UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEN EDWARD SMITH,

Plaintiff,

v.

LOWE'S HIW, INC.,

Defendant.

No. 2:13-cv-1713 WBS AC PS

FINDINGS & RECOMMENDATIONS

On April 9, 2014, the court held a hearing on defendant's January 30, 2014 motion to dismiss and motion to strike. Plaintiff Brien Edward Smith appeared in pro per. Y. Anna Suh appeared for defendant. On review of the motions, the documents filed in support and opposition, upon hearing the arguments of plaintiff and counsel, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Allegations

Plaintiff is a former Loss Prevention Manager for defendant Lowe's in Jackson, California, located in Amador County. ECF No. 15, First Am. Compl. ("FAC") ¶¶ 2-3. On April 6, 2012, plaintiff was terminated from his job. Id. ¶ 12.

Following his termination, plaintiff filed a wage claim with the California State Labor Commissioner's office ("the administrative action"). FAC ¶ 7. In the context of the

administrative action, defendant submitted a July 27, 2012 response to plaintiff's complaint, stating "He [Plaintiff] was documented for his failure to work his schedule and was eventually terminated on April 6, 2012 for violation of Lowe's attendance policy and for dishonesty" ("the allegedly defamatory statement"). Id. ¶ 11.

Defendant repeated the allegedly defamatory statement on October 22, 2012 in the context of plaintiff's state court appeal ("the state court action") of the Labor Commissioner's order. FAC ¶ 11.

On May 13, 2013, plaintiff received for the first time a copy of his Personnel File from Lowe's. FAC ¶ 12. There, plaintiff noticed an Employee Performance Report dated April 2, 2012, which included the allegedly defamatory statement. Specifically, the report noted that plaintiff had been "documented for his failure to work his schedule and was eventually terminated . . . for violation of Lowe's attendance policy and for dishonesty." See id. This notation was based on a comment made by an unidentified management team member between March 27, 2012 and April 2, 2012, accusing plaintiff of dishonesty. Id. ¶ 14. On April 5, 2012, the allegedly defamatory statement was repeated in a Personnel Termination Form. Id. ¶ 13.

Plaintiff, who asserts that the allegedly defamatory statement is independently actionable each time it is repeated, brings suit for defamation based on the following five occasions:

1. The late-March or early-April 2012 statement made by an unidentified member of Lowe's management team regarding plaintiff's dishonesty;

2. The April 2, 2012 Employee Performance Report;

3. The April 5, 2012 Personnel Termination Form;

4. The July 27, 2012 allegedly defamatory statement submitted in the context of the administrative action; and

5. The October 22, 2012 allegedly defamatory statement submitted in the context of the state court action.

Plaintiff claims that the statements were false, were published to someone other than plaintiff, were motivated by malice or ill will toward plaintiff, and have caused injury to plaintiff.

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B. Procedural Background

Plaintiff initiated this action on July 1, 2013 in the Amador County Superior Court. See Notice of Removal ("NOR") Ex. A. On August 20, 2013, defendant removed the case pursuant to 28 U.S.C. § 1332(a), as it is a resident of Washington State, plaintiff is a resident of California, and plaintiff seeks $1,000,000.00 in damages.

On August 27, 2013, defendant filed a motion to dismiss the original complaint. ECF Nos. 6, 8. Then, on September 24, 2013, defendant filed a motion to strike. ECF No. 10. Thereafter, plaintiff filed a motion to amend the complaint, which the undersigned granted, accordingly denying as moot defendant's motion to dismiss and motion to strike.

This matter is now proceeding on a first amended complaint filed January 16, 2014, bringing claims for defamation and negligent infliction of emotion distress ("NIED"). ECF No. 15. Defendant again moves to both dismiss and strike the pleading. ECF Nos. 18-19. Plaintiff opposes both motions.

LEGAL STANDARDS

The purpose of a motion to dismiss pursuant to this rule is to test the legal sufficiency of the complaint. N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Thus, a defendant's Rule 12(b)(6) motion challenges the court's ability to grant any relief on the plaintiff's claims, even if the plaintiff's allegations are true.

In determining whether a complaint states a claim on which relief may be granted, the court accepts as true the allegations in the complaint and construes the allegations in the light most favorable to the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989).

The court may consider facts established by exhibits attached to the complaint. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). The court may also consider facts

which may be judicially noticed, Mullis v. United States Bankruptcy Ct., 828 F.2d 1385, 1388 (9th Cir. 1987), and matters of public record, including pleadings, orders, and other papers filed with the court, Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986). The court need not accept legal conclusions "cast in the form of factual allegations." Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

DISCUSSION

A. Motion to Dismiss

1. Defamation

a. Statements Made in "Judicial Proceeding" or "Other Official Proceeding"

Defendant argues first that any communications made during the course of the administrative action and the state court action are absolutely privileged pursuant to California Civil Code § 47(b).

Section 47(b) provides that communications made in any "judicial proceeding" or "any other official proceeding" are privileged such that they cannot give rise to tort liability. Cal. Civ. Code § 47(b). "The section provides an absolute privilege for a publication filed in a judicial proceeding." Alpha & Omega Dev., LP v. Whillock Contracting, Inc., 200 Cal. App. 4th 656, 664 (2011). "Although originally enacted with reference to defamation actions alone, the privilege has been extended to *any* communication, whether or not it is a publication, and to *all* torts other than malicious prosecution." Edwards v. Centex Real Estate Corp., 53 Cal. App. 4th 15, 29 (1997) (emphasis in original). Section 47(b) does not function like an evidentiary privilege to the extent that it does not bar the introduction of evidence, but instead acts as a bar on liability for privileged statements. Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., 42 Cal. 3d 1157, 1168 (1986).

Plaintiff counters that the allegedly defamatory statements were not made during the course of judicial or other official proceedings, but were instead made during the course of an administrative *hearing*. Plaintiff relies on 18 U.S.C. § 1515 to argue that an administrative proceeding before an administrative law judge is neither a judicial proceeding nor an official proceeding. Section 1515 defines certain terms, including "official proceeding," for that portion

of the U.S. Code concerning "Obstruction of Justice" crimes. This federal criminal statute has no bearing on application of California Civil Code § 47(b). The state statute unequivocally applies by its own terms to publications or broadcasts made "[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law . . . ." Here, the state court action is plainly a "judicial proceeding" covered by Section 47(b). The underlying state administrative action, as a quasi-judicial proceeding authorized by California law, also falls squarely within the purview of Section 47(b).

Plaintiff argues further that Section 47(b) applies only to protect attorneys who make allegedly defamatory statements. This proposition is both unsupported and contrary to legal authority. See, e.g., Rest. 2d Torts, §587 ("A party to a private litigation . . . is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding."); Mezzetti v. State Farm Mut. Auto. Ins. Co., 346 F. Supp. 2d 1058, 1065-66 (N.D. Cal. 2004) (recognizing that this privilege applies to statements made by litigants in judicial proceedings, but ultimately concluding that defendant's statement was not privileged); Costa v. Superior Court, 157 Cal. App. 3d 673, 677 (1984) ("The absolute immunity attaches if all of the following conditions have been met: the publication (1) was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objectives of the litigation; and (4) involved *litigants* or other participants authorized by law.") (internal citations and quotations omitted) (emphasis added).

Accordingly, defendant's motion to dismiss should be granted without leave to amend as to the July 27, 2012 allegedly defamatory statement submitted in the context of the administrative action, and the October 22, 2012 allegedly defamatory statement submitted in the context of the state court action.[1]

[1] In his opposition, plaintiff states that the Section 47(b) may be found to apply to the allegedly (continued…)

b. Statements Included in Personnel File

As to the three allegedly defamatory statements included in plaintiff's personnel file, defendant argues that plaintiff has not adequately alleged publication and that these statements are protected by the "common interest" privilege pursuant to California Civil Code §47(c).

i. Publication

As to publication, defendant asserts that plaintiff fails to allege publication with sufficient specificity to make his defamation claim plausible.

"Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injure or which causes special damage." Ringler Assoc., Inc. v. Maryland Cas. Co., 80 Cal. App. 4th 1165, 1179 (2000). "Publication, which may be written or oral, is defined as a communication to some third person who understands both the defamatory meaning of the statement and its application to the person to whom reference is made." Id.; see also Restatement (2d) Torts, § 577. Publication to a single individual is sufficient to satisfy the publication element of a defamation claim. Ringler Assoc., Inc., 80 Cal. App. 4th at 1179. In all cases of alleged defamation the truth of the offensive statements or communication is a complete defense against civil liability, regardless of bad faith or malicious purpose. Id. at 1180.

In the amended pleading, plaintiff asserts that the allegedly defamatory statements were included in his personnel file, and courts have held that statements included in a personnel file can be deemed libelous if an employer falsely accuses an employee of criminal conduct, lack of integrity, dishonesty, incompetence, or reprehensible personal characteristics or behavior. See Johnson v. Hewlett-Packard Co., 14 Cal. App. 4th 958, 965 (1993). But defendant is correct that plaintiff has not adequately alleged who, other than plaintiff, was made aware of these statements.

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defamatory statement made in the April 5, 2012 Personnel Termination Form and the statement made by an unknown member of defendant's management team allegedly dishonesty by plaintiff. See Opp'n MTD at 3. Since neither of these statements was made in the context of a judicial proceeding or other type of official proceeding, Section 47(b) is simply inapplicable and cannot be a basis for dismissal.

Instead, plaintiff alleges only that he "is informed and believes [that] the defamatory statements . . . were published to someone other than the Plaintiff . . . ." FAC ¶ 15. This is insufficient, and the first amended complaint must be dismissed. Leave to amend should be granted, however, in light of plaintiff's claim in his opposition that "multiple members of Defendant's management were exposed to" the allegedly defamatory statements. See Opp'n MTD at 2.

ii. The Common Interest Privilege

Assuming the court found an adequate allegation of publication, defendant further argues that the statements included in his personnel file are protected by a "common interest" privilege pursuant to California Civil Code § 47(c).

Generally, because an employer and its employees have a common interest in protecting the workplace from abuse, an employer's statements to employees regarding the reasons for termination of another employee generally are privileged. King v. United Parcel Service, Inc., 152 Cal. App. 4th 426, 440 (2007); Deaile v. General Tel. Co. of Cal., 40 Cal. App. 3d 841, 846 (1974). In order for this qualified privilege to apply, the communicator and the recipient must have a common interest, the communication must be made without malice, and the statements must be reasonably calculated to protect or further that common interest. Cal. Civ. Code § 47(c); Taus v. Loftus, 40 Cal. 4th 683, 720-21 (2007). In order to prevent application of the qualified privilege, malice may be alleged by pleading that the publication was motivated by hatred or ill will toward the plaintiff. See Sanhorn v. Chronicle Pub. Co., 18 Cal.3d 406, 413-14 (1976).

Plaintiff argues that the common interest privilege does not apply because defendant's conduct was motivated by malice based on plaintiff's filing of a wage claim and his prior participation in a class action. At the hearing on the instant motion, plaintiff clarified that the wage claim he discusses in this context is different from and filed before the wage claim discussed in the complaint. While the court finds that both of these incidents might potentially support a plausible inference of malice, plaintiff must assert more than conclusory allegations. Upon amendment, plaintiff must allege specific facts establishing malice, including knowledge of his prior wage claim and class action on the part of those individuals who made the allegedly defamatory statements, and the nexus between that knowledge and their actions.

2. Negligent Infliction of Emotional Distress

Defendant next seeks dismissal of plaintiff's NIED claim on four grounds: (1) plaintiff does not allege sufficient facts to state a claim, (2) the NIED claim cannot be based on the same conduct as defamation claims, (3) the NIED claim is preempted by the Worker's Compensation Act, and (4) the NIED claim is premised on privileged conduct. Plaintiff has not opposed defendant's motion as to the NIED claim. For the reasons set forth here, the undersigned finds that the Workers' Compensation Act preempts plaintiff's NIED claim, and accordingly declines to consider defendant's alternative arguments for dismissal of this claim.

Generally, in California, injuries sustained by employees in the course of employment are governed by the workers' compensation law. See Cal. Lab. Code, § 3600 *et seq.* Such injuries are preempted by the exclusivity provisions of that law and are not compensable in a civil action. Id. § 3602. Preemption under the workers' compensation law includes claims for intentional or negligent infliction of emotional distress based on actions that are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances. See Cole v. Fair Oaks Fire Protection Dist., 43 Cal. 3d 148, 159-60 (1987); see also Miklosy v. Regents of the Univ. of Cal., 44 Cal. 4th 876, 902-03 (2008).

Some California courts have held that claims of intentional and negligent infliction of emotional distress that are based on an employer's conduct that contravenes fundamental public policy or exceeds the risks inherent in the employment relationship are not subject to workers' compensation law preemption. See Livitsanos v. Superior Court, 2 Cal. 4th 744, 754 (1992); Cabesuela v. Browning–Ferris Indus. of Calif., Inc., 68 Cal. App. 4th 101, 112-13 (1998). The California Supreme Court, though, has subseuquently clarified that where the alleged unlawful conduct occurs at the worksite in the normal course of an employer-employee relationship, worker's compensation is the exclusive remedy for any injury that results; and that the exception for conduct that "contravenes fundamental public policy" simply means that a wrongful termination claim is not preempted by the worker's compensation exclusive remedy rule (but the intentional infliction of emotional distress claim is). Miklosy, 44 Cal. 4th at 902-03.

In this case, plaintiff's NIED claim arises out of conduct that criticizes his work performance. As criticism of an employee's work performance is a normal part of a working relationship and because plaintiff has failed to allege any facts which can be characterized as violations of fundamental public policy, the court finds that plaintiff's NIED claim is preempted by the Workers' Compensation Act and must be dismissed without leave to amend.

B. Anti-SLAPP Motion to Strike

Defendant also moves to strike plaintiff's claims to the extent they are based on the allegedly defamatory statements made in the context of the administrative action and the state court action.

The anti-SLAPP statute was passed in response to concern over an increase in meritless lawsuits brought against private individuals to gain economic advantage and to deter them from exercising their political and legal rights. Wilcox v. Superior Court, 27 Cal. App. 4th 809, 816 (1994). The anti-SLAPP statute permits a special motion to strike such claims; it provides:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Civ. Proc. Code § 425.16(b)(1).

When a motion filed pursuant to Federal Rule of Civil Procedure 12(b)(6) is granted and certain claims are dismissed, a motion to strike may be rendered moot. This is because, as the Ninth Circuit has noted, "the purpose of the anti-SLAPP statute [is] the early dismissal of meritless claims . . . ." Verizon Delaware, Inc. v. Covad Comm. Co., 377 F.3d 1081, 1091 (9th Cir. 2004). Verizon Delaware has been interpreted to "suggest that a federal court should hesitate to hear and decide an anti-SLAPP motion to strike prior to affording a plaintiff an opportunity to amend." Flores v. Emerich & Fike, 1:05-cv-0291 OWW DLB, 2006 WL 2536615, at *10 (E.D. Cal. Aug. 31, 2006); Thornbrough v. Western Placer Unified School District, et al., 2:09-cv-2613 GEB GGH, 2009 WL 5218039, at *7 (E.D. Cal. Dec. 29, 2009). Where a state law claim has been dismissed without leave to amend, courts have also held that an anti-SLAPP motion to strike

is moot since "[n]o claims remain to be stricken." Phillips v. KIRO-TV, Inc., 817 F. Supp. 2d 1317, 1328 (W.D. Wash. 2011). See also Lara v. Aurora Loan Services LLC, 2013 WL 1628955, at *9 (S.D. Cal. 2013); Ennix v. Stanten, 2007 WL 2462119, at *9 (N.D. Cal. 2007).

Here, in light of the recommendation that defendant's motion to dismiss be granted and plaintiff's claims directed to the allegedly defamatory statements made in the administrative action and the state court action be dismissed with prejudice, the court will also recommend that the motion to strike be denied as moot.

CONCLUSION

Based on the foregoing, IT IS HEREBY RECOMMENDED that:

1. Defendant's January 30, 2014 motion to dismiss (ECF No. 18) be granted;
2. Defendant's January 30, 2014 motion to strike (ECF No. 19) be denied as moot;
3. Plaintiff be granted leave to amend his complaint to assert defamation claims based exclusively on the allegedly defamatory statements included in his personnel file.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: April 11, 2014

ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE