

United States District Court
For the Northern District of California

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

GREGORY HALL, et al.,
Plaintiffs,

v.

APARTMENT INVESTMENT AND MANAGEMENT
COMPANY; AIMCO CAPITAL, INC.; FORTNEY
& WEYGANDT, INC.; IMR CONTRACTOR
CORPORATION; BAY BUILDING SERVICES;
AND BAY AREA CONSTRUCTION FRAMERS,
INC.,
Defendants.

No. 08-CV-3447 CW

ORDER GRANTING
DEFENDANT IMR'S
MOTION FOR A MORE
DEFINITE
STATEMENT,
GRANTING IN PART
ITS MOTION TO
DISMISS AND
DENYING ITS
MOTION TO STRIKE

INTRODUCTION

Defendant IMR Contractor Corporation, Inc. (IMR) moves for a more definite statement, or, in the alternative, moves to dismiss or strike Plaintiffs' eighth through thirteenth causes of action.¹ Plaintiffs oppose part of this motion. Having considered all of the papers filed by the parties, the Court GRANTS Defendant IMR's motion for a more definite statement, GRANTS IN PART its motion to

¹In its reply, Defendant IMR withdraws its motion to strike. Therefore, the Court denies it.

1 dismiss and DENIES its motion to strike.

2 BACKGROUND

3 The following facts are taken from Plaintiffs' Second Amended
4 Complaint (SAC). On approximately May 23, 2006, the Bayview-
5 Hunters Point Redevelopment Plan (BHPRP) was approved to be funded
6 with state bonds. SAC at ¶ 1. Bayview-Hunters Point is a
7 predominantly African-American neighborhood in San Francisco,
8 California. Defendants Apartment Investment and Management Company
9 (AIMCO) and AIMCO Capital, Inc. are real estate developers for the
10 BHPRP; Defendant Fortney & Weygandt is the BHPRP general contractor
11 and Defendants IMR, Bay Building Services, Inc. and Bay Area
12 Construction Framers, Inc. are BHPRP contractors. Id. at ¶¶ 2-7.
13 Plaintiffs are African-American and Latino individuals who worked
14 or attempted to work at sites under the supervision of Defendants.

15 Defendants maintained a discriminatory workplace by taking
16 adverse employment actions against African-American construction
17 employees such as assigning them less desirable work, segregating
18 them from Latino workers and assigning them fewer hours and
19 inadequate tools. See, e.g., id. at ¶¶ 17, 52, 59, 125.
20 Defendants failed to hire qualified African-American workers for
21 the project, and instead gave preference to Latino workers. Id. at
22 ¶ 18. Supervisors fostered a racially hostile work environment by
23 encouraging African-American and Latino workers to compete against
24 each other and by making derogatory comments to African-American
25 employees. Id. at ¶ 17, 21. At times, Defendants provided work
26 instructions and safety warnings to the African-American Plaintiffs
27 only in Spanish and would not provide them in English when

1 requested to do so. Id. at ¶ 118.

2 Latino Plaintiffs were pushed to work in unsafe conditions and
3 were denied meal periods, rest periods and overtime pay. See,
4 e.g., id. at ¶¶ 19, 27, 72-73, 112. Furthermore, Latino Plaintiffs
5 had portions of their wages withheld and were paid reduced wages in
6 cash. Id. at ¶ 20. Some Latino Plaintiffs were required to pay a
7 portion of their wages to supervisors in cash after depositing
8 their paychecks. Id.

9 BHPRP supervisors retaliated against, and in some cases
10 terminated, Latino and African-American Plaintiffs who complained
11 to Defendants or to the union about the unlawful deductions. Id.
12 at ¶ 23.

13 On December 14, 2007, Plaintiffs filed their original
14 complaint in San Francisco superior court; on March 12, 2008, they
15 filed their First Amended Complaint; and on April 22, 2008, they
16 filed their SAC. In the SAC, Plaintiffs allege twenty-one causes
17 of action, including California Labor Code wage and hour claims;
18 discrimination based on race, national origin and/or ancestry;
19 intentional infliction of emotional distress; and retaliation. The
20 eighth through thirteenth causes of action are tort claims for
21 harassment in violation of public policy, discrimination in
22 violation of public policy and retaliation in violation of public
23 policy. The fifteenth through seventeenth causes of action include
24 statutory discrimination, harassment and retaliation claims under
25 the Fair Employment and Housing Act (FEHA), California Government
26 Code § 12940. The eighteenth and nineteenth causes of action are
27 statutory retaliation claims arising under California Labor Code

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1 §§ 98.6 and 1102.5.

2 Defendants Fortney & Weygandt, Inc., AIMCO and AIMCO Capital,
3 Inc. and Bay Area Construction Framers, Inc. filed their answers to
4 the complaint in state court. On July 17, 2008, Defendant IMR,
5 with the consent of the other Defendants, removed the action to
6 this Court pursuant to 28 U.S.C. § 1446, based on federal question
7 jurisdiction. The removal was based on the theory that, because
8 the resolution of some of Plaintiffs' causes of action would
9 require interpretation of collective bargaining agreements, those
10 claims are preempted by Section 301 of the Labor-Management
11 Relations Act, 29 U.S.C. § 185.

12 In its motion for a more definite statement, IMR argues that
13 Plaintiffs must identify the parties involved in each cause of
14 action and must clarify the nature of causes of action eight
15 through thirteen. In the alternative, IMR moves to dismiss the
16 eighth through thirteenth causes of action.

17 Plaintiffs do not oppose the motion for a more definite
18 statement concerning the identification of the parties involved in
19 each cause of action. Plaintiffs also agree voluntarily to dismiss
20 causes of action eight and nine for harassment in violation of
21 public policy based on race and national origin.

22 LEGAL STANDARDS

23 I. Rule 12(e) Motion for a More Definite Statement

24 Pursuant to Federal Rule of Civil Procedure 12(e), a party may
25 move for a more definite statement when a pleading to which a
26 responsive pleading is permitted is "so vague or ambiguous that a
27 party cannot reasonably be required to frame a responsive

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1 pleading." Where a pleading "fails to specify the allegations in a
2 manner that provides sufficient notice, a defendant can move for a
3 more definite statement under Rule 12(e)." Swierkiewicz v. Sorema
4 N.A., 534 U.S. 506, 514 (2002). A Rule 12(e) motion is proper
5 "where the complaint is so general that ambiguity arises in
6 determining the nature of the claim or the parties against whom it
7 is being made." Sagan v. Apple Computer, Inc., 874 F. Supp. 1072,
8 1077 (C.D. Cal. 1994). A Rule 12(e) motion is also appropriate
9 where it is not clear from the complaint what the legal nature of
10 the claim is or if an employee is asserting a common law or
11 statutory claim. McHenry v. Renne, 84 F.3d 1172, 1179 (9th Cir.
12 1996).

13 II. Rule 12(b)(6) Motion to Dismiss

14 A complaint must contain a "short and plain statement of the
15 claim showing that the pleader is entitled to relief." Fed. R.
16 Civ. P. 8(a). When considering a motion to dismiss under Rule
17 12(b)(6) for failure to state a claim, dismissal is appropriate
18 only when the complaint does not give the defendant fair notice of
19 a legally cognizable claim and the grounds on which it rests.
20 Bell Atlantic Corp. v. Twombly, ___ U.S. ___, 127 S. Ct. 1955, 1964
21 (2007). In considering whether the complaint is sufficient to
22 state a claim, the court will take all material allegations as true
23 and construe them in the light most favorable to the plaintiff. NL
24 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

25 When granting a motion to dismiss, the court is generally
26 required to grant the plaintiff leave to amend, even if no request
27 to amend the pleading was made, unless amendment would be futile.

1 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
2 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
3 would be futile, the court examines whether the complaint could be
4 amended to cure the defect requiring dismissal "without
5 contradicting any of the allegations of [the] original complaint."
6 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
7 Leave to amend should be liberally granted, but an amended
8 complaint cannot allege facts inconsistent with the challenged
9 pleading. Id. at 296-97.

10 DISCUSSION

11 I. Motion for a More Definite Statement

12 As described above, Plaintiffs agree to provide an amended
13 complaint in which they identify all parties involved in each cause
14 of action in this case. Therefore, Defendant IMR's motion for a
15 more definite statement is GRANTED.

16 II. Rule 12(b)(6) Motion to Dismiss

17 As mentioned above, Plaintiffs agree to dismiss their eighth
18 and ninth causes of action. Therefore, these claims are dismissed
19 with prejudice.

20 Plaintiffs' tenth and eleventh causes of action allege
21 discrimination in violation of the public policy against race and
22 national origin discrimination found in article I, section 8 of the
23 California Constitution² and California Government Code

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26 ²Article I, section 8 of the California Constitution provides:
27 "A person may not be disqualified from entering or pursuing a
28 business, profession, vocation, or employment because of . . .
race, . . . color, or national or ethnic origin."

1 §§ 12940(a).³ Plaintiffs' twelfth cause of action alleges
2 retaliation in violation of the public policy found in California
3 Labor Code § 1102.5(c).⁴ Plaintiffs' thirteenth cause of action
4 alleges retaliation in violation of the public policy against
5 retaliation against those who protest race and national origin
6 discrimination. Plaintiffs claim the public policy for this cause
7 of action is found in article I, section 8 of the California
8 Constitution and in California Government Code §§ 12940(a), (h) and
9 (j).⁵

10 Under California law, an employee may maintain a tort cause
11 of action against his or her employer where the employer's
12 discharge of the employee contravenes fundamental public policy.
13 Foley v. Interactive Data Corp., 47 Cal. 3d 654, 666 (1988). Such
14 claims are often referred to as Tameny claims, after the decision
15 in Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 176-177
16 (1980). A claim for wrongful termination in violation of public

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18 ³This section of the FEHA provides, "A person may not be
19 disqualified from entering or pursuing a business, profession,
20 vocation, or employment because of . . . race, . . . color, or
21 national or ethnic origin."

22 ⁴ California Labor Code § 1102.5(c) prohibits an employer from
23 retaliating against an employee for any refusal to participate in
24 an activity that would result in a violation of state or federal
25 law or noncompliance with state or federal regulations.

26 ⁵Plaintiffs err in citing Government Code §§ 12940(a) and (j)
27 as sources of public policy against retaliation. Subsection (a)
28 contains a broad prohibition against discrimination and subsection
(j) makes it unlawful for an employer to harass an employee. Only
California Government Code section 12940(h) relates to retaliation,
making it unlawful for an employer "to discharge, expel, or
otherwise discriminate against any person because the person has
opposed any practices forbidden under this part or because the
person has filed a complaint, testified, or assisted in any
proceeding under this part."

1 policy must be based on the policy established by a constitutional
2 or statutory provision. Gantt v. Sentry Ins., 1 Cal. 4th 1083,
3 1095 (1992); see also Green v. Ralee Eng'g Co., 19 Cal. 4th 66, 90
4 (1998) (fundamental public policy may sometimes be established by
5 regulations).

6 Plaintiffs argue that they state proper Tameny claims because
7 such claims may encompass not only termination in violation of
8 public policy but also adverse employment actions in violation of
9 public policy. The California court of appeal in Garcia v.
10 Rockwell Int'l Corp., 187 Cal. App. 3d 1556, 1561 (1986), abrogated
11 on other grounds by Gantt, 1 Cal. 4th at 1093, applied Tameny to a
12 claim that an employee was demoted and suspended without pay for
13 nearly six months in retaliation for whistle-blowing. Id. at 1559.
14 The court reasoned that the same wrongful conduct was involved in
15 an unpaid suspension as in a discharge. Id. at 1562. The holding
16 of Garcia was narrow and gave no indication that adverse employment
17 actions beyond retaliatory termination or unpaid suspension were
18 cognizable. Nonetheless, Plaintiffs argue that, based on Garcia
19 and cases following it, the scope of Tameny is broad enough to
20 include adverse employment actions other than termination or
21 suspension.

22 Defendant cites Medix Ambulance Service, Inc. v. Superior
23 Court, 97 Cal. App. 4th 109, 118-119 (2002), which held that the
24 plaintiff could not state a common law claim for sexual harassment.
25 Though sexual harassment is not claimed here, Medix makes it clear
26 that Tameny does not necessarily extend to all adverse employment
27 actions short of termination.

1 Plaintiffs cite no authority establishing that discrimination
2 or retaliation, short of termination or suspension, in violation of
3 the public policy against discrimination or retaliation provides
4 the basis for a claim under Tameny.

5 Therefore, Plaintiffs may not base a Tameny claim on
6 discrimination or retaliation alone. However, they may state a
7 Tameny claim if they were terminated or suspended on the basis of
8 race or national origin. Claims ten and eleven do not allege that
9 Plaintiffs were terminated or suspended. Therefore, the tenth and
10 eleventh causes of action are dismissed with leave to amend for
11 Plaintiffs to allege, if they truthfully can, that they were
12 terminated or suspended based on race or national origin in
13 violation of public policy.

14 Plaintiffs' twelfth and thirteenth causes of action state
15 valid claims for retaliatory termination in violation of public
16 policy for protesting the underpayment of wages, unlawful wage
17 deductions, and race and national origin discrimination. If
18 Plaintiffs wish to sue for retaliatory suspension in violation of
19 public policy they may amend these causes of action as well.

20 CONCLUSION

21 For the foregoing reasons, Defendant's motion for a more
22 definite statement is GRANTED. (Dkt. # 4.) Plaintiffs must file
23 an amended complaint identifying with specificity which Plaintiffs
24 assert each cause of action against which Defendants.

25 Defendant's motion to dismiss is GRANTED in part. (Dkt.
26 # 4.) The eighth and ninth causes of action are dismissed with
27 prejudice. The tenth and eleventh causes of action are dismissed

1 with leave to amend. Plaintiffs may amend their twelfth and
2 thirteenth causes of action as well.

3 Plaintiffs' Third Amended Complaint shall be filed no later
4 than twenty days from the date of this order. Defendants' response
5 is due twenty days after the Third Amended Complaint is served.
6 Defendants shall notice any motion to dismiss for December 18, 2008
7 at 2:00 p.m. The October 21, 2008 case management conference is
8 continued to December 18, 2008 at 2:00 p.m.

9 IT IS SO ORDERED.

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12 Dated: 9/26/08



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CLAUDIA WILKEN
United States District Judge