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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 ROBERT A. BACON, JR.,

11 Plaintiff,

12 v.

13 T-MOBILE USA, INC., a Delaware
14 Corporation,

15 Defendant.

Case No. C09-5608RJB

ORDER ON MOTION
FOR LEAVE TO AMEND
COMPLAINT

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17 This matter comes before the Court on Plaintiff's Motion for Leave to Amend the Complaint.
18 Dkt. 15. The Court has considered the motion, opposition to the motion, and the file herein.

19 **I. FACTS**

20 On September 3, 2009, Plaintiff filed this case alleging that Defendant discriminated against him
21 and failed to accommodate his disability contrary to Washington law, RCW 49.60, *et seq.*, and the
22 Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* Dkt. 1. He asserts that Defendants violated
23 the Family Medical Leave Act, 29 U.S.C. § 2654, *et seq. Id.* He makes reference to 42 U.S.C. § 2000E.
24 *Id.* Plaintiff also asserts that the Defendant intentionally or negligently inflicted emotional distress upon
25 him. *Id.* Plaintiff seeks damages, attorneys' fees and costs. *Id.*

26 Plaintiff now seeks leave to amend his complaint to add a state law claim for wrongful discharge
27 in violation of public policy. Dkt. 15. Plaintiff's proposed Amended Complaint states that:
28 "Plaintiff engaged in activity protected by public policy, the National Labor Relations Act, ("NLRA"), at

1 T-Mobile. Defendant terminated Mr. Bacon for engaging in such protected activity.” Dkt. 15-1, at 7.
2 Defendants oppose the motion, arguing that it is futile and that it would unfairly prejudice them. Dkt. 25.
3 Trial is set for September 27, 2010.

4 **II. DISCUSSION**

5 Fed. R. Civ. P. 15(a)(1) permits a party to amend the complaint before being served with a
6 responsive pleading; or within 20 days after serving the pleading if a responsive pleading is not allowed
7 and the action is not yet on the trial calendar. In all other cases, Fed. R. Civ. P. 15(a)(2) provides that “a
8 party may amend its pleading only with the opposing party's written consent or the court's leave. The
9 court should freely give leave when justice so requires.” “Five factors are taken into account to assess the
10 propriety of a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party, futility
11 of amendment, and whether the plaintiff has previously amended the complaint. Futility alone can justify
12 the denial of a motion to amend.” *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004)(*internal*
13 *quotations and citations omitted*).


14 Plaintiff’s motion to seek leave to amend his complaint should be denied because it is futile.
15 Plaintiff states that he does not make a claim under the NLRA, which would be preempted, but one under
16 Washington’s tort of termination in violation of public policy. Dkt. 27. Plaintiff argues that he is merely
17 drawing a standard from the NLRA. *Id.* To the extent that Plaintiff seeks to add a claim which is
18 arguably subject to § 7 or § 8 of the NLRA, the motion to amend the complaint should be denied. “The
19 general rule of preemption in labor cases is that if the activity relied on as the basis for a suit is arguably
20 subject to § 7 or § 8 of the NLRA, the States as well as the federal courts must defer to the exclusive
21 competence of the National Labor Relations Board.” *Lumber Production Indus. Workers Local No. 1054*
22 *v. West Coast Indus. Relations Ass'n, Inc.*, 775 F.2d 1042, 1048 (9th Cir. 1985). “[I]f a crucial element of
23 a state court action is identical to an element of an unfair labor practice that is arguably covered by the
24 NLRA, then the state action is preempted.” *Id.* Plaintiff’s attempt to circumvent the preemption clauses
25 in the NLRA are unavailing. Plaintiff argues that the Washington courts have permitted claims for
26 employment discrimination through the tort of wrongful termination in violation of public policy, for
27 example, where the employer had too few employees to be subject to the federal or state anti-
28 discrimination statutes. Dkt. 27. Plaintiffs does not cite to any case which would allow a Plaintiff to

1 premise their wrongful termination claim on violations of the NLRA. Plaintiff does not address the fact
2 that the statutory preemption language in the NLRA is sweeping. Plaintiff's motion to amend his
3 complaint for a claim of termination in violation of public policy in violation of the NLRA is futile. His
4 motion should be denied.

5 Therefore, it is hereby **ORDERED** that Plaintiff's Motion for Leave to Amend the Complaint.
6 (Dkt. 15) is **DENIED**.

7 The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any
8 party appearing *pro se* at said party's last known address.

9 DATED this 9th day of August, 2010.

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13 Robert J Bryan
14 United States District Judge

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