

JS-6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

SANAA GUIRGUIS,

Plaintiff,

v.

**THE NEIMAN MARCUS GROUP
LLC, MARK OSHIMA, and DOES 1
through 10, inclusive,**

Defendants.

Case No.: CV 19-00901-CJC(FFMx)

**ORDER GRANTING PLAINTIFF'S
MOTION TO REMAND [Dkt. 17]**

I. INTRODUCTION

Plaintiff Sanaa Guirguis brings this lawsuit against Defendants The Neiman Marcus Group LLC (“Neiman Marcus”), Mark Oshima, and Does 1 through 10, alleging a number of claims under California employment law. (Dkt. 1-2 [Complaint, hereinafter

1 “Compl.”].) Before the Court is Plaintiff’s motion to remand the case to Los Angeles
2 Superior Court. (Dkt. 17.) For the following reasons, the motion is **GRANTED**.¹

3 4 **II. BACKGROUND**

5
6 In August 2005, Neiman Marcus hired Plaintiff to work as a sales associate in
7 designer handbags. (Compl. ¶ 7.) Plaintiff was allegedly an exemplary employee who
8 performed her job well. (*Id.*) In 2015, Plaintiff got a new supervisor, Mark Oshima, who
9 purportedly “began to immediately harass, discriminate, and retaliate against her based
10 on her age.” (*Id.* ¶ 8.) Plaintiff allegedly made numerous complaints to supervisory and
11 managerial employees, but the harassment, discrimination, and retaliation continued. (*Id.*
12 ¶ 9.)

13
14 In September 2016, Plaintiff was forced to take a medical leave of absence due to
15 the stress she encountered in the workplace. (*Id.* ¶ 10.) In early December 2016, Plaintiff
16 returned to work for nine days, but she was then forced to take an additional medical
17 leave of absence. (*Id.* ¶ 11.) In November 2017, Plaintiff was released to return to work
18 with medical restrictions. (*Id.* ¶ 12.) Defendants, however, refused to return Plaintiff to
19 her previous position, or to a similarly situated position, and ultimately terminated her
20 employment on January 5, 2018. (*Id.* ¶ 13.)

21
22 On December 4, 2018, Plaintiff filed this lawsuit in Los Angeles Superior Court.
23 (Dkt. 1-1.) Plaintiff asserts causes of action against Neiman Marcus for (1)
24 discrimination in violation of the California Fair Employment and Housing Act
25 (“FEHA”), (2) retaliation in violation of FEHA, (3) harassment in violation of FEHA, (4)

26
27
28 ¹ Having read and considered the papers presented by the parties, the Court finds this matter appropriate
for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set
for April 15, 2019 at 1:30 p.m. is hereby vacated and off calendar.

1 failure to prevent discrimination and harassment, (5 & 6) failure to provide reasonable
2 accommodation, and (7) wrongful termination in violation of public policy. (Compl.
3 ¶¶ 15–73.) She asserts a cause of action against Oshima for harassment in violation of
4 FEHA. (*Id.* ¶¶ 31–38.) On February 6, 2019, Neiman Marcus removed the case to
5 federal court, asserting diversity jurisdiction and contending that Oshima had been
6 fraudulently joined. (Dkt. 1 [Notice of Removal, hereinafter “NOR”].)
7

8 **III. ANALYSIS**

9

10 A civil action brought in state court, but over which a federal court may exercise
11 original jurisdiction, may be removed by the defendant to a federal district court. 28
12 U.S.C. § 1441(a). The burden of establishing subject matter jurisdiction falls on the
13 defendant, and the removal statute is strictly construed against removal jurisdiction.
14 *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (“Federal jurisdiction must be
15 rejected if there is any doubt as to the right of removal in the first instance.”). If at any
16 time before final judgment, the court determines that it is without subject matter
17 jurisdiction, the action shall be remanded to state court. 28 U.S.C. § 1447(c). Federal
18 district courts have diversity jurisdiction over suits for more than \$75,000 where the
19 citizenship of each plaintiff is different from that of each defendant. 28 U.S.C. § 1332(a).
20

21 The parties dispute whether there is diversity of citizenship. Plaintiff is a
22 California resident. (Compl. ¶ 1.) Defendant Neiman Marcus is a citizen of Delaware
23 and Texas. (*See* NOR ¶¶ 14–18.) Defendant Oshima is a citizen of California. (Compl.
24 ¶ 3.) Defendants, however, assert that the Court should not consider Oshima’s
25 citizenship because he was fraudulently joined. (*Id.*) Plaintiff disagrees, contending the
26 Court must remand this action and award attorneys’ fees for the costs of removal.
27

28 //

1 **A. Fraudulent Joinder**

2
3 Although diversity jurisdiction requires complete diversity of citizenship, there
4 is an exception to the diversity requirement “where a non-diverse defendant has been
5 ‘fraudulently joined.’” *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1043 (9th Cir.
6 2009). “There are two ways to establish fraudulent joinder: ‘(1) actual fraud in the
7 pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of
8 action against the non-diverse party in state court.’” *Grancare, LLC v. Thrower ex rel.*
9 *Mills*, 889 F.3d 543, 548 (9th Cir. 2018) (internal citation omitted). Here, Defendants
10 assert fraudulent joinder based on Plaintiff’s inability to establish a cause of action
11 against Oshima. In such circumstances, “[j]oinder is fraudulent ‘if the plaintiff fails to
12 state a cause of action against a resident defendant, and the failure is obvious
13 according to the settled rules of the state.’” *Hunter*, 582 F.3d at 1043 (alterations
14 omitted) (quoting *Hamilton Materials Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206
15 (9th Cir. 2007)). Conversely, “if there is any possibility that the state law might
16 impose liability on a resident defendant under the circumstances alleged in the
17 complaint, the federal court cannot find that joinder of the resident defendant was
18 fraudulent, and remand is necessary.” *Id.* at 1044 (quoting *Tillman v. R.J. Reynolds*
19 *Tobacco*, 340 F.3d 1277, 1279 (11th Cir. 2003)).

20
21 Defendants have not carried their burden of showing that Plaintiff obviously
22 fails to state a cause of action against Oshima. Plaintiff brings a claim against Oshima
23 for harassment in violation of FEHA. (Compl. ¶¶ 31–38.) In support of this claim,
24 Plaintiff alleges that Oshima harassed, discriminated, and retaliated against her based
25 on her age. (*Id.* ¶ 8.) In her complaint to the California Department of Fair Employment
26 and Housing, which Plaintiff attaches to her Complaint, Plaintiff further alleges that she
27 is sixty-eight years old and that “[t]he harassment, discrimination, and retaliation against
28 [Plaintiff] has taken numerous forms, including, but not limited to, denial of promotion,

1 demotion, denial of a work environment free of discrimination and retaliation, denial of
2 [her] employment benefits or privileges, forced transfer, denial of reasonable
3 accommodation of [her] disability, denial of a good faith interactive process, failure to
4 receive equal consideration in employment decisions, and ultimately, [her] wrongful
5 termination.” (*Id.* Ex. A.)
6

7 Defendants fail to show that there is no possibility that FEHA might impose
8 liability on Oshima for harassment. Under FEHA, is it unlawful “[f]or an employer . .
9 . or any other person, because of . . . age . . . to harass an employee.” Cal. Gov’t Code
10 § 12940(j)(1). Harassment in the workplace consists of “discriminatory intimidation,
11 ridicule, and insult” that is “sufficiently severe or pervasive to alter the conditions of the
12 victim’s employment and create an abusive working environment.” *Kelly-Zurian v. Wohl*
13 *Shoe Co.*, 22 Cal. App. 4th 397, 409 (1994) (quoting *Harris v. Forklift Systems, Inc.*, 510
14 U.S. 17, 21 (1993)). Harassing conduct takes place “outside the scope of necessary job
15 performance,” and is “presumably engaged in for personal gratification, because of
16 meanness or bigotry, or for other personal motives.” *Reno v. Baird*, 18 Cal. 4th 640, 646
17 (1998). “[H]arassment focuses on situations in which the *social environment* of the
18 workplace becomes intolerable because the harassment (whether verbal, physical, or
19 visual) communicates an offensive message to the harassed employee.” *Roby v.*
20 *McKesson Corp.*, 47 Cal. 4th 686, 707 (2009). Personnel-related decisions involving
21 discipline, performance evaluations, compensation, or job assignments do not inherently
22 constitute unlawful harassment. *Reno*, 18 Cal. 4th at 646-47. But “some official
23 employment actions done in furtherance of a supervisor’s managerial role can also
24 have a secondary effect of communicating a hostile message. This occurs when the
25 actions establish a widespread pattern of bias.” *Roby*, 47 Cal. 4th at 709.
26

27 Plaintiff’s allegations demonstrate that there is a possibility that Plaintiff can
28 state a claim against Oshima for harassment. Plaintiff alleges that Oshima began to

1 harass her based on her age, starting in 2015. (Compl. ¶ 8.) Plaintiff does not describe
2 the harassment in significant detail, but she alleges that age-related harassment from
3 Oshima and other associates caused her a substantial level of stress and forced her to
4 take a medical leave of absence in September 2016. (*Id.* ¶ 10.) She further alleges that
5 Oshima refused to return Plaintiff to her previous position after her medical leave of
6 absence and ultimately terminated her based on her age. While some of these actions
7 appear to be taken in the context of personnel-related decisions, they could also have
8 the “secondary effect of communicating a hostile message.” *Roby*, 47 Cal. 4th at 709.
9

10 Defendants contend that Plaintiff cannot establish any severe or pervasive
11 conduct by Oshima within the relevant limitations period. Plaintiff filed her
12 Complaint on December 8, 2017, so her harassment claim is limited to contact that
13 occurred on or after December 8, 2016. *See* Cal. Gov’t Code § 12960(d). Based on
14 Neiman Marcus’s records, Plaintiff worked only on December 8th, 9th, and 10th
15 during this time period. When harassment occurs over a short period of time, it must
16 be extremely severe to be actionable. *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal.
17 App. 3d 590, 609–12 (1989); *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991)
18 (discussing, in the Title VII context, “that the required showing of severity or
19 seriousness of the harassing conduct varies inversely with the pervasiveness or
20 frequency of the conduct”). Defendants, however, have not proved that it would be
21 impossible for FEHA to impose liability for harassment within a three-day period.
22 According to the Complaint, the harassment was so severe that Plaintiff was forced to
23 take an additional medical leave of absence until November 2017. (Compl. ¶¶ 11–12.)
24

25 In light of the presumption against removal jurisdiction, *see Gaus*, 980 F.2d at
26 566, Defendants have failed to show that Oshima was fraudulently joined. Because the
27 fraudulent joinder exception to the diversity requirement does not apply, the parties in
28 this action are not completely diverse and this Court lacks subject matter jurisdiction.

1 The action was improperly removed and must be remanded to Los Angeles County
2 Superior Court. *See* 28 U.S.C. § 1447(c) (“If at any time before final judgment it
3 appears that the district court lacks subject matter jurisdiction, the case shall be
4 remanded.”)

5
6 **B. Attorneys’ Fees**

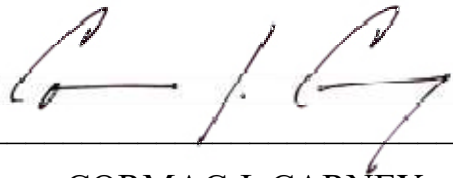
7
8 Plaintiff also seeks reasonable costs and attorneys’ fees associated with the case’s
9 removal to federal court. A court may, at its discretion, award reasonable costs and
10 attorneys’ fees incurred as a result of removal. 28 U.S.C. § 1447(c). “[A]bsent unusual
11 circumstances, attorney’s fees should not be awarded when the removing party has an
12 objectively reasonable basis for removal.” *Martin v. Franklin Capital Corp.*, 546 U.S.
13 132, 136 (2005). The Court declines to exercise its discretion to award attorneys’ fees.
14 Here, the three-day statutory period for Plaintiff’s harassment claim, plus the requirement
15 that harassment be severe or pervasive when it occurs over a short period of time and
16 Plaintiff’s cursory allegations in the Complaint, provided an objectively reasonable basis
17 for Defendants to believe that Oshima was fraudulently joined.

18
19
20
21
22
23
24
25
26
27 //

1 **IV. CONCLUSION**

2
3 For the foregoing reasons, Plaintiff's motion to remand is **GRANTED**. The Court
4 hereby **REMANDS** this case to Los Angeles Superior Court. Since the Court lacks
5 jurisdiction over this action, Defendants' motion to compel arbitration is **DENIED AS**
6 **MOOT**.

7
8
9
10 DATED: April 8, 2019

11 
12 _____
13 CORMAC J. CARNEY
14 UNITED STATES DISTRICT JUDGE