UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

RICHARD FERNANDEZ,

Plaintiff,

v.

PSC INDUSTRIAL OUTSOURCING LP, et al.,

Defendants.

Case No. 5:17-cv-00444-EJD

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

Re: Dkt. No. 13

I. INTRODUCTION

Plaintiff Richard Fernandez ("Plaintiff") brought this action for employment discrimination in the California Superior Court for the County of San Benito. Defendants PSC Industrial Outsourcing, LP ("PSC"), a citizen of the State of Delaware, and Gary Colbert ("Colbert"), a citizen of the State of California, removed the action, asserting diversity jurisdiction under 28 U.S.C. §1441(b). Defendants acknowledge that both Plaintiff and Defendant Colbert are citizens of California; however, Defendants contend that Colbert is a sham defendant whose presence does not defeat diversity. Plaintiff filed a motion to remand and noticed the motion for hearing on July 27, 2017. The Court finds it appropriate to take the motion under submission for decision without oral argument pursuant to Civil Local Rule 7-1(b). Having considered the motion, opposition, and reply briefs, and for the reasons set forth below, Plaintiff's motion to remand the action to San Benito County Superior Court is granted.

II. BACKGROUND

Plaintiff's original complaint contains six causes of action: (1) disability discrimination in violation of the Fair Employment and Housing Act ("FEHA"); (2) failure to engage in the interactive process in violation of the FEHA; (3) failure to accommodate in violation of the FEHA; (4) wrongful termination in violation of public policy; (5) intentional infliction of emotional distress ("IIED"); and (6) negligent infliction of emotional distress ("NIED"). All six claims are asserted against Plaintiff's former employer, PSC; the IIED and NIED claims are asserted against Plaintiff's former manager, Colbert. After Defendants removed the action to this Court, Plaintiff filed a First Amended Complaint ("FAC"), to set forth additional facts in support of his six causes of action.

In the FAC, Plaintiff alleges that in December 2011, he began working as a Technician for PSC, a company that provides specialty maintenance services for the aerospace, manufacturing, refining, chemical, and other industries. Starting in October 2015, Plaintiff made numerous complaints to Colbert about company practices that he believed posed imminent harm to himself and his co-workers. For example, Plaintiff raised concerns about the lack of training provided to workers regarding the operation of a self-contained breathing apparatus ("SCBA"), a device worn by workers to provide breathable air in a hazardous atmosphere. Plaintiff also complained that PSC failed to provide employees with proper equipment to clean hazardous material in a liquid tank.

Plaintiff alleges that after he made the complaints, "Colbert's conduct became hostile." More specifically, Plaintiff alleges that Colbert treated him with disdain; withheld resources necessary for him to perform his job; refused to take steps to protect him from workplace bullying; and ignored complaints that another supervisor, Bruce Gilbert, intentionally created a hostile work environment and used abusive language. Plaintiff also alleges that instead of addressing Plaintiff's concerns, Colbert intentionally assigned Plaintiff to work on projects that Gilbert supervised.

Plaintiff alleges that in December of 2015, he took a medical leave of absence due to severe lower back pain, and in late February of 2016, he requested an extension of his medical

leave of absence and mailed PSC a Certification of Health Care Provider for Employee's Serious Health Condition Form ("Certification"). Plaintiff alleges that despite repeated phone calls, PSC ignored his request for an extension of his medical leave of absence and terminated him on March 24, 2016. Plaintiff alleges on information and belief that Colbert made and/or approved the termination decision. Plaintiff further alleges that PSC cancelled his employer-provided medical benefits, and consequently, medical treatment for his back has been compromised and delayed. Plaintiff alleges that he has and continues to suffer pain, humiliation, severe emotional distress, trauma and sleeplessness.

III. STANDARDS

Removal jurisdiction is a creation of statute. See Libhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1064 (9th Cir. 1979) ("The removal jurisdiction of the federal courts is derived entirely from the statutory authorization of Congress."). In general, only those state court actions that could have been originally filed in federal court may be removed. 28 U.S.C. § 1441(a) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant."); see Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987) ("Only state-court actions that originally could have been filed in federal court may be removed to federal court by defendant."). Accordingly, the removal statute provides two basic ways in which a state court action may be removed to federal court: (1) the case presents a federal question, or (2) the case is between citizens of different states and the amount in controversy exceeds $75,000. 28 U.S.C. §§ 1441(a), (b).

On a motion to remand, it is the removing defendant's burden to establish federal jurisdiction, and the court must strictly construe removal statutes against removal jurisdiction. Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992) ("The 'strong presumption' against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper."). "Where doubt regarding the right to removal exists, a case should be remanded to state court." Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003).

IV. DISCUSSION

Plaintiff does not dispute that, without Colbert, there would be complete diversity, and the amount in controversy would exceed the jurisdictional minimum. Thus, the only issue on this motion is whether Plaintiff has stated or can state a claim against Colbert.

A. Fraudulent Joinder

Under the "fraudulent joinder" doctrine, a defendant may remove a civil action that alleges claims against a non-diverse defendant when the plaintiff has no basis for suing that defendant. McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987). "If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent." Id.; see also Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001); Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998). In such a case, the "sham" defendant is disregarded for jurisdictional purposes. McCabe, 811 F.2d at 1339.

In the Ninth Circuit, "there is a general presumption against fraudulent joinder." Hamilton Materials, Inc. v. Dow Chem. Corp., 494 F.3d 1203, 1206 (9th Cir. 2007). On the issue of fraudulent joinder, a defendant is entitled to present facts showing the joinder to be fraudulent. Morris, 236 F.3d at 1067. A fraudulent joinder, however, "must be proven by clear and convincing evidence." Id. Further, "all disputed questions of fact and all ambiguities in the controlling state law are [to be] resolved in plaintiff's favor." Calero v. Unisys Corp., 271 F. Supp. 2d 1172, 1176 (N.D. Cal. 2003). "[A] defendant seeking removal based on an alleged fraudulent joinder must do more than show that the complaint at the time of removal fails to state a claim against the non-diverse defendant." Nasrawi v. Buck Consultants, LLC, 776 F. Supp. 2d 1166, 1170 (E.D. Cal. 2011). "Remand must be granted unless the defendant shows that the plaintiff 'would not be afforded leave to amend his complaint to cure [the] purported deficiency.'" Id. (quoting Burris v. AT&T Wireless, Inc., 2006 WL 2038040 (N.D. Cal. Jul. 19, 2006)).

In an effort to show that Plaintiff has no basis upon which to sue Colbert, Defendants first contend that Plaintiff's IIED and NIED claims against Colbert are barred by the exclusivity provision of California's Workers' Compensation Act ("WCA"). Relying on Maynard v. City of

San Jose, 37 F.3d 1396 (9th Cir. 1994), Plaintiff contends that his claims against Colbert are premised upon his employer's violation of a fundamental public policy, namely discrimination, and are, therefore, not preempted.

Workers' Compensation provides "the exclusive remedy for injury or death of an employee against any other employee of the employer acting with the scope of his or her employment." Cal. Lab. Code 3601(a). An employee's emotional distress injuries are subsumed under the exclusive remedy provisions of the WCA as long as the employer's conduct does not "contravene[] fundamental public policy" or "exceed[] the risks inherent in the employment relationship." Livitsanos v. Superior Court, 2 Cal.4th 744, 754 (1992). In Miklosy v. Regents of the University of California, 44 Cal.4th 876 (2008), the California Supreme Court analyzed the scope of the two exceptions in a case in which the plaintiffs alleged they had been wrongfully terminated in retaliation for lodging safety complaints. Despite plaintiffs' allegations of whistleblower retaliation and "outrageous conduct," the court declined to apply the "fundamental public policy" exception, reasoning that this exception is aimed at permitting a wrongful termination action under Tameny v. Atlantic Richfield Co., 27 Cal.3d 167 (1980), to proceed despite the WCA. Miklosy, 44 Cal.4th at 902-903. The court also concluded that the alleged whistleblower retaliation and resulting emotional distress did not "exceed[] the risks inherent in the employment relationship." Id. at 903.

Defendants do not cite, and this Court is not aware, of any post Miklosy California appellate cases addressing whether a claim for IIED predicated on allegations of disability discrimination is barred by Miklosy. Instead, Defendants rely on numerous cases involving primarily allegations of mistreatment, shouting, threats, harassment, and retaliation unaccompanied by allegations of illegal discrimination. See e.g. Yau v. Santa Margarita Ford, Inc., 229 Cal.App.4th 144 (2014) (demurrer sustained to IIED claim based on WCA where IIED claim premised on alleged mistreatment at work). In contrast, Plaintiff cites to several California district court cases in which the courts found no preemption of IIED claims that were based upon allegations of discrimination. See e.g. Vanderhule v. Amerisource Bergen Drug Corp., 2017 WL 168911 (C.D. Cal. Jan. 13, 2017) (granting plaintiff's motion to remand where it was alleged that

the supervisor mocked her disability); Macias v. Levy Premium Foodservices Ltd. P'ship., 2015 WL 12747900 (C.D. Cal. 2015) (IIED claim not preempted when based on harassment on the basis of race and sexual orientation); Wason v. Am. Int'l Grp., Inc., 2010 WL 1881067 (S.D. Cal. 2010) (IIED claim not preempted where it was alleged that supervisor participated in discrimination).

In light of the absence of controlling California caselaw applying Miklosy to IIED claims based on allegations of disability discrimination, the Court cannot conclude that it is "obvious according to the settled rules of the state," that the exclusivity provisions of the WCA bar Plaintiff's IIED claim. See McCabe, 811 F.2d at 1339.

Second, Defendants contend that Colbert is shielded from individual liability by the managerial privilege, which generally immunizes agent-employees who act in part by a desire to benefit the employer-principal. See Los Angeles Airways, Inc. v. Davis, 687 F.2d 321, 328 (9th Cir. 1982). More specifically, Defendants contend that the alleged conduct, namely, failure to address complaints, job or project assignments, withholding resources, and participating in the termination decision , are all personnel actions that cannot support individual supervisor liability. Plaintiff contends, however that Colbert's discriminatory acts and other conduct are beyond typical personnel actions and fall outside the scope of the managerial privilege.

The court's analysis in Dagley v. Target Corp., Inc., 2009 WL 910558 (C.D. Cal. 2009), supports Plaintiff's position. In Dagley, the plaintiff filed a complaint in state court alleging several causes of action, including IIED, against her former employer and manager. The IIED claim was based upon allegations that plaintiff's manager terminated plaintiff's employment "in her time of need, while she was disabled and/or suffering from a medical condition." Id. at *3. The employer removed the action to federal court, asserting that the manager was fraudulently joined to defeat diversity. The Dagley court reasoned that a claim for IIED is possible where a plaintiff alleges conduct other than that inherent in terminating an employee, such as violating a fundamental interest of the employee in a deceptive manner that results in the plaintiff being denied rights granted to other employees. Id. In granting plaintiff's motion to remand, the Dagley court found that plaintiff had sufficiently alleged an IIED claim based upon allegations that the

manager had denied her medical leave in a deceptive manner by terminating her. Id.

Construing Plaintiff's allegations in the light most favorable to her, the Court finds that at least some of the actions allegedly taken by Colbert are, arguably, not strictly personnel actions. Plaintiff alleges that Colbert failed to take remedial action to address unsafe practices. FAC at ¶12. Plaintiff alleges that Defendants failed to provide adequate training regarding the operation of the SCBA. Id. Plaintiff alleges that Defendants failed to provide proper equipment to clean hazardous material in a liquid tank. Id. Plaintiff also alleges that Colbert approved the termination of his employment despite the fact –or perhaps precisely because – Plaintiff was on disability leave. FAC at ¶16. Plaintiff also alleges that Defendants discriminated against him on the basis of his disability. In light of the allegation of disability discrimination in particular, defendants cannot carry their burden of showing with clear and convincing evidence that the managerial privilege precludes liability against Colbert. See Morris v. Mass. Electric Construction Co., 2015 WL 6697260 (C.D. Cal. 2015) (managerial privilege "has no place in case where an employee alleges that a manager acted with discriminatory intent.")

Third, Defendants argue that Colbert's alleged conduct is not sufficiently extreme and outrageous conduct to support a claim for IIED as a matter of law. To establish a claim for IIED, a plaintiff must establish that: (1) defendant engaged in outrageous conduct; (2) defendant intentionally caused or recklessly disregarded the probability of causing emotional distress; (3) plaintiff suffered severe emotional distress; and (4) defendant's outrageous conduct was the actual and proximate cause of the emotional distress. Pardi v. Kaiser Foundation Hospitals, 389 F.3d 840, 852 (9th Cir. 2004).

Although Plaintiff's allegations may ultimately be insufficient to prevail, the Court cannot conclude at the pleading stage that Plaintiff has no possibility of recovery on his IIED claim against Colbert, especially in light of the allegations relating to his disability, the manner in which he was terminated, and cancellation of his medical benefits. See Charles v. ADT Security Services, 2009 WL 5184454 (C.D. Cal. 2009) (court could not conclude that plaintiff had no possibility of recovering on an IIED claim based on allegations that defendant supervisor was aware of plaintiff's severe disability and yet demanded plaintiff return to work); see also Barsell v.

Urban Outfitters, Inc., 2009 WL 1916495 at *7 (C.D. Cal. 2009) ("it is possible a jury might conclude that communicating the termination decision while [plaintiff] was hospitalized for depression was conduct that was outside the normal employment relationship and was designed to cause [plaintiff] stress.").

In summary, Defendants have not met their burden of showing that Colbert was fraudulently joined. At the pleading stage, it is not "obvious" that Plaintiff has no basis for a claim against Colbert. See McCabe, 811 F.2d at 1339; see also Negherbon v. Wells Fargo Bank, 2015 WL 6163570 (N.D. Cal. 2015) (granting motion to remand because some of the alleged conduct against supervisor may go beyond mere personnel management); Hale v. Bank of Am., N.A., 2013 WL 989968 (C.D. Cal. 2013) (granting motion to remand because "the court cannot conclude with certainty that every one of defendant's purported actions was a personnel management decision). Moreover, even if the facts pled are relatively weak, nothing precludes Plaintiff from amending his complaint to add additional facts in support of his claim on remand. See Nelson v. PetSmart, Inc., 2015 WL 6566003 (C.D. Cal. 2015).

B. Attorney Fees and Cost

Plaintiff requests an award of fees pursuant to 28 U.S.C. § 1447(c). "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). Because "[t]he process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources," requiring the payment of fees and costs is appropriate where "the removing party lacked an objectively reasonable basis for seeking removal." Martin v. Franklin Capital Corp., 546 U.S. 132, 140-41 (2005). The Ninth Circuit has explained that "removal is not objectively unreasonable solely because the removing party's arguments lack merit, or else attorney's fees would always be awarded whenever remand is granted." Lussier v. Dollar Tree Stores, Inc., 518 F. 3d 1062, 1065 (9th Cir. 2008). Instead, the objective reasonableness of a removal depends on the clarity of the applicable law and whether such law "clearly foreclosed" the arguments in support of removal. Id. at 1066-67.

In this case, the Court does not find the applicable law so clear as to foreclose the removal.

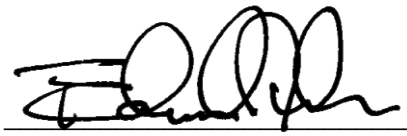
Although the Court ultimately found that Colbert is not a sham defendant, Defendants did have an objectively reasonable basis for seeking removal. This is not a removal that was "clearly foreclosed" by the law. The request for fees is denied.

V. CONCLUSTION

For the reasons set forth above, Plaintiff's motion for remand is GRANTED and the request for attorney fees is DENIED. The Clerk shall remand this action to San Benito County Superior Court. Any pending matters are terminated and the Clerk shall close the file.

IT IS SO ORDERED.

Dated: July 24, 2017



EDWARD J. DAVILA
United States District Judge

United States District Court
Northern District of California