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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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| GEORGE L. KIRBYSON, |) | Case No. 09-3990 SC |
| |) | |
| Plaintiff, |) | ORDER DENYING MOTION FOR |
| |) | <u>SANCTIONS</u> |
| v. |) | |
| |) | |
| TESORO REFINING AND MARKETING |) | |
| COMPANY; BRUCE SMITH; DAN PORTER; |) | |
| WILLIAM BODNAR; BILL REITZEL; |) | |
| DANIEL CARLSON; RICK RIOS; TAMMY |) | |
| MEAMBER; DIANE DANIELS; LARRY |) | |
| ANGEL; UNITED STEEL WORKERS, |) | |
| INTERNATIONAL UNION LOCAL 5; JEFF |) | |
| CLARK; STEVE ROJEK, and DOES 1 |) | |
| through 200, inclusive, |) | |
| |) | |
| Defendants. |) | |

I. INTRODUCTION

Now before the Court is the Motion for Sanctions filed by Individual Defendants Bruce Smith, Dan Porter, William Bodnar, Bill Reitzel, Daniel Carlson, Rick Rios, Tammy Meamber, and Diane Daniels (collectively, "the Individual Defendants"). Docket Nos. 36 ("Mot."), 37 ("Mem. of P. & A."). Plaintiff George Kirbyson ("Plaintiff") filed an Opposition, and the Individual Defendants submitted a Reply. Docket Nos. 43, 45. For the reasons stated below, the Motion for Sanctions is DENIED.

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1 **II. BACKGROUND**

2 Plaintiff joined the U.S. Air Force in 1994, and transitioned
3 into the Air Force Reserve in 1999. Second Amended Complaint
4 ("SAC"), Docket No. 41, ¶ 9. Plaintiff began working as a refinery
5 operator at the Golden Eagle Refinery in November 1999. Id. ¶ 10.
6 In 2003, Tesoro Refining and Marketing Company ("Tesoro") purchased
7 the refinery. Id. On January 5, 2005, Plaintiff was recalled to
8 active duty, and Tesoro placed him on a military leave of absence.
9 Id. ¶ 12. While serving in Iraq, Plaintiff was injured, and
10 permanently disabled. Id. ¶ 13. He was medically retired from the
11 military in November 2008. Id. On December 22, 2008, Tesoro
12 terminated Plaintiff's employment. Id. ¶ 18.

13 On August 28, 2009, Plaintiff commenced this action. See
14 Docket No. 1 ("Compl."). On December 3, 2009, Plaintiff filed a
15 First Amended Complaint. See Docket No. 15 ("FAC"). It alleged
16 two causes of action against the Individual Defendants: (1)
17 violation of section 389 et seq. of the California Military and
18 Veterans Code; and (2) negligent hiring, training, supervision and
19 retention. Id. ¶¶ 63-66, 71-73. The Individual Defendants filed a
20 Motion to Dismiss, which the Court granted on March 2, 2010.
21 Docket Nos. 22("MTD"), 32 ("March 2, 2010 Order").

22
23 **III. LEGAL STANDARD**

24 Under Federal Rule of Civil Procedure 11, the court may impose
25 sanctions against a party or attorney when a pleading is filed for
26 an improper purpose, when the legal contentions are not warranted
27 by existing law or a nonfrivolous argument for the extension of
28 existing law, or when the factual contentions lack evidentiary

1 support. Fed. R. Civ. P. 11(b)-(c). "The rule provides two
2 independent bases for the imposition of sanctions: one if a
3 pleading is frivolous and another if it has been filed for an
4 improper purpose." Westlake North Property Owners Ass'n v. City
5 of Thousand Oaks, 915 F.2d 1301, 1305 (9th Cir. 1990). The court
6 must determine (1) whether the complaint is legally or factually
7 baseless from an objective perspective, and (2) if the attorney
8 has conducted a reasonable and competent inquiry before signing
9 and filing it. Christian v. Mattel, Inc., 286 F.3d 1118, 1127
10 (9th Cir. 2002). "The key question in assessing frivolousness is
11 whether a complaint states an arguable claim - not whether the
12 pleader is correct in his perception of the law." Hudson v. Moore
13 Business Forms, Inc., 836 F.2d 1156, 1159 (9th Cir. 1987).

14
15 **IV. DISCUSSION**

16 The Individual Defendants contend that Plaintiff's claim
17 against them based on section 389 of the California Military and
18 Veterans Code was baseless. Mem. of P. & A. at 10. Section 389
19 provides, in part, that "[n]o person shall discriminate against any
20 officer, warrant officer or enlisted member of the military or
21 naval forces of the state or of the United States because of that
22 membership." Cal. Mil. & Vet. Code § 394(a). This Court
23 determined that individual employees could not be held liable under
24 this statute for claims arising out of the performance of personnel
25 management duties. March 2, 2010 Order at 9-12. The Court noted
26 that there was no legal authority directly on point. Id. at 10.
27 Plaintiff's argument was text-based, relying on the fact that the
28 statute states "no person" shall discriminate. See id. This

1 argument, although unsuccessful, was not legally baseless or
2 frivolous.

3 The Court also dismissed Plaintiff's claim against the
4 Individual Defendants for negligent hiring, training, supervision,
5 and retention. Id. at 12. The claim was based on an allegation
6 that, during the course of a U.S. Department of Labor
7 investigation, Diane Daniels ("Daniels") stated she had never heard
8 of the Uniformed Services Employment and Reemployment Rights Act
9 ("USERRA"). See id. at 13 n.5; FAC ¶ 37. Daniels worked in
10 Tesoro's Human Resources Department, and she informed Plaintiff of
11 his termination. FAC ¶¶ 27-28. Although the Court found this
12 allegation of ignorance concerning the USERRA insufficient to state
13 a plausible claim for negligent hiring, training, supervision, and
14 retention of Daniels, the claim was not entirely baseless or
15 frivolous.

16 These were the only claims asserted against the Individual
17 Defendants. While both claims were unsuccessful, neither claim was
18 frivolous, and the Court cannot infer they were filed for an
19 improper purpose. Plaintiff's counsel spent 65 hours investigating
20 the facts and researching the law before filing the original
21 complaint, and engaged in an additional 6.5 hours of research
22 before filing the First Amended Complaint. Hewitt Decl. ¶¶ 3, 7.¹
23 After Defendants' counsel sent Plaintiff's counsel a Rule 11 letter
24 dated January 21, 2009, see Chamberlain Decl. Ex. D,² Plaintiff's

25 _____
26 ¹ Shanan L. Hewitt, attorney for Plaintiff, filed a Declaration in
27 Support of Plaintiff's Opposition to the Motion for Sanctions.
Docket No. 43-1.

28 ² Michael S. Chamberlain, attorney for Defendants, filed a
Declaration in Support of the Motion for Sanctions. Docket No. 38.

1 counsel responded, explaining the basis for believing the claims
2 against the Individual Defendants had merit, see id. Ex. C. The
3 Court dismissed the two claims against the Individual Defendants,
4 but the Court denied the motion to dismiss most of the claims filed
5 against the company, Tesoro. See March 2, 2010 Order at 13-18.
6 The circumstances of this case are not so unusual as to warrant an
7 award of attorney fees to the Individual Defendants. Such an award
8 would merely serve to chill zealous advocacy. The Court finds that
9 sanctions are not appropriate in this case.

10

11 **V. CONCLUSION**

12 For the reasons stated above, the Court DENIES the Motion for
13 Sanctions filed by the Individual Defendants.

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15 IT IS SO ORDERED.

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17 Dated: June 2, 2010

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UNITED STATES DISTRICT JUDGE

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