

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

CAROL HACKLER,

Plaintiff,

v.

BERKELEY BOWL PRODUCE, INC.; BERKELEY  
BOWL MARKETPLACE; and LARRY EVANS,

Defendants.

No. 10-01877 CW

ORDER GRANTING  
PLAINTIFF'S  
MOTION TO REMAND  
AND DENYING  
REQUEST FOR  
ATTORNEYS' FEES  
(Docket No. 11)

Plaintiff Carol Hackler alleges that Defendants Berkeley Bowl Produce, Inc., et al., engaged in unlawful employment practices in violation of the California Fair Employment and Housing Act (FEHA) and the California Family Rights Act (CFRA). She moves to remand her case to state court and seeks attorneys' fees. Defendants oppose the motion. The motion was taken under submission on the papers. Having considered the papers submitted by the parties, the Court GRANTS Plaintiff's motion to remand and DENIES her request for attorneys' fees.

BACKGROUND

Plaintiff is a disabled female over the age of 40. She has filed "a number of charges" of discrimination with the California Department of Fair Employment and Housing (DFEH) based on conduct

1 she allegedly suffered as an employee of Berkeley Bowl. Compl.  
2 ¶ 12. She contends that, after she filed one such charge, she "was  
3 encouraged to sign a settlement agreement . . . that was never  
4 explained to her, contains improper terms, is ambiguous, and  
5 otherwise not a legally binding contract." Id. ¶ 21.

6 Plaintiff pleads eleven claims against all Defendants: (1) a  
7 FEHA claim for sex- and disability-based discrimination; (2) a FEHA  
8 claim for sex- and disability-based harassment; (3) a FEHA claim  
9 for retaliation; (4) a FEHA claim for a failure to accommodate her  
10 disability; (5) a FEHA claim for a failure to engage in a "good  
11 faith interactive process;" (6) a FEHA claim for a failure to  
12 prevent discrimination; (7) a claim for violation of the CFRA, Cal.  
13 Gov't Code § 12945.2; (8) intentional infliction of emotional  
14 distress; (9) defamation; (10) wrongful termination in violation of  
15 public policy; and (11) declaratory and injunctive relief  
16 concerning her settlement agreement with Defendants.

17 Plaintiff initiated her action in Alameda County Superior  
18 Court on November 20, 2009. On March 31, 2010, she served  
19 Defendants with process and her complaint. On April 29, 2010  
20 Defendants answered her complaint and, one day later, removed her  
21 action to federal court.

22 LEGAL STANDARD

23 At any time before judgment, if it appears that the district  
24 court lacks subject matter jurisdiction over a case previously  
25 removed from state court, the case must be remanded. 28 U.S.C.  
26 § 1447(c). On a motion to remand, the scope of the removal statute  
27 must be strictly construed. See Gaus v. Miles, Inc., 980 F.2d 564,

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1 566 (9th Cir. 1992). "The 'strong presumption' against removal  
2 jurisdiction means that the defendant always has the burden of  
3 establishing that removal is proper." Id. (internal citation  
4 omitted). Courts should resolve doubts as to removability in favor  
5 of remanding the case to state court. Id.

6 DISCUSSION

7 Defendants assert that the Court has federal question  
8 jurisdiction over this case. They argue that § 301(a) of the Labor  
9 Management Relations Act (LMRA), 29 U.S.C. § 185(a), preempts all  
10 of Plaintiff's claims because the claims necessarily require the  
11 interpretation of the collective bargaining agreement (CBA) to  
12 which she was a party.

13 Generally, "the well-pleaded complaint rule provides that  
14 federal jurisdiction exists only when a federal question is  
15 presented on the face of the plaintiff's properly pleaded  
16 complaint." Hunter v. Philip Morris USA, 582 F.3d 1039, 1042 (9th  
17 Cir. 2009) (citation and internal quotation marks omitted). An  
18 exception to this rule is the "complete preemption" doctrine.  
19 Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1107  
20 (9th Cir. 2000). This "doctrine is actually a doctrine of  
21 jurisdiction and is not to be confused with ordinary preemption  
22 doctrine (although it is related to preemption law)." Id. Under  
23 the doctrine, the "preemptive force" of certain statutes is  
24 recognized as being "so strong that they 'completely preempt' an  
25 area of state law" such that "any claim purportedly based on that  
26 preempted state law is considered, from its inception, a federal  
27 claim . . . ." Id.

1 Section 301(a), which has been deemed to have such an effect,  
2 provides:

3 Suits for violation of contracts between an employer and  
4 a labor organization representing employees in an  
5 industry affecting commerce as defined in this chapter,  
6 or between any such labor organizations, may be brought  
7 in any district court of the United States having  
8 jurisdiction of the parties, without respect to the  
9 amount in controversy or without regard to the  
10 citizenship of the parties.

11 29 U.S.C. § 185(a). As explained by the Ninth Circuit,

12 Although the language of § 301 is limited to “[s]uits for  
13 violation of contracts,” courts have concluded that, in  
14 order to give the proper range to § 301’s policies of  
15 promoting arbitration and the uniform interpretation of  
16 collective bargaining agreement provisions, § 301  
17 “complete preemption” must be construed to cover “most  
18 state-law actions that require interpretation of labor  
19 agreements.”

20 Balcorta, 208 F.3d at 1108.

21 “A state law claim is completely preempted by the LMRA when it  
22 ‘necessarily requires the court to interpret an existing provision  
23 of a CBA that can reasonably be said to be relevant to the  
24 resolution of the dispute.’” Dahl v. Rosenfeld, 316 F.3d 1074,  
25 1077 (9th Cir. 2003) (quoting Cramer v. Consol. Freightways Inc.,  
26 255 F.3d 683, 693 (9th Cir. 2001)). Courts must narrowly construe  
27 the term “interpret.” Balcorta, 208 F.3d at 1108. “A ‘reference  
28 to or consideration of terms of a collective bargaining agreement  
is not the equivalent of interpreting the meaning of the terms.’”  
Detabali v. St. Luke’s Hosp., 482 F.3d 1199, 1203 (9th Cir. 2007)  
(quoting Ramirez v. Fox Television Station, Inc., 998 F.2d 743, 749  
(9th Cir. 1993)).

Plaintiff’s complaint does not provide a basis for federal  
question jurisdiction. She pleads claims for unlawful employment

1 practices and torts related thereto. The only factual allegations  
2 related to her claims provide that she was retaliated against for  
3 complaining about disparate treatment and other violations of state  
4 law. These claims and allegations, on their own, do not require  
5 interpretation of the CBA. See, e.g., Detabali, 482 F.3d at 1203  
6 ("FEHA employment discrimination claims are not ipso facto  
7 preempted by § 301 of the LMRA."). Resolving all doubts against  
8 Defendants, the Court finds that Plaintiff's pleadings do not  
9 justify removal.

10 Noting that Plaintiff's complaint provides little insight into  
11 the nature of her action, Defendants turn to allegations contained  
12 in her DFEH charges, filed before the inception of her lawsuit, to  
13 assert that interpretation of the CBA is necessary. Although  
14 Plaintiff does not deny that her lawsuit includes conduct plead in  
15 her administrative complaints, it does not follow that she  
16 currently seeks relief for all the acts alleged in them. Indeed,  
17 Defendants point to no controlling authority indicating that  
18 consideration of such pre-lawsuit documents is permissible;  
19 generally, a court's analysis on the propriety of removal is  
20 limited to a plaintiff's initial pleading or "other paper" served  
21 on a defendant after the commencement of the lawsuit. See 28  
22 U.S.C. § 1446(b); Lowery v. Ala. Power Co., 483 F.3d 1184, 1213  
23 (11th Cir. 2007) ("[U]nder § 1446(b), in assessing the propriety of  
24 removal, the court considers the document received by the defendant  
25 from the plaintiff -- be it the initial complaint or a later  
26 received paper -- and determines whether that document and the  
27 notice of removal unambiguously establish federal jurisdiction.");

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1 see also Cohn v. Petsmart, Inc., 281 F.3d 837, 840 n.1 (9th Cir.  
2 2002) (stating that settlement letter could satisfy amount-in-  
3 controversy requirement for diversity jurisdiction). Nevertheless,  
4 even if her current lawsuit were co-extensive with her DFEH  
5 charges, it is not evident that an interpretation of the CBA would  
6 be required.

7 Defendants argue that Plaintiff's claims for discrimination  
8 and failure to accommodate are premised on their decision not to  
9 assign her to another position. Thus, they assert, the Court must  
10 interpret the meaning of Article 21 of the CBA,<sup>1</sup> which concerns  
11 promotions and transfers. However, the limited record does not  
12 show that such an interpretation is necessary. Article 21 outlines  
13 when an employee may be promoted "to lead positions" or transferred  
14 "to vacant positions." Notice of Removal, Ex. C ¶ 21.0. Plaintiff  
15 does not assert that Defendants failed to accommodate her in  
16 violation of this provision. Article 21 does not even appear  
17 relevant to Plaintiff's claims; it offers no insight on how  
18 Defendants are to provide accommodations for disabled employees.  
19 Although a court may need to consider the terms contained in  
20 Article 21 to adjudicate Plaintiff's claims, its interpretation is  
21 not necessarily required.

22 Defendants also argue that Article 30 of the CBA, a general  
23 non-discrimination provision, must be interpreted. This argument  
24 was rejected in Ackerman v. Western Electric Co., Inc., 860 F.2d  
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26 <sup>1</sup> Defendants refer to Article 26, which concerns meal and rest  
27 periods. Because they discuss provisions regarding transfers, the  
28 Court understands them to intend to cite Article 21.

1 1514 (9th Cir. 1988). There, a defendant argued that a CBA's  
2 general non-discrimination provision required interpretation  
3 because it was "inextricably intertwined" with a plaintiff's claim  
4 for disability discrimination. Id. at 1517. The court disagreed,  
5 stating,

6 California's statute confers upon employees certain  
7 rights not to be discriminated against because of  
8 physical handicap or medical condition. That right is  
9 defined and enforced under state law without reference to  
10 the terms of any collective bargaining agreement.  
Ackerman's state-law claim is consequently independent of  
the agreement. That she might also have separate  
remedies under the bargaining agreement makes no  
difference.

11 Id. Here, Plaintiff seeks relief under the FEHA, not the CBA;  
12 consequently, her claims can be resolved without interpreting  
13 Article 30. This obviates any need to analyze Defendants' so-  
14 called "interplay" between Articles 21 and 30. Opp'n at 9.

15 Defendants next contend that providing Plaintiff with an  
16 accommodation could be prohibited by Article 33, which proscribes  
17 individual contracts "concerning wages, hours of work and/or  
18 working conditions that provides less benefits than the terms of"  
19 the CBA. Notice of Removal, Ex. C ¶ 33.1. The current record does  
20 not indicate that such an individual contract was necessary to  
21 accommodate Plaintiff's purported disability. Even if it did,  
22 there is no reason to believe that Article 33 requires  
23 interpretation.

24 With respect to Plaintiff's claims for retaliation and failure  
25 to prevent discrimination and harassment, Defendants assert a need  
26 to interpret Article 26, which governs meal and rest periods.  
27 Plaintiff avers that she was retaliated against because she  
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1 complained that she was required to ask permission to use the  
2 restroom and wrongly accused of taking breaks longer than ten  
3 minutes.<sup>2</sup> Defendants contend that these allegations demonstrate  
4 the necessity of interpreting the terms "breaks" and "promptly,"  
5 which appear in Article 26. They do not. As with her  
6 discrimination and failure to accommodate claims, consultation of  
7 the CBA may be necessary; it does not follow, however, that  
8 interpretation is required.

9 Plaintiff's claim for intentional infliction of emotional  
10 distress also fails to provide a basis for federal question  
11 jurisdiction. This claim appears related to Plaintiff's claim for  
12 wrongful termination in violation of public policy. In her July  
13 21, 2009 DFEH charge, Plaintiff alleges that she was terminated  
14 because of her disability. Because her termination is implicated,  
15 Defendants assert the need to interpret Article 6, which requires  
16 that employees be terminated only for just cause. However, the  
17 Ninth Circuit has stated "that there is no preemption when 'the  
18 tort of wrongful discharge in violation of public policy exists  
19 independent [sic] of any contractual right.'" Jimeno v. Mobil Oil  
20 Corp., 66 F.3d 1514, 1528 (9th Cir. 1995) (quoting Paige v. Henry  
21 J. Kaiser Co., 826 F.2d 857, 863 (9th Cir. 1987)) (alteration in  
22 original). Here, California law defines such a tort, which  
23 Plaintiff alleges. As a defense in state court, Defendants could

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25 <sup>2</sup> Plaintiff's complaint is not clear as to whether she  
26 complained about these practices and was retaliated against as a  
27 result or whether these were the retaliatory acts taken against  
28 her. For the purposes of this motion, this ambiguity is  
immaterial.

1 assert that they lawfully terminated Plaintiff for just cause.  
2 However, on the current record, such a defense does not require an  
3 interpretation of Article 6.

4 Finally, Defendants assert that the CBA's provisions for  
5 grievance and arbitration and non-discrimination must be  
6 reconciled, citing 14 Penn Plaza v. Pyett, \_\_\_ U.S. \_\_\_, 129 S. Ct.  
7 1456 (2009). Pyett addressed "whether a provision in a  
8 collective-bargaining agreement that clearly and unmistakably  
9 requires union members to arbitrate claims arising under the Age  
10 Discrimination in Employment Act of 1967 (ADEA) is enforceable."  
11 Id. at 1460 (internal citation omitted). The Supreme Court  
12 answered in the affirmative. Id. at 1474. Here, Defendants do not  
13 identify a provision for arbitration that "expressly covers both  
14 statutory and contractual discrimination claims." Id. at 1469.  
15 Nor do they offer a colorable argument that the CBA clearly and  
16 unmistakably required Plaintiff to arbitrate her discrimination  
17 claims. Unlike the non-discrimination clause in Pyett,<sup>3</sup> the CBA

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19 <sup>3</sup> The relevant clause provided:

20 § 30 NO DISCRIMINATION. There shall be no discrimination  
21 against any present or future employee by reason of race,  
22 creed, color, age, disability, national origin, sex,  
23 union membership, or any other characteristic protected  
24 by law, including, but not limited to, claims made  
25 pursuant to Title VII of the Civil Rights Act, the  
26 Americans with Disabilities Act, the Age Discrimination  
in Employment Act, the New York State Human Rights Law,  
the New York City Human Rights Code, . . . or any other  
similar laws, rules, or regulations. All such claims  
shall be subject to the grievance and arbitration  
procedures (Articles V and VI) as the sole and exclusive  
remedy for violations.

27 Pyett, 129 S. Ct. at 1460.

1 merely states that any "controversy between the Employer, the  
2 Union, or an employee arising out of any matter involving the  
3 interpretation of any provisions of this Agreement or any matter  
4 involving an alleged violation of any provisions of this Agreement"  
5 is subject to the grievance and arbitration process. Notice of  
6 Removal, Ex. C ¶ 7.0. Although discriminatory conduct would  
7 violate the CBA, as noted above, Plaintiff asserts rights provided  
8 by the FEHA. Defendants do not point to a CBA provision that  
9 prevents her from doing so.

10 Defendants removed Plaintiff's case at a stage in which her  
11 pleadings were not clear concerning the conduct for which she seeks  
12 relief. Unless and until Plaintiff raises issues that necessarily  
13 require an interpretation of the CBA, federal question jurisdiction  
14 does not lie.

15 CONCLUSION

16 For the foregoing reasons, the Court GRANTS Plaintiff's motion  
17 to remand; because Defendants' removal was not frivolous, her  
18 request for attorneys' fees under 28 U.S.C. § 1447(c) is DENIED.  
19 (Docket No. 11.)

20 The Clerk shall remand this action to Alameda County Superior  
21 Court. The case management conference, scheduled for September 7,  
22 2010, is VACATED.

23 IT IS SO ORDERED.

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25 Dated: July 13, 2010



26 CLAUDIA WILKEN  
27 United States District Judge  
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