts Abishola pilot subject to approval from the executive producers. ADF 25. Collier, a co-executive producer and the boss of Miller, spoke to Miller about trying to find African-American crew members for the Bob Hearts Abishola pilot and trying to make the cast feel comfortable, which Miller thought was a good idea. ADF 26.

Miller admits her work selecting crew for Bob Hearts Abishola was consistent with the Commitment. ADF 27. In an e-mail between Carol Miller and the executive producers, including Al Higgins, regarding the selection of crew. Miller referred to a prospective crew member as African-American because Miller and Michael Collier thought that because they had an African American cast, it was important to make the cast feel comfortable. ADF 28.

Higgins responds saying, "[a]re their any other department heads we have to fill? I don't want them all white." Miller Depo. Exhibit C thereto; pg. 30 ln. 8. ADF 29. Roth is unwilling to admit Higgins' statement "I don't want them all white" constitutes a problem and Lorre understood that Higgins "was probably

trying to do the right thing . . . " because "he was trying to be inclusive" as "he wanted rainbow colored employees, a crew that represented our world." ADF 30.

Lorre, who continues to work for Warner Bros and who still works with Al Higgins, who continues to be a producer on Bob Hearts Abishola, stated he doesn't think he will take any steps to communicate to Al Higgins its not appropriate to make such statements as "I don't want them all white." ADF 31.

In an e-mail between Miller, Collier, and other executive producers including Al Higgins, regarding selection of crew for Bob Hearts Abishola, Higgins states, "I hate to put it bluntly but how many African Americans are on your list." ADF 32. Lorre understands Higgins statement, "I hate to put it bluntly, but how many African-Americans are on your list" arises from an "honorable" intent to be inclusive and to be " . . . something written by someone trying to do the right thing" because "[h]e's trying to adhere to diversity, inclusivity . . ." which Lorre supports. ADF 33.

In response to the e-mail, Miller states, "These are our African Americans as of now. This does not touch upon our other minorities." ADF 34. Roth believes that Carol Miller's reference to "these are our African Americans as of now. This does not touch upon our other minorities" not to be discriminatory, to not pose a risk of discriminating against white people, and is actually consistent with the Warner Bros Statement to Diversity and Inclusion. ADF 35.

Lorre understands Carol Miller's statement, "these are our African-Americans as for now" to be ". . . people trying to do the right thing" because "they're trying to

honor the effort toward inclusivity." because "[h]e's trying to adhere to diversity, inclusivity . . ." which Lorre supports. To the extent Lorre has an issue with the statement, it is only because Lorre believes the statement "speaks to white privilege." ADF 36.

Lorre acknowledged the phrase "these are our African-Americans as of now" didn't cast a "wide enough" net because "it should be embracing all minorities and groups that have in the past been excluded." When asked, "what about white people," Lorre responded, "What about them? You're seriously asking me that question. Oh, my goodness. Good for you." ADF 37.

Silver hired Ben Steeples to work on The Big Bang Theory, Silver supervised Steeples, and Silver asked Steeples to check for crew who are African-American in connection with staffing Bob Hearts Abishola. Steeples Depo. ADF 38.

When Silver asked Steeples to find African-American crew, Steeples understood Silver as communicating it was something he felt he had to do as a responsibility to carry out a higher aspiration to find additional African-American crew, communicating to Steeples, "we're being asked." ADF 39.

2. Steeples and Silver Tell Plaintiff About Miller's Race Based Selections and Many Crew Members Make Similar Offensive. Comments about that And the Commitment

Steeples told Plaintiff that he was told to begin the search in the camera department with any and all African-American technicians that are available. Steeples told Plaintiff about Carol's directive in which "she demands that I, having put me in charge, start

with African-American people, male or female, and then go from there." ADF 40.

Silver put his arm around Plaintiff and said, "You know, you got to understand this, Brian, that Carol has made it known that we need to work off of the Warner Brothers new diversity hiring program not only in front of the camera but behind the camera. In other words, our employees now have to fit a certain demographic to take you to Bob." ADF 41.

In a text message exchange between Miller and another crew member, Steeples, Miller asked Steeples if a potential crew member is "African-American" because Miller "wanted to make the cast comfortable, and by hiring a camera utility, that was the least disruption to the unity of the crew. It wasn't a camera operator. It wasn't a first AC. It wasn't a dolly grip. It was a camera utility who was not a part of the team." Miller elaborated, "camera operators work as a team. They work as a camera operator, a first AC, and a dolly grip. And that's a unit that works together, and they know their language and their queues . . . You don't want – you don't break that up. They're a unit." ADF 42.

In the text message Miller asks, "Is Selvin African American" and Steeples replies, "Yes ma'am." Miller Depo. ADF 43. Roth considers a Unit Production Manager asking a subordinate if a potential crew members is African American to be a "reasonable question" as "an attempt to ensure a crew that has diversity." ADF 44.

Miller admits she was trying to find crew to work on the basis of race and likened finding African-American crew to match the race of the cast as part of doing "everything to make sure that your cast are happy. You

make sure they have the foods they want to eat in Craft Service. You make sure they're happy with their dressing rooms. . . it's all about making the cast happy and comfortable so they can perform well on camera so you get your pilot." ADF 45.

Crew member Jeannette Hjorth told Plaintiff, "I believe I'm pretty sure this is where we part ways" based on "the diversity thing," "Carol is on fire to make sure that not only is that letter followed to the T, that statement . . ." ADF 46. Crew member Jamie Hitchcock told Plaintiff, "Army, looks like we're both kind of screwed here" and "you know this new diversity thing . . . Carol is in charge of it." Armstrong 2021 Depo. 104:8-21. ADF 47.

Crew member David Pearce told Plaintiff, "Well, Army, I guess it's finally happened. It looks like we've been diversified out of the business. Didn't you see the memo? Didn't you see it? None of us." ADF 48. Crew member T Ryan Brennan told Plaintiff, "You know what. Go read that diversity thing that just came out. You think I'm happy about that? You think people like you and I are ever going to work in this industry again because of that?" ADF 49.

Crew member Todd Slater said, "Honkie. Didn't you see the note? You out of work my friend. You and me and people like us." Slater continued, "Dude, the new hiring program . . . certain people on the list have no chance of not only working on Mom but of never working again." ADF 50. Crew member Johnny Witmer said, "We knew this shit was going to happen" and "We'll probably never work another day in this business in our life." ADF 51.

3. While Many People Are Making Offensive Statements About Race and Employment Caused by the Commitment and Miller's Directives, Roth and Lorre Falsely Reassure Plaintiff He Will Continue to Be Employed

In early March, 2019, in response to discussion about The Big Bang Theory ending, Roth told Plaintiff, "Don't you worry. This family will never be broken up." ADF 52. In March 2019, Lorre told Plaintiff, "I hope you come with the rest of your guys, meaning camera people, onto the next one" to which Plaintiff replied, "Absolutely." ADF 53.

In early April 2019, Crew member Sean Bard in response to Plaintiff stating that Lorre and Roth had told Plaintiff they were going on to the next show, Bard said, "Yeah you believe what you want to, white boy." ADF 54. Todd Sader would come up to Plaintiff and say, "Hey, honkie" and "Looks like your days are numbered. You saw it. It's on the wall. All of us here. We're done man. It's over." ADF 56. The Bob Hearts Abishola pilot was filmed April 16-18, 2019. ADF 55.

In mid-April 2019, Lorre told Plaintiff, "You're worried about the next show" and continued, "You haven't let me down. I'm not going to let you down." ADF 57. In early April, 2019, a crew member asked Roth, "We going to all have to start looking for jobs pretty soon?" Roth replied, "You guys will always have a place here." ADF 58.

In April 2019, Roth and Lorre told Plaintiff there was going to be another show and Plaintiff would be with them forever. ADF 59. Toward the end of Big Bang Theory in approximately April, 2024, Lorre and Roth were talking to Plaintiff. Roth put his arm around

Plaintiff and said, "Don't you worry. We got other things coming for you. Lorre told Plaintiff, "Army, you're gold. Why in the world would you never have as long a career as you ever want with me." ADF 60. On the last Tuesday of April, 2019, on the second to last episode of The Big Bang Theory, Roth told Plaintiff, "It's not over. You'll always have a job here at Warner Bros . . . as long as Chuck and I are here." ADF 61.

On May 3, 2019, Roth told Plaintiff, "Not only has it been a long family relationship, a long run, but it's not over." When Plaintiff and other crew wanted to know if they had a job to come back to, Roth said "yes," and when a crew member called out, "Okay. We're counting on that," Roth replied with a thumbs up. ADF 64.

4. On May 2 and 3, 2019, Lorre, Green, and Cecil (All Supervisors) Make Severe Comments That By Themselves Constitute a Hostile Work Environment Under the Circumstances and Constitute Direct Evidence of Discrimination in This Case

On May 2, 2019, Lorre told Plaintiff, "We got more stuff coming up. So this isn't the end." Plaintiff responded, "Well it's so nice to know that, you know, I won't be looking for other work . . ." Lorre responded, "You know something else, Army. You guys are going to be seeing a lot more schvartzes in the next couple of years." When Plaintiff misunderstood what schvartze meant, Lorre responded to another showrunner, "Army doesn't know what a shvartze," and the other showrunner smiled and said "really you don't know what that is." ADF 62. Lorre admits schvartze is a hateful word and hateful words would create a hostile work environment. ADF 63.

On May 3, 2029, Plaintiff and Cecil were discussing the next show and Cecil told Plaintiff, "didn't you see the DEI statement. Well, people like you are not – don't have much of a future in this business . . . " Cecil further told Plaintiff, "It's all true Brian. You know, the things you heard about this diversity thing is true. I had to hand over the hiring process for Bob to Carol Miller." Cecil further reiterated the "things you've heard . . . about the hiring of" and then partially went down the list starting with African-Americans. ADF 65.

On May 3, 2019, Green told Plaintiff, "Yep. It looks like we are an endangered species." "Well, Kristy has been ordered to follow this new diversity hiring program which includes, you know, we got to hire more Blacks." "Hey, it's Chuck Lorre's world." When Plaintiff asked Green what he meant by the species comment, Green said, "you'll understand soon enough." ADF 66.

From late 2018/early 2019 to May 3, 2019, Plaintiff was offended by all of the aforementioned comments made about the Commitment, subject matter regarding which color/race person would continue on to the new show and/or have a future in the entertainment industry, and all other references to race, color, stereotypes, tropes, and slurs as stated in Plaintiff's depositions. ADF 67.

The aforementioned comments were made in the open on the set that was frequently traversed by Defendants' supervisors including without limitation Kristy Cecil, Robin Green, Steve Silver, Chuck Lorre and Peter Roth. ADF 68. Plaintiff believed that if you complained you would be fired as he had observed prior individuals doing such and being retaliated against for it. ADF 69.

The "schvartze" comment offended Plaintiff because it appeared to Plaintiff to be an affirmation that race and color would be the cause of who would continue to work with Defendants on their next show, Bob Hearts Abishola, and this issue troubled Plaintiff for some time as a result of the constant discussion about that topic on the set. ADF 70.

5. After Carol Miller and Steve Silver Did Not Satisfy Higgins Demand Regarding Department Heads Not Being All White and Seeking More African American Crew (Since Miller Limited Her Efforts to Only the "Least Disruption"), Green and Cecil replace Silver with Patti Lee, A Person of Color Who Takes Pride in Making Television Sets Include More People of Color in Greater Numbers; Cecil's and Green's Explanation for Replacing Silver is Not Credible and a Pretext for Discrimination

Cecil got her position on Bob Hearts Abishola because she was asked to work on the show. ADF 71. Cecil and Green were producers and supervisors of the whole show on the last season of The Big Bang Theory. While Cecil was working as a producer on The Big Bang Theory, Cecil was also selecting crew positions for Bob Hearts Abishola. ADF 72.

Lorre and Higgins gave approval to the selection of the department heads by Cecil including Patti Lee. ADF 73. In Cecil's capacity selecting positions for Bob Hearts Abishola, she included people of color in greater numbers behind the camera than were included on the last season of The Big Bang Theory including replacing two Caucasian department heads

with persons of color. Cecil described this as a "coincidence" with the Commitment. ADF 74.

Cecil does not deny that Plaintiff was not selected to work on Bob Hearts Abishola due to the Commitment. ADF 75. Patti Lee is a person of color. ADF 76. Lorre understands Patti Lee to be a person of color. ADF 77. Lee maintains there is nothing abnormal about a Director of Photography working on two shows at the same time. ADF 78. Prior to becoming Director of Photography for Bob Hearts Abishola, Lee informed Cecil and Green that Lee would be working on another show, Mad About You, while also working on Bob Hearts Abishola, and neither Cecil nor Lee made any negative comments in response. ADF 79.

Green also acknowledges Lee worked on another show on Thursdays and Fridays. ADF 80. It wasn't an issue for Cecil that Patti Lee was Director of Photography on Mad About You (which shot Thursdays and Fridays [the same days as Mom]) and also on Bob Hearts Abishola which shot on Monday through Wednesday; and it didn't cause any problem on the show. ADF 81.

When asked if Silver wasn't selected to be Director of Photography for the Bob Hearts Abishola series because there was an effort to increase the amount of people of color behind the camera, Lorre responded no because Silver was "spread out pretty thin," "on several shows at the same time," and "there were so many hours in the day and he was already committed to other shows." Lorre claims "there were probably at least three shows" but couldn't name another show Silver was working on beside Mom. ADF 82.

Cecil and Green now claim they did not ask Silver to be Director of Photography for Bob Hearts Abishola

because Silver was working on another show and "we didn't believe that a director of photography could do that and another show, because we would need the director of photography to be available on Monday, Tuesday, Wednesday of our shoot when they were also needing to work Monday, Tuesday, and Wednesday of their other show." ADF 83.

Cecil stated Silver couldn't have been rolled over from The Big Bang Theory to Bob Hearts Abishola because Silver "wouldn't be available to do both shows . . ." because at the time Cecil was selecting the Director of Photography for Bob Hearts Abishola, Silver's shoot schedule for his other show was Thursday and Friday and Bob Hearts Abishola was Monday-Wednesday. ADF 84. Green now claims they couldn't have a Director of Photography on Bob Hearts Abishola that also shot another show on Thursdays and Fridays. ADF 85.

Lorre admits the last season of The Big Bang Theory was an excellent season, the show looked great, and "the crew was a talented crew." ADF 86. Lorre denies Silver's performance on the last season of The Big Bang Theory was sub par and confirms that if anyone said his performance was sub par that person would be wrong. ADF 87.

Lee adhered to the Commitment in selecting television camera operators for Bob Hearts Abishola and will continue to adhere to the commitment in her future work with Defendants continuing ensure that there are greater numbers of people of color working behind the camera in addition to other underrepresented groups. ADF 88.

At the time Lee selected television camera operators for Bob Hearts Abishola, Lee believed that she must

ensure there is greater numbers of people of color behind the camera and has "been pushing for all [of her] sets to look more like the world at large" including the set of Bob Hearts Abishola by including more people of color behind the camera at the time she was selecting television camera operators for Bob Hearts Abishola. ADF 89.

The selection of Patti Lee as Director of Photography caused Michelle Crenshaw, to work on the recurring camera crew of the first season of Bob Hearts Abishola than on the last season of The Big Bang Theory. ADF 90. Lee understood Michelle Crenshaw to be a person of color and at the time Lee selected Michelle Crenshaw to become Camera Operator X for Bob Hearts Abishola, Lee felt good about her belief she was increasing the amount of people of color behind the camera because Lee "like[s] to have a diverse and inclusive workplace." By selecting Michelle Crenshaw, Lee was helping to create a more inclusive set. ADF 90.

Chris Hinojosa is a person of color with non-Caucasian heritage. At the time Lee selected Chris Hinojosa to be a television camera operator for Bob Hearts Abishola, Lee believed Hinojosa to appear to be racially ambiguous. Prior to selecting Chris Hinojosa as television camera operator for Bob Hearts Abishola, Lee had only spoken to Hinojosa for a total of ten (10) minutes total in two (2) five (5) minute conversations. ADF 92.

While Lee had worked with many of the people she selected for her crew on Bob Hearts Abishola, Lee did not previously work with the two (2) television camera operators, Michelle Crenshaw and Chris Hinojosa. At the time Lee selected Chris Hinojosa and Michelle Crenshaw, Lee had never worked with them and Lee

had no personal knowledge as to their work performance. ADF 93.

Lee made a list of who she wanted on her crew and sent it to Bob Hearts Abishola's producers, including Robin Green, to say yes or no. ADF 94.

Steve Silver had previously introduced Plaintiff to Patti Lee. Plaintiff met and exchanged pleasantries with Patti Lee while Plaintiff working on Two and a Half Men, again on The Big Bang Theory, and in 2019 on the set of The Ranch. In early 2019, on the set of The Ranch, Lee told Plaintiff she thought the show was "fantastic" and "you guys have brough feature film work to a sitcom." ADF 95.

Plaintiff didn't reach out to Patti Lee because Plaintiff wasn't told Silver wouldn't be the Director of Photography, Plaintiff wasn't told that Plaintiff wouldn't be working on the show, and Plaintiff didn't find out Patti Lee would be the Director of Photography until June, 2019. ADF 96.

Plaintiff was more qualified than Michelle Crenshaw. ADF 97. Cecil considered Plaintiff to be an exceptional television camera operator and acknowledges Plaintiff was qualified and was not not selected to work as a television camera operator for Bob hearts Abishola due to performance or conduct. ADF 98.

C. Retaliation

On June 10, 2019, Plaintiff e-mailed Cecil stating he has heard "illegally vicious" and wanted to verify that he was still on track to work on the next show, Bob Hearts Abishola. ADF 99.

Cecil replied, "Sadly what you hear is true. Due to the nature of the shoot schedule of our new show (three day block and shoot M-W) we had to bring in a

new DP. (And other various department heads as well.) It was unfortunate to lose Steve because we knew we would lose some camera crew as well. The new DP has a crew she's selected to do the show. Unfortunately, we weren't able to just roll everyone onto the new show. . ." ADF 100 (emphasis added).

Plaintiff responds by disclosing that there is a violation of "the Supreme Court Decision known as "McDonald vs. Santa Fe Trail Tranpo Co." (1976) #75-60 as decided by Justice Thurgood Marshall . . ." Armstrong Decl. 6:37, Exhibit B thereto, pg. 3:1-28. ADF 101.

Cecil reviewed Plaintiff's disclosure of alleged race discrimination soon after receiving the June 11, 2019 e-mail from Plaintiff and in response called Lisa Jackson (production executive) and said, "I've received a very uncomfortable, disturbing e-mail . . ." Lisa Jackson told Cecil that they would talk to Silisha, Warner Bros. Vice President of Labor Relations. Jackson then told Cecil to e-mail Jackson and Bob Jensen (Labor Relations) the link to the Facebook post where Plaintiff complains about race discrimination, and Cecil reported it to Warner Bros. Labor Relations. ADF 102.

Within three days of Plaintiff's complaint to Cecil about race discrimination, Cecil forwarded to Warner Bros. Labor Relations another Facebook post by Brian Armstrong that Cecil considered to be negative information. ADF 103.

During Plaintiff's June, 2019, call with Vice President for Labor Relations, Silisha Sidell, Plaintiff told Sidell he believed he was discriminated against on the bases of race and color; and that he was not

selected for the Bob Hearts Abishola position becusae he is white and Caucasian. ADF 104.

Sidell responded by threatening Plaintiff, "not to speak of this or pursue it in any manner, and if Plaintiff did then he would never work for the studio again. ADF 105. The call was typed out by another person Sidell Depo. ADF 106. The document purporting to be a record of the call as typed by another person is not a complete record and in the document there are symbols of two brackets and three dots in the middle where there was discussion but they didn't capture it. ADF 107.

In June, 2019, Vice President Sidell administered Warner Bros' "Do-Not-Hire List" and Sidell was able to add people to the "Do-Not-Hire List" including for the reason that "there's been an argument." ADF 108.

Steeples has continued to work for WBTV for various shows in circumstances where Silver or another person contacted Steeples to work on the shows and in no circumstances did Steeples every find such positions by submitting a job application. Instead, Steeples was able to continue his career because people contacted him to ask if he wanted to join a show. Steeples has never reported race or color discrimination to Warner Bros. Steeples Depo. ADF 109.

For the first time in close to twenty (20) years, Defendants stopped assigning Plaintiff positions on their television shows. ADF 110.

D. Additional Facts Supporting Punitive Damages

Lorre laughed because he thinks "the very idea of inclusion is to go beyond what has primarily been

overwhelmingly Caucasian and to open the door so there's opportunity for all. So when you ask what about white people, that's funny." ADF 111.

When asked whether Miller was being inclusive of white people, Lorre responded, "We're going back to the comedy idea. The whole idea of inclusion is to go beyond white people to all people. So you can't say – your question is – I'm sorry. It's preposterous." Lorre specifically believes the concept of including white people in the definition of inclusive is "preposterous" and that "it's preposterous to discuss white people – white people have always been included. It's the world we live in." "Inclusivity is to encourage and make up, create opportunity for everyone else." Lorre Depo. ADF 112.

Lorre described a person advocating a discrimination case on behalf of a white person as "hateful," going further to say, "you should be ashamed of yourself." ADF 112.

Lorre admits he has not seen any efforts of Higgins or Miller to be inclusive of white people and when asked if that was unfair, Lorre said this was the most "ridiculous" conversation he has ever had. Lorre admits he believes that "trying to prove discrimination against a white person" is "ridiculous" and "foolish." Lorre laughed when he said "discrimination against a white man" because Lorre believes the phrase is "ridiculous." ADF 113.

No one from Warner Bros has contacted Miller to investigate. ADF 114. Nobody from Warner Bros. contacted Cecil to investigate whether or not Plaintiff was not selected to Bob Hearts Abishola on the basis of race and color. ADF 115.

Miller cannot recall any race discrimination prevention training by Warner Bros. prior to her work on the Bob Hearts Abishola pilot. ADF 116. Warner Bros has not provided any race discrimination training to Lee. ADF 117. Sidell did not take any steps to investigate any potential race discrimination toward Brian Armstrong. ADF 118.

III. CONCLUSION

A large corporation instituted a discriminatory commitment to exclude white and Caucasian people, which predictably caused a very hostile work environment replete with pervasive references to race and severe comments made to the Plaintiff.

The statute of limitations for a hostile work environment is based on the last date of the last act in a continuous hostile work environment. Here, the hostile work environment was continuously hostile from late 2018/early 2019 to June, 2019, for a common reason – the Commitment and management's attempts to implement it – and for that reason the hostile work environment is also properly attributed to Defendants. Even without a continuous hostile work environment, Defendants' conduct on May 3, 2019, itself is sufficiently hostile to support a hostile work environment claim.

Defendants' conduct also constitutes a discriminatory course of conduct whether or not Plaintiff can prove there was a final employment action, although he does prove such here. Specifically, Plaintiff shows that race and color caused Defendants to replace Steve Silver, which Defendants' Supervisor Kristy Cecil admits caused television camera operators such as Plaintiff to also lose their job. Additionally, there is a multitude of evidence that Patti Lee also made her

decisions on the basis of race. Because there is direct evidence of race discrimination. McDonnell Douglas burden shifting test does not apply. Even if it did apply, Plaintiff adduces sufficient evidence to overcome such burdens by showing the proffered reasons to be pretextual.

Federal retaliation claims typically require only an act that would discourage a worker from engaging in such a protected activity. Here, the Vice President threatened Plaintiff that he would never work again if he asserted his rights. That alone is sufficient to sustain a retaliation claim. However, in this case, there is also circumstantial evidence that Supervisor Kristy Cecil caused the Vice President to put Plaintiff on a Do Not Hire list, and Plaintiff has not worked for Defendants since.

Dated: April 1, 2024

LAW OFFICE OF MICHAEL FREIMAN

/s/ Michael J. Freiman, Esq.
Michael J. Freiman, Esq.

Attorney for Plaintiff Brian Armstrong