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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RICHARD SCHOENFELDER,
Plaintiff,
vs.
CORRECTIONS CORPORATION OF
AMERICA; CCA OF TENNESSEE,
LLC; SAN DIEGO
CORRECTIONAL; FRED
LAWRENCE; and DOES 1 through
20, Inclusive,
Defendants.

CASE NO. 14cv1275-WQH-
NLS

ORDER

HAYES, Judge:

The matter before the Court is the Motion to Remand filed by Plaintiff Richard Shoenfelder. (ECF No. 11).

I. Background

On February 21, 2014, Plaintiff Richard Shoenfelder commenced this action by filing a Complaint in the Superior Court of California, County of San Diego (ECF No. 1-1). On April 16, 2014, Plaintiff filed the First Amended Complaint (“FAC”), which is the operative pleading. (ECF No. 1-1). The FAC asserts the following claims for relief: (1) wrongful termination in violation of public policy against Defendants Corrections Corporation of America (“CCA”) and CCA of Tennessee, LLC (“CCA Tennessee”) (collectively, the “CCA Defendants”); (2) intentional infliction of

1 emotional distress (“IIED”) against Defendant Fred Lawrence; (3) harassment in
2 violation of the Fair Employment and Housing Act (“FEHA”) against Lawrence; (4)
3 retaliation in violation of FEHA against all Defendants; (5) termination in violation
4 of FEHA against all Defendants; and (6) violation of California Labor Code § 970
5 against all Defendants. The Complaint alleges that Plaintiff “is, and at all times relevant
6 hereto, was a resident of the State of California, County of San Diego.” (ECF No. 1-1
7 at 7). The Complaint alleges that the CCA Defendants have their principal place of
8 business in Tennessee, San Diego Correctional has its principal place of business in San
9 Diego County, and Lawrence is a resident of San Diego County. *Id.* Defendant CCA
10 was served with the FAC on April 22, 2014. (ECF No. 1-1 at 63).

11 On May 22, 2014, the CCA Defendants removed the action to this Court
12 pursuant to 28 U.S.C. § 1441 and 28 U.S.C. § 1332 on the basis of diversity of
13 citizenship. (ECF No. 1). The Notice of Removal states that CCA is a Maryland
14 corporation with its principal place of business in the State of Tennessee and that CCA
15 Tennessee is a Tennessee corporation with a principal place of business in Nashville,
16 Tennessee. *Id.* at 5-6. The Notice of Removal asserts that Defendant Lawrence “is an
17 improperly named sham defendant and may be properly ignored for purposes of
18 diversity jurisdiction.” *Id.*

19 On June 17, 2014, Plaintiff filed a Motion to Remand to state court on the basis
20 of a lack of diversity jurisdiction. (ECF No. 6). On July 7, 2014, the CCA Defendants
21 and Defendant Lawrence filed an opposition. (ECF No. 14). On July 14, 2014,
22 Plaintiff filed a reply. (ECF No. 23).

23 **III. Discussion**

24 28 U.S.C. section 1332 authorizes district courts to exercise original jurisdiction
25 in cases in which the amount in controversy exceeds the sum or value of \$75,000.00
26 and the parties are citizens of different states. 28 U.S.C. § 1332. Diversity jurisdiction
27 requires complete diversity, meaning every plaintiff must be diverse from every
28 defendant. *Id.* Pursuant to the removal statute, “any civil action brought in a State

1 court of which the district courts of the United States have original jurisdiction, may be
2 removed by the defendant or the defendants to the district court of the United States for
3 the district and division embracing the place where such action is pending.” 28 U.S.C.
4 § 1441(a). Federal jurisdiction must exist at the time the complaint is filed and at the
5 time removal is effected. *Strotek Corp. v. Air Transp. Ass’n of Am.*, 300 F.3d 1129,
6 1131 (9th Cir. 2002). There is a “strong presumption against removal” such that the
7 removing party “always has the burden of establishing that removal is proper.” *Gaus*
8 *v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). “Federal jurisdiction must be rejected
9 if there is any doubt as to the right of removal in the first instance.” *Id.*

10 Plaintiff contends that no diversity jurisdiction exists because Defendant
11 Lawrence, a resident of California, is not a “sham defendant.” (ECF No. 6-1 at 2).
12 Plaintiff contends that the FAC adequately alleges IIED and FEHA harassment claims
13 (Second and Third Claims) against Defendant Lawrence by alleging “repeated
14 derogatory comments about Plaintiff’s age” and allegations that Defendant Lawrence
15 “forced Plaintiff to touch his protruding hernia.” (ECF No. 6-1 at 4). Defendants
16 contend that “Plaintiff’s allegations against Defendant Lawrence, Plaintiff’s supervisor,
17 fail to allege conduct that satisfies the strict, severe and pervasive threshold to set forth
18 an actionable harassment claim under the FEHA or facts to support an IIED claim.”
19 (ECF No. 8 at 2). Specifically, Defendants contend that the FAC fails to allege how
20 frequently Defendant Lawrence “harassed” Plaintiff about his age, and that “occasional,
21 isolated, sporadic, or trivial” conduct does not suffice to state a claim for harassment.
22 *Id.* at 4-6. Defendants contend that the alleged comments, while “arguably offensive,”
23 do not “rise to the level of outrageous conduct. *Id.* at 9. Defendants also contend that
24 Plaintiff’s claims for retaliation and termination in violation of the FEHA (Fourth and
25 Fifth Claims) “cannot be brought against an individual like Lawrence as a matter of
26 law.” *Id.* at 3.

27 **A. “Fraudulent” or “Sham” Joinder**

28 Joinder of a nondiverse defendant for the sole purpose of depriving the federal

1 courts of jurisdiction is deemed fraudulent. *Ritchey v. Upjohn Drug Co.*, 139 F.3d
2 1313, 1318 (9th Cir. 1998). First, a defendant’s presence will be ignored for the
3 purposes of diversity pursuant to the doctrine of fraudulent joinder only if “the plaintiff
4 fails to state a cause of action against a resident defendant, and the failure is obvious
5 according to the settled rules of the state.” *Morris v. Princess Cruises, Inc.*, 236 F.3d
6 1061, 1067 (9th Cir. 2001). In other words, the “removing party bears the burden of
7 proving that the plaintiff failed to state a cause of action against the non-diverse
8 defendant who would otherwise destroy diversity,” and that “the failure is obvious
9 according to settled law of the state.” *Id.*

10 **B. Allegations of the FAC**

11 Plaintiff was hired by CCA as an assistant warden for San Diego Correctional
12 Facility in December 2008. Defendant Lawrence was “Plaintiff’s supervisor at all times
13 relevant in this complaint.” (ECF No. 1-1 at 7). Defendant Lawrence “was not a
14 pleasant person to work for.” *Id.* at 8. Defendant Lawrence “repeatedly harassed
15 Plaintiff about his age (Plaintiff is in his 50s), including making comments about
16 Plaintiff needing Viagra and Geritol, and made fun of his hearing loss.” *Id.* at 9. “In
17 a bizarre display, Lawrence repeatedly lifted his shirt and forced Plaintiff to touch his
18 protruding hernia.” *Id.* at 9.

19 When the CCA began to investigate Defendant Lawrence in connection with an
20 arrest for a DUI, “Plaintiff fully cooperated with the investigation and expressed some
21 of his concerns about Lawrence’s behavior including widespread and persistent rumors
22 of an improper relationship between Lawrence and a guard at the facility which was
23 having a very detrimental effect on morale at the facility.” *Id.* at 11. When Defendant
24 Lawrence returned from leave, “Lawrence got in Plaintiff’s face while making
25 threatening gestures, swore at him, fired him and ordered him to leave the facility
26 immediately.” *Id.* at 11.

27 “Plaintiff returned to work the next week despite his concerns that his career at
28 CCA was finished.” *Id.* at 12. “Lawrence began to increasingly overrule Plaintiff on

1 personnel issues and otherwise marginalize him.” *Id.* “In September 2012, Lawrence
2 accused Plaintiff of stealing his personal cell phone. Of course, Plaintiff did not take
3 the phone and Lawrence later found it.” *Id.* “In April 2013, Plaintiff was terminated
4 by CCA allegedly as a result of violating various CCA policies.” *Id.*

5 **C. Ruling of the Court**

6 “To prevail on a hostile work environment claim under California’s FEHA, an
7 employee must show that the harassing conduct was ‘severe enough or sufficiently
8 pervasive to alter the conditions of employment and create a work environment that
9 qualifies as hostile or abusive to employees because of [membership in a protected
10 class].” *Hughes v. Pair*, 46 Cal. 4th 1035, 1043 (2009). “[A]n employee seeking to
11 prove sexual harassment based on no more than a few isolated incidents of harassing
12 conduct must show that the conduct was ‘severe in the extreme.’” *Id.*

13 Plaintiff has alleged harassing conduct by Defendant Lawrence. It is not
14 “obvious” that Plaintiff has not stated a FEHA harassment claim against Defendant
15 Lawrence, his work supervisor, for “repeatedly harass[ing] Plaintiff about his age
16 (Plaintiff is in his 50s), including making comments about Plaintiff needing Viagra and
17 Geritol, and [making] fun of his hearing loss” and “repeatedly lift[ing] his shirt and
18 forc[ing] Plaintiff to touch his protruding hernia.” (ECF No. 1-1 at 9). Even if the FAC
19 failed to allege sufficient facts to demonstrate that Defendant Lawrence’s conduct was
20 “severe” or “pervasive,” Defendants have failed to establish that Plaintiff would be
21 unable to amend the FAC to allege more facts to show that Defendant’s Lawrence’s
22 conduct rose to that level. *See Padilla v. AT&T Corp.*, 697 F. Supp. 2d 1156, 1159-60
23 (C.D. Cal. 2009) (granting motion to remand because the defendants “have not
24 established that Plaintiff could not amend her pleadings and ultimately recover against
25 [the allegedly sham defendant] for harassment under FEHA,” where the defendants
26 argued that the plaintiff “cannot maintain a claim for harassment.... based on the
27 asserted ‘facts’ alone”).


28 Defendants have not met their burden to overcome the “strong presumption

1 against removal.” *Gaus*, 980 F.2d at 566. The Court concludes that it lacks subject
2 matter jurisdiction over this case for lack of diversity.

3 **IV. Conclusion**

4 IT IS HEREBY ORDERED that the Motion for Remand is GRANTED. (ECF
5 No. 6). Pursuant to 28 U.S.C. § 1447(c), this action is REMANDED to San Diego
6 County Superior Court, where it was originally filed and assigned case number 37-
7 2014-00003934-CU-WT-CTL.

8 DATED: August 28, 2014

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10 **WILLIAM Q. HAYES**
United States District Judge

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