2005 WL 885604
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and Raul Tomas Gutierrez, Plaintiffs,
v.
INTERSTATE HOTELS, L.L.C., HMC Acquisition Properties, Inc., dba San Francisco Marriott at Fisherman's Wharf; John Trovato; Penny Richardson, Defendants.

No. C 04-04092 WHA. | April 14, 2005.

Attorneys and Law Firms

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Opinion

ORDER STRIKING DEFENDANTS' FIRST, SECOND, SIXTH, NINTH, SIXTEENTH, SEVENTEENTH AND EIGHTEENTH AFFIRMATIVE DEFENSES

ALSUP, J.

INTRODUCTION

***1** In this employment-discrimination case, intervenor Raul Tomas Gutierrez moves to strike portions of the answer of defendant HMC Acquisition Properties, Inc., and portions of the first amended answer of defendants Interstate Hotels, L.L.C., John Trovato, and Penny Richardson to his complaint in intervention. For the reasons stated below, this order strikes the first, second, sixth, ninth, sixteenth, seventeenth and eighteenth affirmative defenses of defendants' answer and denies plaintiff's motion to strike defendants' third, fifth, seventh, eighth, tenth, eleventh, thirteenth, and fourteenth affirmative defenses.

STATEMENT

In 2004, the Equal Employment Opportunity Commission filed a complaint alleging that Interstate Hotels, LLC, which manages the Marriott Hotel at Fisherman's Wharf in San Francisco, subjected charging party, Raul Tomas Gutierrez, and other Latino individuals to unlawful discrimination, harassment and retaliation based on their national origin pursuant to Title VII of the Civil Rights Act of 1964. Gutierrez moved to intervene and the motion was granted. Gutierrez then filed a complaint that included the original claims and alleged additional violations pursuant to the Civil Rights Act of 1866 and the California Fair Employment and Housing Act. He served the complaint on HMC Acquisition Properties, Inc., John Trovato, and Penny Richardson in addition to the original defendant, Interstate.

Interstate answered EEOC's complaint and the intervention complaint. Interstate then amended its answer to the intervention complaint by answering on behalf of the additional defendants, John Trovato and Penny Richardson. On the same date, HMC answered the intervention complaint. Both answers were identical in substance. Gutierrez informed defense counsel of his intent to move to strike; defense counsel replied with a detailed letter, stipulating to withdraw their seventeenth affirmative defense without prejudice (Herrington Exh. 1). In a timely manner, Gutierrez moved to strike HMC's answer to the

intervention complaint and Interstate's first amended complaint. While Gutierrez served separate motions they are identical in substance.[1]

ANALYSIS

FRCP 12(f) provides that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Rule 12(f) motions are proper when a defense is insufficient as a matter of law. *Cal. Dep't of Toxic Substances Control v. Alco Pac. Inc.,* 217 F.Supp.2d 1028, 1032-33 (C.D.Cal.2002). To determine that a defense is insufficient as a matter of law, "the court must be convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed. *Colaprico v. Sun Microsystems, Inc.,* 758 F.Supp. 1335, 1339 (N.D.Cal.1991); *SEC v. Sands,* 902 F.Supp. 1149, 1165 (C.D.Cal.1995). While courts are split on whether the moving party must show that it will be prejudiced unless the challenged pleading is stricken, the Ninth Circuit has held that striking portions of pleadings are proper, absent prejudice, if granting the motion to strike would make the trial less complicated or otherwise streamline resolution. *See Fantasy, Inc. v. Fogerty,* 984 F.2d 1524, 1528 (9th Cir.1993).

***2** Rule 12(f) is a vehicle by which to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Sidney Vinstein v. A.H. Robins Co.,* 697 F.2d 880, 885 (9th Cir.1983). When ruling on a motion to strike, a court must view the pleadings in the light most favorable to the non-moving party. *Xilinx Inc. v. Altera Corp. .,* 33 U.S.P.Q.2d 1149, 1152 (N.D.Cal.1994). The grounds for a motion to strike must appear on the face of the pleading under attack.

1. DEFENDANTS' FIRST AFFIRMATIVE DEFENSE.

Although lawyers often plead "failure to plead a claim" as an affirmative defense, it is not really an affirmative defense at all. Either the complaint states a claim for relief or it does not. If not, it can be challenged under Rule 12(b)(6). Inserting a so-called affirmative defense that no claim has been stated does not add or subtract from the complaint and failure to so defend in no way constitutes an admission that the complaint is well pled. The role of an affirmative defense under Rule 8(b) and (c) is to set forth additional matters beyond the four corners of the complaint constituting an "avoidance" to a well-pled claim. That is, a proper affirmative defense presumes that a claim has been stated and avers that, even so, additional circumstances bar or mitigate the claim, such as an accord and satisfaction not referenced in the complaint. Why lawyers continue to insert this counterfeit "defense" is strange and probably flows from an excess of caution. It is rarely challenged, however, because everyone recognizes that it is meaningless. But here plaintiff has taken the time to challenge it. It is surplusage. Therefore, the first affirmative defense is now STRICKEN.

2. DEFENDANTS' SECOND AFFIRMATIVE DEFENSE.

Defendants' second affirmative defense is that the conduct in the complaint is a just and proper exercise of management's discretion. Plaintiff argues this defense is insufficient as a matter of law because the common-law "managerial privilege" does not apply to statutory claims. This order agrees and STRIKES the second affirmative defense. A managerial privilege means that "a person in a managerial or supervisory role for a company or client cannot be personally liable to an injured party for injury stemming from a contract between the company and the injured." *Dehorney v. Bank of America Nat. Trust & Sav. Asso.,* 879 F.2d 459, 464 (9th Cir.1989). This privilege is akin to the privileges associated with intentional interference with contract or economic relationship. *Calero v. Unisys,* 271 F.Supp.2d 1172, 1179 (9th Cir.2003). We are unaware of any published case holding that the managerial privilege applies to insulate a defendant from liability for conduct in violation of public policy. One unpublished case, however, holds that the managerial privilege does not apply to Title VII and FEHA cases. *Ibironke v. Norpac Manufacturing Co. Inc.,* 1992 U.S. Dist. Lexis 8557, *17 (N.D.Cal.1992). There is no contractual dispute at issue here. Rather, plaintiff alleges that he was the target of harassment and discrimination. It appears from the pleadings that no scenario suitable for this defense will yet emerge. Therefore, the second affirmative defense is now stricken.

3. DEFENDANTS' THIRD AFFIRMATIVE DEFENSE.

***3** Plaintiff argues that defendants' third affirmative defense that plaintiff's claims are barred by the statute of limitations is insufficient as a matter of law. The Court disagrees. As defendants point out, in order to determine whether this defense is insufficient as a matter of law the Court would need to analyze numerous facts regarding the time-line of the events that frame this litigation. Again, given the broad and liberal scope that must be accorded the complaint, it cannot now be said, as a matter of law, that no scenario will emerge for which a statute of limitations defense will not apply.

4. DEFENDANTS' FIFTH AFFIRMATIVE DEFENSE.

Defendants' fifth affirmative defense is that plaintiff's claim for punitive damages violates the state and federal constitutions. Plaintiff argues that this defense is premature. This affirmative defense is not redundant, immaterial or impertinent. Whether or not this defense is premature is irrelevant to the instant motion. Later on, plaintiff might seize on any such omission to argue that defendants' point was waived by failure to raise it now. This order DENIES plaintiff's motion to strike this portion of defendants' answer.

5. DEFENDANTS' SIXTH AFFIRMATIVE DEFENSE.

Defendants' sixth affirmative defense is that plaintiff's claims are preempted by the Worker's Compensation Act to the extent that the claims seek a remedy for any alleged mental, emotional, or physical injuries. Plaintiff moves to strike on the basis that defendants' affirmative defense is insufficient as a matter of law. This order agrees and STRIKES defendants' sixth affirmative defense. Unlawful employment practices, such as discrimination, retaliation, and harassment, are violations of public policy that fall outside of the compensation bargain. Cal. Gov.Code § 12920. Relying on *Cole v. Fair Oaks Fire Protection,* 43 Cal.3d 148, 233 Cal.Rptr. 308, 729 P.2d 743 (1987), defendants argue that *if* plaintiff were to testify that he was exclusively seeking to recover damages relating to emotional distress, then there would be a question as to whether plaintiff's alleged emotional distress damages were encompassed within the compensation bargain and therefore preempted by WCA. This misstates the law. *Cole* states an employee may maintain an action against an employer for intentional infliction of emotional distress. *Id.* at 312. Furthermore, *Cole* did not decide whether the exclusive remedy provisions of the Labor Code bar causes of action created by statute. *Id.* at 157 n. 9, 233 Cal.Rptr. 308, 729 P.2d 743.

California's WCA does not bar tort claims stemming from actions that violate public policy such as harassment and discrimination. *Maynard v. City of San Jose,* 37 F.3d 1396, 1405 (9th Cir.1994). Specifically, the Ninth Circuit has held that under California law the exclusive remedy provision of worker's compensation law does not preclude employees from pursuing claims under FEHA. *Buckley v. Gallo Sales Co.,* 949 F.Supp. 737, 746 (N.D.Cal.1996). Therefore, the defense that plaintiff's claims are preempted by WCA is insufficient as a matter of law and this order STRIKES defendants' sixth affirmative defense.

6. DEFENDANTS' SEVENTH AND EIGHTH AFFIRMATIVE DEFENSES.

***4** Defendants' seventh affirmative defense alleges that, to the extent that plaintiff has suffered emotional distress, such distress was caused, in part, by conduct of a third party and defendants' eighth affirmative defense is that plaintiff has not suffered any damages as a result of defendants' alleged conduct. This order leaves in the seventh and STRIKES the eighth affirmative defense. At this time the Court cannot say, conclusively, that there can be no scenario in which any emotional distress was not caused, in part, by a third party. On the other hand, the eighth affirmative defense has no purpose. It is plaintiff's burden to prove that he has suffered damages. If plaintiff fails to do so, plaintiff will lose the claim and an affirmative defense to that effect is unnecessary. Again, the role of an affirmative defense is to set forth new matter beyond the minimum plaintiff must prove. Plaintiff already has to prove damages to obtain relief. Saying that plaintiff will fail to do so is nothing more than a denial, not an affirmative defense.

7. DEFENDANTS' NINTH AFFIRMATIVE DEFENSE.

Defendants' ninth affirmative defense is that at no time did defendants act purposely, knowingly, deliberately, maliciously, oppressively, intentionally, willfully, wantonly, with any bad faith or with conscious or reckless disregard toward plaintiff. Plaintiff alleges that motive, with regard to any of the claims, is not an affirmative defense. This order agrees and STRIKES defendant's ninth affirmative defense. If relevant to the claim, plaintiff must prove intent in its case in chief. For example,

plaintiff must prove that defendants acted intentionally to get a relief of punitive damages; consequently, defendants have no burden to affirmatively defend. With regard to Title VII and FEHA, plaintiff has the ultimate burden of proving that defendant intentionally discriminated against the plaintiff. As defendants correctly point out, because the objectives of FEHA are identical to Title VII, California courts have expressly adopted Title VII legal standards in interpreting and applying FEHA. *See e.g., Walker v. Blue Cross of California,* 4 Cal.App.4th 985, 997-98, 6 Cal.Rptr.2d 184 (1992). While the plaintiff does not need to show intent per se with regard to these statutory claims, the Supreme Court in *McDonnell Douglas v. Green* describes the burden-shifting that must take place against the back-drop of circumstantial evidence with regard to the intent element. 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). If the plaintiff establishes a *prima face* case of discrimination, a presumption of discrimination exists, and the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the action. If the employer is able to articulate a nondiscriminatory reason, the burden shifts back and plaintiff has the ultimate burden of showing that the defendant intentionally discriminated against the employee. This burden-shifting acknowledges an affirmative defense with regard to intent that is unlike defendants' ninth affirmative defense. Therefore, this Court STRIKES this defense.

8. DEFENDANTS' TENTH AFFIRMATIVE DEFENSE.

***5** Defendants' tenth affirmative defense alleges that plaintiff failed to exhaust all of his administrative remedies prior to filing suit and that such failure bars this suit. Plaintiff asserts this defense is insufficient as a matter of law. This order denies plaintiff's motion to strike this portion of defendants' answer. Exhaustion of administrative remedies is a prerequisite to filing a FEHA and Title VII claim. Cal. Govt.Code § 12965(b); *B.K.B. v. Maui Police Dep't,* 276 F.3d 1091, 1099 (9th Cir.2002) (requiring plaintiff to exhaust administrative remedies under Title VII); *Rojo v. Kliger,* 52 Cal Cal.3d 65, 88 (1990) (requiring plaintiff to exhaust administrative remedies under FEHA).

9. DEFENDANTS' ELEVENTH AFFIRMATIVE DEFENSE.

Defendants' eleventh affirmative defense alleges laches. Plaintiff contends this defense is insufficient as a matter of law. The Court disagrees with plaintiff and DENIES striking this defense. A laches defense is available to an employer and it cannot now be said, as a matter of law, that no scenario suitable for this defense will yet emerge. *National Railroad Passengers Corp. v. Abner Morgan,* 536 U.S. 101, 121, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).

10. DEFENDANTS' THIRTEENTH AFFIRMATIVE DEFENSE.

Defendants' thirteenth affirmative defense alleges that to the extent that plaintiff was subjected to unlawful discrimination, harassment, or retaliation by an employee or agent of the defendants, that employee or agent acted contrary to defendants' express policies and outside the course and scope of his or her employment-basically, this affirmative defense is that defendants are not vicariously liable for the acts of an employee whose behavior is outside the scope of his employment. Plaintiff contends that, for the reasons he cites regarding managerial privilege (second affirmative defense), this defense is redundant and insufficient as a matter of law.

The managerial privilege is wholly different from this defense based on the lack of vicarious liability. While the managerial privilege immunizes certain behavior by a manager who is acting in the interest of the company from liability, vicarious liability holds the company liable for certain behavior by employees that is within the scope of their employment.

Plaintiff has identified several entities and individuals, who are at different tiers of the supervision and management of the hotel, as responsible for the harassment and discrimination he suffered. Defendant Interstate is an agent of defendant HMC, and Interstate manages the hotel. Defendant John Trovato was the general manager of the hotel and the supervisor of the human resources director, defendant Penny Richardson. Richardson, in turn, was the supervisor of Cush Elavia, who is not a named defendant but who was the hotel food and beverages manager and directly supervised the plaintiff. Plaintiff alleges that Cush is the one who called him derogatory names and created a hostile work environment. Clearly, determining individual and vicarious liability will be a fact-intensive analysis, and it cannot now be said, as a matter of law, that no scenario suitable for this defense will yet emerge.

11. DEFENDANTS' FOURTEENTH AFFIRMATIVE DEFENSE.

***6** Defendants' fourteenth affirmative defense alleges that they exercised reasonable care to prevent and correct promptly any discriminatory, harassing, or retaliatory behavior and had policies with an accompanying complaint procedure in place ("The Ellerth/Faragher" defense. *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)). Plaintiff argues defense is insufficient as a matter of law. The Court disagrees and denies plaintiff's motion to strike this portion of defendants' answer. To determine whether an Ellerth/Faragher defense is applicable, the Court would have to resolve numerous issues of fact and law including whether a "tangible adverse employment action" existed and whether a complaint procedure was in place-inquiries that are not appropriate for a motion to strike.

12. DEFENDANTS' SIXTEENTH AND EIGHTEENTH AFFIRMATIVE DEFENSES.

Defendants' sixteenth affirmative defense alleges that the complaint is preempted by the Labor Management Relations Act. Defendants' eighteenth affirmative defense alleges that plaintiff failed to exhaust all grievances under the applicable Collective Bargaining Agreement. Plaintiff argues these defenses are insufficient as a matter of law. This order agrees and STRIKES the sixteenth and eighteenth affirmative defenses. Plaintiff's causes of actions under Title VII and FEHA are not preempted by Section 301 of the Labor Management Relations Act. The analysis for preemption must focus on whether the tort action either (1) "confers nonnegotiable state-law rights on employers or employees independent of any right established by contract" or (2) "whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corporation v. Lueck,* 471 U.S. 202, 213, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). Under the first scenario, Section 301 preempts; under the second, there is no preemption. Claims brought under Title VII and FEHA create an independent right to be free of discrimination separate from the contractual rights of the members of the bargaining unit under the Collective Bargaining Agreement. *See, e.g., Torrez v. Consolidated Corp. of Delaware,* 58 Cal.App.4th 1247, 1258, 68 Cal.Rptr.2d 792 (1997). The issues here involve purely factual questions regarding the conduct and motivation of employees and employers and find no meaning in the employment contract. Because this Court finds that there is no set of facts that could establish that the LMRA preempts plaintiff's Title VII and FEHA claims, this order STRIKES affirmative defenses sixteen and eighteen.

13. DEFENDANTS' SEVENTEENTH AFFIRMATIVE DEFENSE.

Defendants' seventeenth affirmative defense alleges that plaintiff's claims are barred because he failed to exhaust the internal complaint procedure. Parties have stipulated to striking this portion of defendants' answer. Therefore, this order STRIKES defendants' seventeenth affirmative defense.

CONCLUSION

***7** For the foregoing reasons, this order strikes the first, second, sixth, ninth, sixteenth, seventeenth and eighteenth affirmative defenses of defendants' answer and denies plaintiff's motion to strike defendants' third, fifth, seventh, eighth, tenth, eleventh, thirteenth, and fourteenth affirmative defenses.

IT IS SO ORDERED.

Footnotes

[1] In this order, Interstate, HMC, John Trovato and Penny Richardson are referred to collectively as "defendants," intervenor Gutierrez is referred to as "plaintiff" and the intervention complaint is referred to as the "complaint."