UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BURLEY D. TOMPKINS,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, a corporation,

Defendant.

No. 2:12-cv-01481 JAM-GGH

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS IN PART AND DENYING IN PART

This matter is before the Court on Defendant Union Pacific Railroad Company's ("Defendant") Motion to Dismiss the first and second causes of action of Plaintiff's First Amended Complaint (Doc. #7). Plaintiff Burley Tompkins ("Plaintiff") opposes the motion (Doc. #9) and Defendant replied (Doc. #14).[1] For the reasons set forth below, Defendant's motion is GRANTED in part and DENIED in part.

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[1] This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for January 23, 2013.

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I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Defendant previously moved to dismiss Plaintiff's first and second causes of action of Plaintiff's initial Complaint and that motion was granted with leave to amend (Doc. #16). On October 19, 2012, Plaintiff filed a First Amended Complaint ("FAC") (Doc. #17). In the FAC, Plaintiff alleges seven causes of action pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60:

(1) negligence in 1998; (2) negligence—deprivation of medical care in 1998 in violation of 49 C.F.R §225.33; (3) negligence in 2011; (4) violation of the Federal Safety Appliance Act, 49 U.S.C. §§ 20301-20306; (5) violation of the Federal Locomotive Inspection Act, 49 U.S.C. §§ 20701-20703; (6) Violation of Federal Safety Regulation, 49 C.F.R. § 229.45; and (7) Violation of Federal Safety Regulation, 49 C.F.R. § 229.13. Defendant once more moves to dismiss the first and second causes of action.

A. First Cause of Action—Negligence in 1998

Plaintiff alleges that in or about August through October 1998, he was working for Defendant at Defendant's Oroville yard near Oroville, California. During work, a trespasser startled him while he was releasing the handbrakes of an open-top gondola car. As a result, he fell from the railcar and sustained a back injury.

Plaintiff further alleges that he timely reported his back injury to Defendant's Manager, Marvin Dunn, who harassed, intimidated and threatened Plaintiff in order to discourage and prevent Plaintiff from timely filing an on-duty injury claim and

seeking proper medical treatment. In addition,

throughout his employment with Defendant, Plaintiff allegedly endured ongoing express and implied threats by railroad management to terminate him if he filed an on duty injury report. Specifically, Plaintiff alleges he was aware of the following threats and actions:

1. In 1998, Dunn told Plaintiff that he would be fired if he reported the injury and told him, "[I]f you want your car, your house, a college education for your kids, get it fucking figured out and get it fucking figured out quick."

2. Plaintiff received letters from Defendant asking him to participate in a "long term back/spine study."

3. From 1998 through 2003, Dunn continued to remind Plaintiff of the consequences of reporting an injury by asking Plaintiff, "How's your back feeling?" and remind Plaintiff of the Personal Attention List ("PALS Program") for new hires who have suffered an injury.

4. Dunn received bonuses for finding cause to fire employees.

5. Defendant fired Armando Corona, Plaintiff's fellow employee and classmate, for reporting his on-duty injury. Corona was later reinstated.

6. In 2008, Corona was intimidated and harassed by management, and told not to report a 2008 injury.

7. Dunn instructed a co-employee, Emidio Gonzalez, not to turn in a 2000 injury report. Further, after turning in a 2000 and 2005 injury report, Gonzalez was investigated by management, followed by personal investigators, and harassed and scrutinized under the PALS Program.

8. Dunn physically intimidated Plaintiff's fellow classmate, Wade Wright, for mentioning that he sustained an on-duty injury. Wright also had managers show up at his house at all hours demanding to discuss the injury report.

9. In 2002, Dunn was found to have falsified documents to

fire employees in order to collect his bonuses.

10. Management told co-employee Tony Truijilo that he would be fired for reporting an injury. Dunn told Truijilo that he, Dunn, would lose his bonus over it.

11. In the early 2000s, Dunn manipulated the injury report of Rob Thinglestadt and charged him for violating the rules. After his injury, Dunn harassed Thinglestadt at the hospital.

12. In the early 2000s, Scott Loyd was injured and Dunn threatened to terminate Loyd if he reported his injury.

13. After 2003, Plaintiff believed Dunn would terminate him if he reported an injury or filed a suit.

14. In 2004, John Eutsler, after an injury, was harassed, intimidated, and scrutinized under the PALS Program.

15. In 2005, Scott Cairns and Cairns's conductor were both harassed and intimidated after the conductor reported an on-duty injury.

16. Between early 2000s and 2011, Plaintiff was aware of other employees who were terminated and/or threatened with termination for reporting on duty injuries.

17. In 2011, Plaintiff suffered another on duty injury.

18. In June 2011, Defendant's manager, Eric Bennett, knowing of Plaintiff's 1998 and 2011 injuries, asked Plaintiff, "[A]re you sure that you want to turn-in these injury reports?" and warned Plaintiff that, "It's bad enough to turn in [the 2011] injury, but if you turn in this [1998] injury report, they will have your job for this."

B. Second Cause of Action—Deprivation of Medical Care in 1998

Plaintiff alleges that he attempted to timely report his injury to Defendant, but Defendant's manager harassed and intimidated him by threatening to terminate him if he made an on-duty injury claim, thereby violating 49 C.F.R. §229.33.

Defendant intended to discourage and prevent Plaintiff from timely filing an on-duty injury claim and from seeking proper medical treatment until the statute of limitations had run. Defendant also prevented Plaintiff from seeking and receiving proper medical treatment from in or about August through October 1998 until about April 2010.

II. OPINION

A. Legal Standard

A party may move to dismiss an action for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). In considering a motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that are mere "legal conclusions," however, are not entitled to the assumption of truth. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). To survive a motion to dismiss, a plaintiff needs to plead "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. Dismissal is appropriate where the plaintiff fails to state a claim supportable by a cognizable legal theory. Balistreri v. Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990).

Upon granting a motion to dismiss for failure to state a claim, the court has discretion to allow leave to amend the

complaint pursuant to Federal Rule of Civil Procedure 15(a). "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could not be saved by amendment." Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

B. Judicial Notice

Defendant requests the Court to take judicial notice of employee personnel data for Harold Dunn, who is mentioned in the FAC, to show that Defendant no longer employs him (Doc. #7). Courts may consider extrinsic evidence when "plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document." Knievel v. ESPN, 393 F.3d 1069, 1076 (9th Cir. 2005). Accordingly, the Court GRANTS Defendant's request for judicial notice pursuant to Federal Rule of Evidence 201.

C. Discussion

1. Equitable Estoppel—First and Second Causes of Action

Defendant once again moves to dismiss Plaintiff's first and second causes of action for failure to plead sufficient facts to estop Defendant from asserting the statute of limitations. Both parties agree that the injury alleged in Plaintiff's first and second causes of action occurred in 1998 and the claims would be barred by the three-year statute of limitations unless an equitable doctrine, either equitable tolling or equitable estoppel, applies. Further, Plaintiff does not dispute that equitable tolling does not apply in this case. Accordingly, the Court addresses only the equitable estoppel issue.

Equitable estoppel focuses on the defendant's affirmative actions that prevent a plaintiff from filing a suit. Keenan v. BNSF Ry. Co., C07-130BHS, 2008 WL 2434107, at *6 (W.D. Wash. June 12, 2008). To determine whether equitable estoppel applies, courts consider several factors, "such as whether the plaintiff actually relied on the defendant's representations, whether such reliance was reasonable, whether there is evidence that the defendant's purpose was improper, whether the defendant had actual or constructive knowledge that its conduct was deceptive, and whether the purposes of the statute of limitations have been satisfied." Id. (citing Santa Maria v. Pacific Bell, 202 F.3d 1170, 1177 (9th Cir. 2000)). Defendant argues that estoppel is not appropriate in this case because (a) retaliatory statements are not sufficient for equitable relief from the statute of limitations, (b) the facts alleged do not establish Plaintiff's reasonable reliance, and (c) the facts alleged do not show that the purpose of the statute of limitations has been satisfied.

a. Retaliatory Statements

Plaintiff argues that threats of termination, harassment, and intimidation, such as those alleged in the FAC, are sufficient to invoke equitable estoppel. Plaintiff cites two cases in support of his contention. See Longo v. Pittsburgh & L. E. R. Co., New York Cent. Sys., 355 F.2d 443, 444 (3d Cir. 1966) (applying FELA); George v. Hillman Transp. Co., 340 F. Supp. 296, 299-300 (W.D. Pa. 1972) (applying the Jones Act, which relies on the FELA limitations statute). In Longo, the plaintiff claimed

that the defendant urged him not to sue the railroad and told him that he would lose his job if he filed a suit against the company. Longo, 355 F.2d at 444. Based in part on these statements, the court reversed the district court and held that the evidentiary record revealed a triable issue of fact on whether the defendant's own conduct was such to estop the defendant from asserting the statute of limitations as a defense. Id. at 445. In George, the plaintiff contended that the defendant should be estopped from asserting the statute of limitations because she was ignorant of her injuries, ignorant of her right to sue, and feared losing her employment. George, 340 F. Supp. at 299. The court held that only plaintiff's fear of losing her employment was attributable to the defendant, but estoppel was not warranted because there was no evidence to show that such fear was induced by any of the defendant's action. Id. at 300.

Moreover, there are cases outside of FELA that suggest that threats and intimidation can be grounds for estoppel. For instance, in Polk v. Cavin, the Ninth Circuit held that the plaintiff had sufficiently alleged that the defendants threatened and intimated her to estop defendants from raising a statute of limitations in her 42 U.S.C. § 1983 action. Polk v. Cavin, 447 F. App'x 840, 842 (9th Cir. 2011) (quoting Ateeq v. Najor, 15 Cal.App.4th 1351, 1356 (1993) ("defendant equitably estopped from asserting statute of limitations as defense where defendant's repeated threats caused plaintiff to delay filing suit")).

Contrastingly, Defendant relies on the district court decision in Johnson v. Henderson for the proposition that

retaliatory statements "do not constitute the specific misinformation about time limits or deliberate or reckless lulling that courts have held necessary for equitable relief from the limits." Johnson v. Henderson, C00-4618EDL, 2001 WL 1112116, at *8 (N.D. Cal. Sept. 14, 2001) aff'd, 314 F.3d 409 (9th Cir. 2002). However, on appeal in Johnson, the Ninth Circuit affirmed the lower court's decision on the ground that no evidence in the record suggested that the plaintiff relied on her employer's statements. Johnson v. Henderson, 314 F.3d 409, 416 (9th Cir. 2002) ("there is no evidence in the record to suggest that the reason [plaintiff] missed the deadline here—by six months—was *because of* what the supervisor said to her") (emphasis in the original).

Accordingly, the Court finds Plaintiff's allegations regarding retaliatory statements, such as threats and intimidations, are sufficient to invoke equitable estoppel.

b. Reasonable Reliance

Plaintiff argues that he has pleaded sufficient facts to show that he relied on Defendant's wrongful acts, which prevented him from filing suit. Plaintiff's actual and reasonable reliance on Defendant's conduct or representations is of critical importance. See Naton v. Bank of California, 649 F.2d 691, 696 (9th Cir. 1981). In Johnson, mentioned above, the Ninth Circuit held that the plaintiff did not reasonably rely because the plaintiff testified that she complained to her supervisors despite the threat that she would be fired if she filed a complaint. Johnson, 314 F.3d at 415-16.

In this case, Plaintiff alleges that he was threatened, was

harassed, and feared being fired. FAC ¶ 10. Plaintiff also alleges that he did not notify the railroad of his 1998 on-duty injury and did not file a lawsuit because of these explicit and implicit threats and harassments. Id. Therefore, unlike the plaintiff in Johnson, Plaintiff relied on the threats. Further, Plaintiff's reliance on the threats was reasonable because he was aware of co-employees who were threatened, harassed, and then fired for reporting their on-duty injuries. Id.

Accordingly, the Court finds that Plaintiff has sufficiently alleged facts to show reasonable reliance.

c. The Purpose of the Statute of Limitations

Defendant argues that the purpose of the statute of limitations is not satisfied by allowing Plaintiff to file eleven years beyond the statute of limitations because the evidence is not fresh and the witnesses may be retired or deceased. Further, Defendant notes that none of cases cited by Plaintiff has entertained the possibility of permitting a plaintiff to commence an action eleven years after the limitations period has expired.

For equitable estoppel, the court considers the extent to which the purposes of the limitations period have been satisfied, notwithstanding the delay in filing. Naton, 649 F.2d at 696. The purpose of statute of limitations is to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Burnett v. New York Cent. R. Co., 380 U.S. 424, 428 (1965).

Here, there is no surprise because Plaintiff has alleged that Defendant was aware of the injury from 1998, when he was

injured, to 2011, when his manager commented on the injury report. FAC at 5-9. Moreover, whether there are available witnesses or sufficient evidence should not be decided in a motion to dismiss. See Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 235 (1959) ("Whether petitioner can in fact make out a case calling for application of the doctrine of estoppel must await trial.") Therefore, for this motion to dismiss, the Court finds that the purpose of the statute of limitations is satisfied.

Accordingly, Plaintiff has alleged sufficient facts to invoke equitable estoppel. Further, at this time, the Court need not address Plaintiff's alternative argument for estoppel based on misrepresentations of law.

2. Second Cause of Action

Alternatively, Defendant moves to dismiss Plaintiff's second cause of action for deprivation of medical care in violation of 49 C.F.R. § 225.33 ("Section 225.33") because Plaintiff has failed to allege facts sufficient to show Defendant violated Section 225.33 or facts to show that Defendant's violation of the statute contributed to the injuries alleged. Plaintiff argues that he has alleged sufficient facts showing that Defendant violated Section 225.33 and that the under FELA, the causation requirement is lower than the requirement used in typical personal injury cases.

Section 225.33, in part, provides that, "[e]ach railroad shall adopt and comply with a written Internal Control Plan." 49 C.F.R. § 225.33. The plan is meant to ensure "the complete and accurate reporting of all accidents, incidents, injuries, and

occupational illnesses arising from the operation of the railroad." Id. As part of this plan, "Each railroad shall have procedures to process complaints from any person about the policy . . . being violated, and to impose the appropriate prescribed disciplinary actions on each employee, supervisor, manager, or officer of the railroad found to have violated the policy." Id.

Here, the allegations in the FAC establish the Defendant violated this policy because Defendant's manager threatened to fire Plaintiff, intimidated him, and prevented the treatment of his on-duty injury. Moreover, Plaintiff alleges that Defendant "created an ongoing and continuous environment of harassment, retribution against injured employees." FAC ¶ 10.

However, Plaintiff does not sufficiently allege facts to show that violation of Section 225.33 caused his injury. Under FELA, a plaintiff need only show that Defendant "played any part, even the slightest, in producing the injury." CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2643 (2011). Although Plaintiff alleges that Defendant's actions "played a part" in his injury, he provides no facts in support of the allegation. FAC ¶ 16. Therefore, this general allegation is too broad and insufficient to support this claim.

Accordingly, Plaintiff's second claim for violation of 49 C.F.R. § 225.33 is dismissed. Because Plaintiff has not indicated any other facts that he may be able to allege to pursue this cause of action, and he has had two chances to properly plead this claim, further amendment is futile.

III. ORDER

For the foregoing reasons, Defendant's Motion to Dismiss is GRANTED in part and DENIED in part. Defendant's Motion to Dismiss Plaintiff's first and second causes of action as time barred is DENIED. Defendant's Motion to Dismiss Plaintiff's second cause of action for failure to properly state a claim is GRANTED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: March 8, 2013

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE