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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

OSCAR GUZMAN,

Plaintiff,

v.

GRUMA CORP., CHUCK DAWSON,
and DOES 1 through 20,
inclusive,

Defendants.

No. 1:15-cv-00159-GEB-SKO

**ORDER GRANTING PLAINTIFF'S
REMAND MOTION**

Plaintiff moves to remand this case to state court under 28 U.S.C. § 1447(c), contending that the diversity jurisdiction basis for removal does not exist, since Plaintiff alleges in his Complaint that both he and Defendant Chuck Dawson are California residents. Defendants counter that Dawson is a fraudulently joined defendant whose residency does not defeat diversity jurisdiction.

"It is a commonplace that fraudulently joined defendants will not defeat removal on diversity grounds." Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998). "If a plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the well-settled rules of the state, the joinder is fraudulent and [that] defendant's presence in the lawsuit is ignored for purposes of determining diversity." United Computer Sys., Inc. v.

1 AT&T Corp., 298 F.3d 756, 761 (9th Cir. 2002) (quotes and
2 citations omitted). This “[j]urisdiction[al issue] must be
3 analyzed on the basis of the pleadings filed at the time of
4 removal without reference to subsequent amendments.” Sparta
5 Surgical Corp. v. Nat’l Ass’n of Sec. Dealers, 159 F.3d 1209,
6 1213 (9th Cir. 1998).

7 Under the involved analysis, “[a] remand motion must be
8 granted unless [the removant] demonstrates that [a plaintiff]
9 ‘would not be afforded leave [in state court] to amend [his]
10 complaint to cure purported deficienc[ies].” Hernandez v. Ignite
11 Rest. Grp., Inc., 917 F. Supp. 2d 1086, 1090 (E.D. Cal. 2013)
12 (citing Burris v. AT&T Wireless, Inc., 2006 WL 2038040, at *2
13 (N.D. Cal. Jul. 19, 2006). “[T]he removal statute is strictly
14 construed against removal jurisdiction.” Gov’t of Marinduque v.
15 Placer Dome, Inc., 582 F.3d 1083, 1087 (9th Cir. 2009). Moreover,
16 “any doubt about the right of removal requires resolution in
17 favor of remand.” Moore-Thomas v. Alaska Airlines, Inc., 553 F.3d
18 1241, 1244, (9th Cir. 2009) (citing Gaus v. Miles, Inc., 980 F.2d
19 564, 566 (9th Cir. 1992)).

20 The parties take opposite positions on whether
21 Plaintiff could plead a harassment claim against Dawson under
22 California law. Plaintiff alleges in his Complaint harassment
23 claims against Dawson, under the California Fair Employment and
24 Housing Act (“FEHA”), based on Plaintiff’s disability and age.
25 Specifically, Plaintiff alleges:

26 [After] former owner[] Roberto Gonzalez
27 Barrera [died], the company dynamic changed.
28 Thereafter, an effort was made to hire
younger[]lower-paid employees to replace or
phase out senior employees. In early 2014,

1 Defendant realigned three sales districts in
2 the Central Valley of California. As part of
3 the realignment, Plaintiff assumed
4 responsibilities for the district previously
presided over by former employee, John
Escalante.

5 At Plaintiff's 2013 year-end review,
6 conducted in February 2014, Plaintiff
7 received high marks. Despite the favorable
8 review, Mr. Dawson sent Plaintiff a text-
9 message picture of John Escalante sticking
10 his middle finger up. Because Plaintiff
11 viewed the picture as offensive, with a
12 negative subtext about his continued
employment, Plaintiff complained to Mr.
Dawson that the message was unwelcome. In
response, Mr. Dawson conducted a second
performance review for the 2013 year. This
time, and unlike the first review for the
same 2013 year, in the second review,
Plaintiff received extremely negative marks.

(Notice of Removal Ex. A, Compl. ("Compl.") ¶¶ 6-7, ECF No. 1-1.)

13 Thereafter, Dawson "put Plaintiff on a performance
14 plan." (Id. ¶ 7.) Subsequently, Plaintiff took medical leave due
15 to "the onset of depression and anxiety," and he informed Dawson
16 "that he had been diagnosed with generalized anxiety disorder
17 . . . [and] that his condition impacted his ability to sleep and
18 work." (Id. ¶ 8.) Dawson then "shunned Plaintiff." (Id. ¶ 9.)
19 Plaintiff alleges Dawson's conduct was "so severe and pervasive
20 that a reasonable person in Plaintiff's circumstances would have
21 found the work environment to be hostile or abusive," and that he
22 suffered from a "changed work[] environment." (Id. ¶¶ 44, 48.)
23 Plaintiff alleges he "was wrongfully terminated—two months before
24 his sixtieth birthday." (Id. ¶ 9.)

25 Defendants argue it is obvious under well-settled
26 California law that Plaintiff cannot allege an age or disability
27 harassment claim against Dawson. Specifically, Defendants argue
28

1 Plaintiff's "allegations of harassment are based almost entirely
2 on personnel-management decisions[,] " which are non-actionable
3 against a supervisor because such actions are considered "a
4 normal part of an employment relationship that cannot be
5 avoided." (Opp'n to Mot. to Remand 15:1-5, 15:22-28, ECF No.
6 23.)

7 To establish a claim for harassment [under
8 the FEHA], a plaintiff must demonstrate: (1)
9 [he is a member of a protected group; (2)
10 [he was subjected to harassment because [he
11 belonged to this group; and (3) the alleged
12 harassment was so severe that it created a
13 hostile work environment. The plaintiff must
14 show a concerted pattern of harassment of a
15 repeated, routine or a generalized nature.
16 Unlike discrimination claims, harassment
17 consists of actions outside the scope of job
18 duties which are not of a type necessary to
19 business and personnel management. For
20 example, commonly necessary personnel
21 management actions such as hiring and firing,
22 job or project assignments, promotion or
23 demotion, and performance evaluations, do not
24 come within the meaning of harassment.

25 Lawler v. Montblanc North America, LLC, 704 F.3d 1235, 1244 (9th
26 Cir. 2013) (citations, ellipses, and quotations omitted).

27 Harassment "consists of actions outside the scope of
28 job duties which are not of a type necessary to business and
personnel management." Lawler, 704 F.3d at 1244. However, "some
official employment actions done in furtherance of a supervisor's
managerial role can also have a secondary effect of communicating
a hostile message." Roby v. McKesson Corp., 47 Cal. 4th 686, 709
(2009) (holding that official employment actions may constitute
the evidentiary basis of harassment claims if the actions are
used as a means of conveying an offensive message).

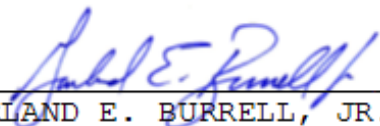
Defendants have not shown it is obvious under well-

1 settled California law that Plaintiff would not be granted leave
2 to amend any deficiencies in his harassment claims against
3 Dawson. Therefore, Defendants have not established that Dawson is
4 fraudulently joined, and Plaintiff's remand motion will be
5 granted.

6 Plaintiff also requests, under 28 U.S.C. § 1447(c),
7 attorney's fees incurred as a result of the removal. However,
8 "[a]bsent unusual circumstances, courts may award attorney's fees
9 under § 1447(c) only where the removing party lacked an
10 objectively reasonable basis for . . . removal." Martin v.
11 Franklin Capital Corp., 546 U.S. 132, 141 (2005). Plaintiff has
12 not shown that Defendants lacked an objectively reasonable basis
13 for the removal. Therefore, Plaintiff's request for attorney's
14 fees is denied.

15 Plaintiff's remand motion is granted, and the Court
16 Clerk shall remand this case to the Superior Court of California
17 in the County of Fresno.

18 Dated: April 2, 2015

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23 GARIAND E. BURRELL, JR.
24 Senior United States District Judge
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