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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SERGIO PADILLA, Plaintiff, v. PACIFIC BELL TELEPHONE COMPANY; AT&T CALIFORNIA; AT&T CORP.; AT&T COMMUNICATIONS WORKERS OF AMERICA AFL-CIO, CLC LOCAL 9003, Defendants.	Case No. CV 14-09760 DDP (JPRx) **ORDER REMANDING TO STATE COURT** Dkt. Nos. 7, 12

Presently before the Court is Plaintiff's motion to remand this case to state court under 28 U.S.C. 1447. (Dkt. No. 12.) Having considered the parties' submissions, the Court adopts the following order.

I. BACKGROUND

Plaintiff worked as "Premises Technician" for Pacific Bell ("Bell") from some unknown time until 2012. (Compl. ¶¶ 17, 23; Decl. Sheila Bordeaux ¶¶ 3, 6.) In September 2011, Plaintiff suffered a back injury, resulting in a physical disability.

(Compl. ¶ 18; Bordeaux Decl. at ¶ 4.) Plaintiff alleges that he requested an accommodation from Bell in the form of a transfer to some job he could perform in his injured condition, but was refused, although "suitable jobs were available." (Compl. ¶ 19.) Plaintiff alleges that Bell did not accommodate him or engage in a "good faith interactive process"; eventually, he alleges, his supervisor told him to lie to his doctor to have his medical restrictions removed. (Id. at ¶ 20-21.) Plaintiff alleges that he refused to do so, after which Bell retaliated against him by refusing to help him find a suitable alternative job and then firing him in October 2012. (Id. at ¶ 23.) Plaintiff also alleges that his union, Communications Workers of America, Local 9003 ("the Union"), "aided and abetted" Bell's retaliatory behavior. (Id. at ¶ 25.)

On October 23, 2014, Plaintiff brought a complaint against Defendants in California state court, alleging violations of California's fair employment laws, especially the Fair Employment and Housing Act ("FEHA"). (Id. generally.) Plaintiff's complaint makes no claims under federal law. (Id.) On December 22, 2014, the Union removed to this federal district court. (Dkt. No. 1.)

Plaintiff moves to remand to state court on the ground that there is no federal jurisdiction. (Dkt. No. 12.)

II. LEGAL STANDARD

A defendant may remove a case from state court to federal court if the case could have originally been filed in federal court. 28 U.S.C. § 1441(a); see also Snow v. Ford Motor Co., 561 F.2d 787, 789 (9th Cir. 1977). As the removing party, Defendant bears the burden of proving federal jurisdiction. Duncan v.

Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996); see also Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003). The removal statute is strictly construed against removal jurisdiction, and federal jurisdiction must be rejected if any doubt exists as to the propriety of removal. Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992) (explaining that courts resolve doubts as to removability in favor of remand).

III. DISCUSSION

A. Federal Labor Law and Preemption of State Law Claims

Ordinarily, this Court does not have jurisdiction to hear cases grounded purely in state law, unless the parties are diverse. 28 U.S.C. 1331-32. "Federal question" jurisdiction normally arises "only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). In essence, the plaintiff is the master of her complaint and may choose whether to subject herself to federal question jurisdiction by careful selection of claims. Id. Additionally, if questions of federal law arise only as defenses to the complaint, federal question jurisdiction does *not* exist. Id. at 392-93.

There is, however, an exception to this "well-pleaded complaint" rule. "On occasion . . . the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." Id. at 393 (internal quotation marks omitted). This "complete preemption" rule is applied primarily in employment cases involving union member

employees, because such cases can implicate § 301 of the Labor Management Relations Act ("LMRA"). That section provides that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect of the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

Suits asserting violations of a collective bargaining agreement ("CBA") between a union and an employer are therefore preempted by § 301 and provide federal question jurisdiction. "Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. California, 463 U.S. 1, 23 (1983).

Where the plaintiff in an employment action is a union member, employed pursuant to a CBA, but does not base a claim directly on a violation of the CBA, the preemption question is more nuanced. Claims involving *interpretation* of a CBA are also considered federal law claims, because "the policies that animate § 301" require a uniform federal interpretation of union contracts. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 210-11 (1985). Nonetheless, "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301." Id. at 211. The LMRA does not preempt claims rooted in "nonnegotiable state-law rights" that are

not "inextricably intertwined" with the interpretation of the terms of a labor contract. Id. 213.

These principles have been distilled by the Ninth Circuit into a three-prong test:

> In deciding whether a state law is preempted under section 301 . . . a court must consider: (1) whether the CBA contains provisions that govern the actions giving rise to a state claim, and if so, (2) whether the state has articulated a standard sufficiently clear that the state claim can be evaluated without considering the overlapping provisions of the CBA, and (3) whether the state has shown an intent not to allow its prohibition to be altered or removed by private contract. A state law will be preempted only if the answer to the first question is "yes," and the answer to either the second or third is "no."

Miller v. AT & T Network Sys., 850 F.2d 543, 548 (9th Cir. 1988).

B. Section 301 Preemption of Plaintiff's Claims Against Union

None of Plaintiff's claims are breach of contract claims. Rather, they are allegations of disability discrimination, harassment, and retaliation, actionable under FEHA and other state laws. Nonetheless, the Union contends that these claims, as to it, are preempted by § 301, because "[as] Plaintiff's bargaining representative, *any alleged action taken or alleged failure by the Union* reasonably requires analysis of the CBA." (Opp'n at 6:21-22 (emphasis added).) That cannot be correct – that is equivalent to saying that *any* lawsuit involving a union and an employer that have entered into a CBA would necessarily be removable to federal court. If that were true, the Miller test would be beside the point.

The Union also argues, more appropriately, that "the substance of Plaintiff's state law claims center around whether he was improperly denied an alternative job position in light of his rights under the CBA." (Id. at 6:26-28.) The Union's Opposition, however, points to no provision in the CBA requiring Bell to provide alternative work for disabled workers – nor, after diligent search, can the Court find any such provision.

Two provisions of the CBA do touch on the subject matter of the FEHA claims in a limited sense. Section 2.04(B)(1)(a) of the CBA provides that certain employees, such as those returning from the military or a leave of absence, will have priority when Bell seeks to fill a job vacancy. "[Q]ualified medically restricted employees" are included in that list. (Dkt. No. 1-18 at 000018.) And Memorandum of Agreement 86-37 governs the *salary* of medically restricted employees who are moved to different job positions. Neither provision requires the employer to attempt to accommodate a disabled employee, nor to engage in a good-faith interactive process with the employee, as FEHA does.

But even assuming that those provisions satisfy the first prong of the Miller test[1] – that is, assuming they actually "govern the actions giving rise to [the] state claim," 850 F.2d at 548 – the Union has not shown that the second and third prongs are satisfied. Nor, likely, could it. FEHA is a clear and well-established statute whose provisions apply with equal force whether

[1]The Court finds even this assumption unlikely. "Causes of action that only tangentially involve a provision of a collective-bargaining agreement are not preempted by section 301." Detabali v. St. Luke's Hosp., 482 F.3d 1199, 1203 (9th Cir. 2007) (quoting Ramirez v. Fox Television Station, Inc., 998 F.2d 743, 748 (9th Cir. 1993)) (internal quotation marks and brackets omitted).

there is a collective bargaining arrangement or not, and the Ninth Circuit has repeatedly held that its provisions are not subject to being contracted away.[2] The Union relies on Audette v. Int'l Longshoremen's & Warehousemen's Union, in which the Ninth Circuit held that workers' claims of sex discrimination and retaliation were preempted by LMRA. 195 F.3d 1107, 1113 (9th Cir. 1999). But Audette is distinguishable, both because it applies Washington rather than California law, id., and because the discrimination alleged in that case was in the context of enforcing a settlement agreement that relied on an underlying CBA to define its terms and provide for enforcement. Id. at 1112. That case therefore does not upset the long line of Ninth Circuit cases concluding that FEHA claims are freestanding under state law and not preempted by LMRA.

There is therefore no basis for concluding that § 301 preempts Plaintiff's claims.

C. Preemption as to the "Duty of Fair Representation"

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[2]See Jimeno v. Mobil Oil Corp., 66 F.3d 1514, 1527 (9th Cir. 1995) (detailing FEHA's "clear statutory and regulatory standards" which "provide a means to determine 'reasonable accommodation' without reference to the CBA"); id. at 1528 ("[T]he California FEHA is unlike the Missouri anti-discrimination provision which requires consideration of the employer's authority under the CBA to make accommodations. Therefore, Mobil cannot assert that the state is indifferent to negotiation and alteration of the right by private contract . . . ."") (citation omitted); Ramirez v. Fox Television Station, Inc., 998 F.2d 743, 748 (9th Cir. 1993) ("[T]he rights conferred by the California Employment Act are defined and enforced under state law without reference to the terms of any collective bargaining agreement. Actions asserting those rights are thus independent of collective-bargaining agreements. These rights are nonnegotiable and cannot be removed by private contract.") (citations omitted) (internal quotation marks omitted). See also Cramer v. Consol. Freightways, Inc., 209 F.3d 1122, 1131-32 (9th Cir. 2000) (distinguishing between rights under FEHA, which are non-negotiable, and the right to privacy under California law, which is negotiable).

The Union also argues that, independent of any possible § 301 preemption, Plaintiff's claims are preemption because they implicate the Union's "duty of fair representation," which is a matter of federal law. (Opp'n at 2-5.) Plaintiff points out that he did not plead any claim as to the duty of fair representation. (Reply at 10.)

The "duty of fair representation" is not mentioned in the LMRA statute; rather, it is a judicial creation imputing to unions a duty "to serve the interests of all members without hostility or discrimination toward any," based on the provisions of the National Labor Relations Act ("NLRA").[3] Vaca v. Sipes, 386 U.S. 171, 177, 87 S. Ct. 903, 910, 17 L. Ed. 2d 842 (1967). Although "the touchstone of the federal district court's removal jurisdiction is . . . the intent of Congress," Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987), and although the duty of fair representation is "judicially evolved" and predates Congress's passage of the LMRA, Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 79 (1989), some circuits have nonetheless found that this judicial creation preempts state law claims and provides removal jurisdiction. See Richardson v. United Steelworkers of Am., 864 F.2d 1162, 1166-67 (5th Cir. 1989) (holding that a claim predicated solely on a union's failure to meet its duty of fair representation provided removal jurisdiction); BIW Deceived v. Local S6, Indus. Union of Marine & Shipbuilding Workers of Am.,

[3]The Supreme Court has never held that the NLRA can preempt state law for purposes of removal jurisdiction. Holman v. Laulo-Rowe Agency, 994 F.2d 666, 668 (9th Cir. 1993) (noting that the Court "has identified only two federal acts whose preemptive force" can justify federal question jurisdiction: LMRA and the Employee Retirement Income Security Act).

IAMAW Dist. Lodge 4, 132 F.3d 824, 831 (1st Cir. 1997) (holding that state law claims against a union rooted in negligence and fraud fell under the duty of fair representation and therefore provided removal jurisdiction). See also Thomas v. Nat'l Ass'n of Letter Carriers, 225 F.3d 1149, 1158 (10th Cir. 2000) (holding that state wrongful discharge and civil conspiracy claims fell under the duty of fair representation, but not addressing removal jurisdiction). Richardson, however, dealt with a complaint that specifically invoked the federal duty rather than a right under state law.[4] As to BIW Deceived and Thomas, the Court, not bound by these out-of-circuit decisions, respectfully disagrees with their reasoning.

First, as at least one other district court has found, the duty is fundamentally a judicial creation and has little to say about congressional intent. Wrobbel v. Asplundh Const. Corp., 549 F. Supp. 2d 868, 874-75 (E.D. Mich. 2008). Although it is read into the NLRA, it is not an explicit statutory grant of jurisdiction to federal courts, as § 301 of the LMRA is. Removal jurisdiction exists only where "Congress has clearly manifested an intent to make causes of action . . . removable to federal court." Taylor, 481 U.S. 58, 66.

Second, the Supreme Court has said that the rationale for preemption that undergirds LMRA preemption has much less force when it comes to the duty of fair representation:

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[4] "The duty which the Union allegedly breached is described in the original petition as 'a duty' which the Union had '[*a*]*s* the bargaining agent for Plaintiffs' (emphasis added). No other source of duty is alleged in the original petition." Richardson v. United Steelworkers of Am., 864 F.2d 1162, 1165 (5th Cir. 1989).

> [T]he decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies.
>
> A primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation.

Vaca, 386 U.S. at 180-81.

Third, even if preemption applies in cases like Richardson where the complaint appeals to the duty directly and does not make a claim under a clear, non-negotiable state statute, applying it as a blanket rule in the face of such state claims would, again, tend to make Miller a dead letter. If every act by a labor union so profoundly implicates the duty of fair representation that state law claims are completely preempted, there is no need to engage in analysis as to § 301.

Fourth, although the Ninth Circuit has not squarely considered the question yet of whether the duty of fair representation completely preempts state law claims for removal purposes, its precedent suggests that FEHA's provisions may not be preempted *at all*, let alone completely.[5] As the Circuit explained in 2008,

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[5]"The jurisdictional issue of whether complete preemption exists . . . is very different from the substantive inquiry of whether a 'preemption defense' may be established." Holman v. (continued...)

> The federal statutory duty which unions owe their members to represent them fairly also displaces state law that would impose duties upon unions *by virtue of their status as the workers' exclusive collective bargaining representative* . . . . To bring a successful state law action, aggrieved workers must make a showing of *additional duties, if they exist, beyond the normal incidents of the union-employee relationship*. Such duties must derive from *sources other than the union's status as its members' exclusive collective bargaining representative* . . . .

Adkins v. Mireles, 526 F.3d 531, 539-40 (9th Cir. 2008) (emphases added). As the Northern District of California recently noted, in a FEHA claim "[t]he duty not to discriminate arises from a source other than the Union's status as its members' exclusive collective bargaining representative—*i.e.*, the duty under FEHA." Martinez v. Kaiser Found. Hospitals, No. C-12-1824 EMC, 2012 WL 2598165, at *7 (N.D. Cal. July 5, 2012).

For all these reasons, the Court finds that Plaintiff's state law claims are not preempted by the federal duty of fair representation.

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[5](...continued)
Laulo-Rowe Agency, 994 F.2d 666, 669 (9th Cir. 1993).

IV. CONCLUSION

The Court finds that it lacks jurisdiction to hear this case. The case is REMANDED to state court. The pending motion to dismiss (Dkt. No. 7) is VACATED as moot.

IT IS SO ORDERED.

Dated: February 19, 2015

DEAN D. PREGERSON
United States District Judge