

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
EASTERN DISTRICT OF CALIFORNIA

----oo0oo----

DANIEL IZMAYLOV,
Plaintiff,

v.

SAVE MART SUPERMARKETS, INC.,
a California corporation, and
KENNETH BACA, an Individual
and DOES 1 through 50,

Defendants.

CIV. NO. 2:15-00323 WBS KJN
MEMORANDUM AND ORDER OF REMAND

----oo0oo----

Plaintiff Daniel Izmaylov brought this action in state court against his employer, Save Mart, and his supervisor, Kenneth Baca, alleging employment discrimination. Defendants removed to this court following plaintiff's response in a request for admissions that suggested he was pursuing a claim under the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601, et seq. Presently before the court is plaintiff's motion to remand.

I. Factual and Procedural Background

1 Plaintiff worked at Save Mart as a clerk at the grocery
2 chain's distribution center. (First Am. Compl. ("FAC") ¶ 12
3 (Docket No. 9-2).) During his employment, plaintiff took leave
4 intermittently for a knee injury and following the birth of his
5 son. (Id. ¶¶ 14-15.) Plaintiff alleges he was subjected to
6 retaliation and harassment due to this leave. (Id. ¶¶ 16, 29-
7 30.)

8 Plaintiff initially filed this action on January 14,
9 2014, in California Superior Court in the County of Stanislaus.
10 (See Notice of Removal ¶ 1 (Docket No. 1).) The case was
11 subsequently transferred to Placer County. (See id. ¶¶ 2, 8.)
12 On April 3, 2014, plaintiff filed his FAC in state court,
13 asserting six claims under state law for unlawful discrimination,
14 Cal. Gov't Code §§ 12900, et seq.; wrongful termination, id.;
15 harassment, id.; failure to accommodate his disability, id.
16 § 12940; retaliation, id.; and failure to take reasonable steps
17 to prevent discrimination, id. § 12940(k). (See FAC ¶¶ 19-57.)

18 On December 5, 2014, defendants served plaintiff with a
19 "Request for Admissions, Set One" and a "Form Interrogatory No.
20 17.1." (See Rafoth Decl. ¶ 5, Exs. 3-4 (Docket No. 10-1).)
21 Plaintiff's response to the request for admissions on January 15,
22 2015, read:

23 **Request:** Plaintiff is not pursuing a claim under the
24 Family Medical Leave Act of 1993, 29 U.S.C. section
2601 et seq. in this lawsuit.

25 **Response:** Plaintiff objects to this request on the
26 grounds that it seeks counsel's legal reasoning,
27 theory, or statutory basis supporting a factual
28 contention. Plaintiff further objects on the ground
the request seeks counsel's work product through
counsel's thought processes. Further, Plaintiff does

1 not waive his right to amend his complaint prior to or
2 during trial under Code of Civil Procedure sections
3 473(a)(1) and 576. Subject to, and without waiving,
4 said objections, Plaintiff responds as follows:
5 Denied.

6 (Notice of Removal ¶ 35; Rafoth Decl. Ex. 3 (citations omitted).)

7 In the separate interrogatory, defendants asked plaintiff to
8 state all facts upon which plaintiff based his response to the
9 request for admission. (See Rafoth Decl. Ex. 4.) Plaintiff
10 stated, "Plaintiff does not have sufficient information to
11 provide a response at this time." (Id.)

12 On February 9, 2015, defendants removed to this court
13 on the basis that plaintiff was pursuing a federal claim that
14 conferred federal question jurisdiction. (Id. ¶ 6; Notice of
15 Removal ¶ 37 ("Plaintiff's response to Defendant Save Mart
16 Supermarket's request for admission was the first concrete paper
17 filed or served in this case that established that Plaintiff was
18 pursuing a federal claim, thereby bestowing upon this Court
19 federal question jurisdiction over the case.") One day later,
20 plaintiff's counsel emailed defendants' counsel to state that
21 plaintiff "has no intent to plead a FMLA, 29 U.S.C. section 2601
22 et seq., in this FEHA discrimination lawsuit" and that the
23 earlier response was an "inadvertent technical error." (Rafoth
24 Decl. ¶ 7, Ex. 5.)

25 The parties subsequently stipulated to permit plaintiff
26 to amend his response to the request for admission on March 2,
27 2015. (See id. ¶ 8; Stipulation and Proposed Order (Docket No.
28 8).) Plaintiff now moves to remand the case to state court.
(Mot. to Remand (Docket No. 9).)

1 II. Discussion

2 "[A]ny civil action brought in a State court of which
3 the district courts of the United States have original
4 jurisdiction, may be removed by the defendant or the defendants,
5 to the district court of the United States for the district . . .
6 where such action is pending." 28 U.S.C. § 1441(a). "If at any
7 time before final judgment it appears that the district court
8 lacks subject matter jurisdiction, the case shall be remanded."
9 28 U.S.C. § 1447(c).

10 Federal courts have original subject matter
11 jurisdiction over "all civil actions arising under the
12 Constitution, laws, or treaties of the United States." 28 U.S.C.
13 § 1331. "It is long settled law that a cause of action arises
14 under federal law only when the plaintiff's well-pleaded
15 complaint raises issues of federal law." Metro. Life Ins. Co. v.
16 Taylor, 481 U.S. 58, 63 (1987). Several authorities also support
17 removal based upon facts developed during discovery. See
18 Karambelas v. Hughes Aircraft Co., 992 F.2d 971, 974 (9th Cir.
19 1993) (collecting cases).

20 "[T]he plaintiff is 'the master of the claim' and is
21 not required to assert federal claims, even if they exist." Id.
22 (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987));
23 see ARCO Env'tl. Remediation, L.L.C. v. Dep't of Health & Env'tl.
24 Quality of Montana, 213 F.3d 1108, 1114 (9th Cir. 2000) ("As the
25 master of the complaint, a plaintiff may defeat removal by
26 choosing not to plead independent federal claims.").
27 "[J]urisdiction must be analyzed on the basis of the pleadings
28 filed at the time of removal without reference to subsequent

1 amendments” Chabner v. United of Omaha Life Ins. Co.,
2 225 F.3d 1042, 1046 n.3 (9th Cir. 2000) (quoting Sparta Surgical
3 Corp. v. Nat’l Ass’n of Sec. Dealers, 159 F.3d 1209, 1213 (9th
4 Cir. 1998)) (internal quotation marks omitted).

5 Defendants argue that the court has subject matter
6 jurisdiction over this case because plaintiff’s response to the
7 request for admissions establishes that plaintiff was pursuing a
8 federal claim at the time of removal. (See Notice of Removal ¶¶
9 30-41.) Plaintiff moves for remand on the basis that this
10 admission does not establish federal question jurisdiction and
11 that, even if it did, the admission was made in error and the
12 parties have stipulated to allow plaintiff to amend its response
13 to clarify that plaintiff is not pursuing any claims under FMLA.
14 (See Pl.’s Mem. at 3-6; Velez Decl. ¶¶ 4-8 (Docket No. 9-2).)

15 Plaintiff’s FAC makes several references to FMLA.
16 These references center on the alleged time plaintiff took away
17 from work as “Intermittent FMLA leave”: first in 2009 to care for
18 a knee injury and later, in 2013, for baby-bonding time with his
19 newborn son. (See FAC ¶¶ 14-15, 22.) For example, plaintiff
20 alleges that he was terminated “for availing himself to FMLA and
21 due to his physical disability.” (Id. ¶ 21.) However, the FAC
22 makes no mention of any claims brought pursuant to FMLA.

23 With regard to plaintiff’s response to the Request for
24 Admission, there is some authority from within the Ninth Circuit
25 supporting removal to federal court based on facts brought to
26 light during discovery. See, e.g., Felton v. Unisource Corp.,
27 940 F.2d 503, 507 (9th Cir. 1991) (finding at the time of summary
28 judgment that the only basis for a plaintiff’s claim was an ERISA

1 violation); Riggs v. Cont'l Baking Co., 678 F. Supp. 236, 238
2 (N.D. Cal. 1988) (denying remand based on facts developed during
3 a deposition). However, those cases involved ambiguous or
4 incomplete pleadings that failed to allege certain facts that
5 might have clarified the basis for the plaintiff's claims. After
6 allowing discovery, it became clear in each case that the
7 plaintiff's only basis for an asserted claim depended on federal
8 law. See Karambelas, 992 F.2d at 974 ("[Felton] was decided on
9 summary judgment, and by that time it was clear that the only
10 basis for the plaintiff's claim was an ERISA violation." (citing
11 Felton, 940 F.2d at 507)); Riggs, 678 F. Supp. at 237-38 (stating
12 that, while plaintiff's complaint did not indicate that plaintiff
13 was a union member, plaintiff's claim was based on the alleged
14 breach of a collective bargaining agreement and thus arose under
15 federal law).

16 The current case more closely resembles the Ninth
17 Circuit's opinion in Karambelas. There, the plaintiff brought a
18 state law claim for breach of an employment contract, see
19 Karambelas, 992 F.2d at 972-973, 975, but during a deposition,
20 the plaintiff "speculated that another possible reason for his
21 discharge might have been to deprive him of ERISA rights," id. at
22 975. Noting that "mere simulacrum of a possible unasserted ERISA
23 claim was insufficient to form a basis for federal jurisdiction,"
24 the Ninth Circuit ordered that the case be remanded to state
25 court. Id.

26 The court finds plaintiff's response comparable to the
27 kind of speculative answer at issue in Karambelas. Plaintiff's
28 response does not assert a FMLA claim, nor does it suggest that

1 the basis for one of plaintiff's existing claims may arise solely
2 under FMLA. See Felton, 940 F.2d at 507. As in Karambelas,
3 plaintiff has never asserted a federal claim in his pleadings,
4 and plaintiff's counsel has declared under oath that there is no
5 federal FMLA claim being made in this case. (See Pl.'s Mem. at
6 6; Velez Decl. ¶¶ 8-9.)

7 Accordingly, because the FAC does not assert a claim
8 arising under federal law, the court will grant plaintiff's
9 motion to remand this case to state court.

10 IT IS THEREFORE ORDERED that plaintiff's motion to
11 remand be, and the same hereby is, GRANTED, and this action is
12 hereby REMANDED to the Superior Court of the State of California,
13 in and for the County of Placer.

14 Dated: April 6, 2015

15 

16 **WILLIAM B. SHUBB**
17 **UNITED STATES DISTRICT JUDGE**
18
19
20
21
22
23
24
25
26
27
28