UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARK KANE,

Plaintiff,

v.

MATSON NAVIGATION COMPANY, INC., et al.,

Defendants.

Case No. 22-cv-04583-WHO

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Re: Dkt. No. 33

Defendant Matson Navigation Company, Inc. ("Matson") moves to dismiss four of plaintiff Mark Kane's claims arising from his termination as a seaman on one of Matson's ships, the M/V Kaimana Hila. Three of Kane's claims are fatally flawed and will be dismissed with prejudice. Kane's California Fair Employment and Housing Act ("FEHA") claim fails because FEHA does not apply extraterritorially; Kane was employed outside of California and the events giving rise to his claim for retaliation also occurred outside the state. His claims for breaches of contract and the implied covenant of good faith and fair dealing fail because they rely on a letter of warning, which is not a contract and lacks consideration. The final claim at issue, for unearned wages, may proceed at this juncture.

BACKGROUND

Kane was hired to work aboard the Kaimana Hila in September 2021. Second Am. Compl. ("SAC") [Dkt. No. 32] ¶ 16. According to the SAC, he got the job out of his union's hall in Honolulu, Hawaii, and then flew to Los Angeles County, where he signed onto the ship and began work on September 13. *Id*. Kane's shipping articles provided work for 90 days, plus 15 days to return to Long Beach, California, for a total of 105 days from September 13, 2021, to December 26, 2021. *Id*. ¶ 18.

According to the SAC, Kane performed and completed his work "as a prudent and competent merchant seaman," with no informal or formal admonishments. *Id.* ¶ 20. However, on December 6, 2021, the captain of the ship (Theodore Bernhard, who is also named as a defendant) issued a letter warning Kane that he had violated workplace policy. *Id.* ¶¶ 3, 20. A copy of the letter is attached to the SAC as Exhibit A. *See id.*, Ex. A.

Kane contends that this letter came in retaliation for his reporting that another sailor harassed and bullied him. SAC ¶ 20. According to the SAC, Bernhard read the letter to him in front of four shipmates, an experience that Kane described as "being dressed down" and "demoralizing and discriminatory." *Id.* ¶ 22. Bernhard allegedly then confined Kane to his quarters, told him "not to try to work," and said he would handcuff Kane if he left. *Id.* ¶ 25.

The next day, "[w]ithout the opportunity to correct any alleged deficiencies" in the warning letter, Bernhard issued another letter terminating Kane. *Id.* ¶ 26. Bernhard then discharged Kane from the ship in Guam. *Id.* ¶ 31. Matson also placed Kane on its "do not hire list" for two years. *Id.* ¶ 32.

Kane filed this suit in August 2022. Dkt. No. 1. After the defendants moved to dismiss, he filed a First Amended Complaint alleging retaliation in violation of FEHA, breach of contract, breach of good faith and fair dealing, intentional interference with economic relations, defamation, and intentional infliction of emotional distress ("IIED"). Dkt. No. 18. Upon another motion from the defendants, I dismissed all but the defamation and IIED claims, with leave to amend. Dkt. No. 31. Kane then filed the SAC, alleging retaliation (again in violation of FEHA), breaches of contract and good faith and fair dealing, defamation, IIED, and unearned wages. Dkt. No. 32. Matson moved to dismiss all but the defamation and IIED claims. Dkt. No. 33.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads facts that allow the court to "draw the reasonable inference that the defendant is liable for

the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 570.

In deciding whether the plaintiff has stated a claim upon which relief can be granted, the court accepts his allegations as true and draws all reasonable inferences in his favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

If the court dismisses the complaint, it "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). In making this determination, the court should consider factors such as "the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment." *Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

DISCUSSION

I. FEHA CLAIM

Among other things, FEHA prohibits an employer from retaliating against an employee because the employee opposed any practices forbidden under the law. *See* Cal. Gov't Code § 12940(h). Kane's first cause of action alleges that he was retaliated against in violation of section 12940 "for the protected activity of reporting a violation of his ability to work free of bullying and harassment." SAC ¶ 44.

Matson argues that FEHA has no extraterritorial effect beyond California and that the adverse employment actions at issue (including reading the warning letter and Kane's subsequent termination) occurred outside the state, in Guam. Mot. to Dismiss ("MTD") [Dkt. No. 33-1] 15:3-16:3. Matson further contends that Kane "performed the majority of his job duties outside the state" and in international waters during the 105-day voyage from Long Beach, California, to Piti,

Guam. *See id*. at 16:3-5. And, it argues, because Matson is incorporated and has its principal place of business in Hawaii, Kane has no grounds upon which he could assert a claim under FEHA. *Id*. at 16:10-15.

Kane frames the issue as a "question of choice of (state) law under the binding federal maritime law" rather than one of extraterritorial application. Oppo. [Dkt. No. 37] 9:7-10. Although his response is difficult to follow, at its core, he argues that "while on the high seas . . . the vessel is effectively an extension of California territory," meaning he "continued to enjoy the protections of California law while on the high seas, and the presumption against extraterritorial application of California laws does not apply." *See id*. at 10:1-13:12, 17:11-13.

"State statutes are presumed not to have extraterritorial effect." *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1061 (N.D. Cal. 2014). "[T]he majority of courts in California and other jurisdictions have found that the extraterritorial application of FEHA is determined by the situs of both employment and the material elements of the cause of action, as opposed to residence of the employee or the employer." *Russo v. APL Marine Servs., Ltd.*, 135 F. Supp. 3d 1089, 1094 (C.D. Cal. 2015) (citing cases).

Russo is instructive. There, the plaintiff argued that FEHA should apply extraterritorially because she was a California resident who signed aboard a U.S.-flagged vessel with a home port in Oakland, California, at that vessel's Oakland port. *See id*. at 1094. The court held that the plaintiff could not assert claims under FEHA because "the majority of [her] occupational duties and the alleged harassment took place on the high seas." *Id*. at 1095-96. Similarly, in *Campbell v. Arco Marine, Inc.*, 42 Cal. App. 4th 1850, 1858-59 (1996), the California Court of Appeal held that a Washington resident could not assert claims under FEHA because she was hired while living in Washington, "her official functions were performed on the high seas," and the majority of the alleged harassment "took place while the ships were at sea," rendering the relationship with California "slight." The court noted that "[a]pplying the FEHA in this situation would raise serious constitutional concerns" under the Commerce Clause. *Id*. at 1858.

Kane discredits *Russo* because it did not "consider acts in both international waters and territorial water" and *Campbell* because it involved a resident of another state. Oppo. at 10:1-19,

15:3-25. These attacks are ineffective. Whether Kane can assert a claim under FEHA depends on "the situs of both employment and the material elements of the cause of action," not where he resides. *See Russo*, 135 F. Supp. 3d at 1094. As alleged, the facts at issue parallel those in *Russo* and *Campbell*. Like the plaintiff in *Campbell*, Kane was hired outside of California, in Hawaii. *See* SAC ¶ 16. Like the plaintiff in *Russo*, he is a California resident who signed aboard a U.S.-flagged vessel in California. *See id*. ¶¶ 1, 3, 16. As in both cases, the majority of his work appears to have been performed outside of California—either in international waters or in or near Guam, which is also where the alleged acts underlying his retaliation claim occurred. *See id*. ¶¶ 4, 18, 20 (alleging that he reported harassment and bullying on November 22, 2021, more than two months after leaving Long Beach on September 13, 2021, and that he received the letter of warning on December 6, 2021), and 31 (alleging that he was discharged in Guam on December 7, 2021). And like the defendants in these cases, Matson is incorporated and has its headquarters outside of California, and there are no allegations that anyone in California ratified the alleged conduct so as to tie it to a California cause of action. *See id*. ¶ 2 (alleging that Matson is a corporation organized under the laws of Hawaii and has its principal place of business there); *see also Russo*, 135 F. Supp. at 1095 (stating that the "connection of plaintiff's termination to California is remote at best," in part because to the extent that the defendant ratified the termination decision, it was a Delaware corporation with Arizona headquarters); *Campbell*, 42 Cal. App. 4th at 1858 (stating that although the defendant was headquartered in California, "no one in its headquarters participated in or ratified the conduct").

Both the situs of Kane's employment and the material facts underlying his retaliation claim occurred outside of California. Whether they occurred on the high seas does not matter under *Russo*. Kane cannot assert a claim under FEHA. The claim is DISMISSED.

II. CONTRACT-BASED CLAIMS

Kane's second cause of action alleges breach of contract based on the December 6, 2021, letter of warning. SAC ¶¶ 56-65. Matson argues that the claim should be dismissed because Kane has not alleged the existence of a valid contract. MTD at 17:1-9. Specifically, it contends that Kane has failed to show any consideration by himself or Matson. *See id*.

Kane's response focuses on whether the letter of warning constitutes a maritime contract or one arising under California law. Oppo. at 17:15-20:5. This is a red herring, as it both contradicts Kane's own pleading (which alleges that "there was a contract made in accordance with maritime law and California state law applies") and does not contest that consideration is also required for maritime contracts. *See id.*; *see also* SAC ¶ 65. Without any argument otherwise, I will assume that for the letter of warning to constitute a valid contract under either state or maritime law, consideration is required. *See* Cal. Civ. Code § 1550 (stating that a contract requires: (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration); *see also Clevo Co. v. Hecny Transp., Inc.*, 715 F.3d 1189, 1194 (9th Cir. 2013) (stating that "[b]asic principles in the common law of contracts readily apply in the maritime context" and describing the "requisite elements" as "offer, acceptance, and consideration").

Under California law, consideration is

> [a]ny benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor.

See Cal. Civ. Code § 1605. "Consideration is present when the promisee confers a benefit or suffers a prejudice." *Property Cal. SCJLW One Corp. v. Leamy*, 25 Cal. App. 5th 1155, 1165 (2018). But that benefit or prejudice "must actually be bargained for as the exchange for the promise." *Id.* (citation and quotation marks omitted). The same is true under the common law, where "a performance or a return promise must be bargained for" to constitute consideration, and "[a] performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." *See* Restatement (Second) of Contracts § 71. Under both California law and the common law, performance of a legal duty owed to a promisor is not consideration. *See id*. § 73; *San Luis Obispo Loc. Agency Formation Comm'n v. City of Pismo Beach*, 61 Cal. App. 5th 595, 600 (2021) ("A promise to do something the promisor is legally bound to do is not consideration.").

Matson first argues that there was no consideration on its part because, as alleged, Matson agreed in the letter of warning "not to wrongfully terminate plaintiff, i.e., not to violate the law,"

and because "contracts requiring a party to abide by the law lack adequate consideration and are therefore invalid." MTD at 17:9-14 (citing SAC ¶¶ 11, 32, 60). According to Matson, it "already had a legal obligation not to wrongfully terminate plaintiff and thus this same obligation cannot form the basis of a valid contract." *Id*. at 18:5-6. Matson also asserts that because Kane "already had an obligation to comply with Matson's workplace policies, his promise to do so based on the [letter of warning] is not adequate consideration." *Id*. at 18:7-9.

Kane responds that the letter of warning constitutes an "additional behavioral/contractual requirement" that "basically said, if you do these things, we will continue to employ you (i.e., not terminate you)." Oppo. at 21:3-8. He further contends that his consideration was "behaving in a particular and prescribed manner based on the . . . team based policies . . . that was not specified prior" to his receipt of the warning letter, and thus not part of any existing employment contract. *See id*. at 21:3-21.

Kane misinterprets the letter of warning. It does not contain any bargained-for promise by either Matson or Kane. *See* SAC, Ex. A. It asserted several infractions of company policy and put Kane on notice that he was "in direct violation of the vessel's safe work environment policy and must change." *See id*. The letter concludes:

> It is with hopes that this letter of warning is received well and understood that if changes are not made that this will be considered grounds for termination for cause. Your actions and your demeanor must align with Matson's and the Kaimana Hila's team based policies.

Id. Kane's name and signature appear at the end of the document, under the notation: "The following was read to me and understood." *Id*.

The language does not contain any benefit or prejudice to or by either party, nor any performance or return promise. The letter does not promise Kane that he will remain employed; instead, it states that if he does not change his behavior, he could be terminated. Nor does it constitute a promise by Kane to abide by Matson policies. Instead, the letter warns Kane that he has violated company policies and could be terminated if he continued to do so. Even if Kane somehow promised to abide by the team based policies, the most that Matson promised—assuming that it made any promise at all—was that it would not unlawfully terminate him, which

is a legal obligation that it already had.

Kane's breach of contract claim fails because he has not adequately alleged a valid contract. The same issue sinks his claim for breach of the implied covenant of good faith and fair dealing, which also "require[s] the existence of a contract." *See Oster v. Caithness Corp.*, No. 16-CV-03164-WHO, 2017 WL 3727174, at *5 (N.D. Cal. Aug. 30, 2017) (stating that one of the elements of a good faith and fair dealing claim is that "the plaintiff and the defendant entered into a contract"). Kane's contract-based claims are DISMISSED with prejudice.[1] This is his second attempt to plead these claims, which were previously based on his union's collective bargaining agreement ("CBA") with Matson or Kane's shipping articles, and thus preempted by section 301 of the LMRA. *See* Order Granting Mot. to Dismiss ("First MTD Order") [Dkt. No. 31] 5:9-8:5. With no other document that could serve as a contract giving rise to these claims, amendment would be futile.

III. WAGES CLAIM

Kane's sixth cause of action alleges a violation of 46 U.S.C. § 10318, which provides in part that if a

> seaman is discharged involuntarily, and it appears that the discharge was not because of neglect of duty, incompetency, or injury incurred on the vessel, the master shall provide the seaman with employment on a vessel agreed to by the seaman or shall provide the seaman with one month's extra wages.

See SAC ¶¶ 91-106; 46 U.S.C. § 10318(d).[2] The SAC alleges that Kane was "discharged in a foreign port involuntarily" on the basis of retaliation (and "not on account of neglect of duty, incompetency or injury"), and is thus entitled to unearned wages from December 7 through December 27, 2021. *See* SAC ¶¶ 101-103. The SAC further alleges that because Matson failed to

[1] Because Kane has not plausibly alleged that the letter of warning constituted a valid contract, I need not address Matson's argument that the good faith and fair dealing claim should also be dismissed as duplicative. *See* MTD at 18:20-19:18. I also need not reach Matson's argument that these claims are preempted or time-barred under section 301 of the Labor Management Relations Act ("LMRA"). *See id.* at 19:19-20:22.

[2] Although the SAC does not identify which subsection of section 10318 it invokes, the allegation that Kane's discharge "was not on account of neglect of duty, incompetency or injury, but upon the basis of retaliation" and that he is entitled to a month's worth of wages tracks the language of section 10318(d).

pay Kane through December 27, 2021, he is entitled to double wages for every day that those wages remain unpaid. *See id*. ¶ 94.

Matson argues that this claim fails as a matter of law because it is "subject to the exclusive remedy under 46 U.S.C. § 10313(c)," which states:

> When a seaman who has signed an agreement is discharged improperly before the beginning of the voyage or before one month's wages are earned, without the seaman's consent and without the seaman's fault justifying discharge, the seaman is entitled to receive from the master or owner, in addition to wages earned, one month's wages as compensation.

See MTD at 16:16-27; 46 U.S.C. § 10313(c). But Matson does not cite any authority that states that section 10313(c) provides the "exclusive remedy" for a claim arising under section 10318, nor otherwise connect any dots between the two statutory provisions. *See* MTD at 16:16-27. Instead, it proffers a 2001 case from the Eastern District of Louisiana, where the court granted summary judgment on the unopposed argument that the plaintiff could not recover under section 10313(c) because he was discharged after the voyage began and after one month's wages were earned. *See id*. (citing *Myles v. Sabine Transp. Co.*, 164 F. Supp. 2d 801, 804 (E.D. La. 2001). This is a far cry from establishing that section 10313(c) provides the exclusive authority for Kane's claim.

Alternatively, Matson argues that this claim is preempted by section 301 of the LMRA because it seeks to vindicate a right afforded to Kane under the CBA. MTD at 20:24-21:7. I am not persuaded. The case that Matson relies upon discusses section 301's preemption of state law claims, as does my prior Order dismissing as preempted Kane's prior claims for breach of contract, breach of good faith and fair dealing, and intentional interference with economic relations. *See Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1151 (9th Cir. 2019) ("The central dispute on appeal is whether Curtis's claims, which he styles as state law claims, are preempted by § 301 of the LMRA."); *see also* First MTD Order at 4:1-8:24. As pleaded, Kane's cause of action alleges a violation of federal, not state, law. SAC ¶¶ 91-106. And the CBA provision that Matson points to provides sailors the right to "come back to the area in the United States where they shipped before they must leave their ship." *See* MTD at 21:1-8. On its face, this provision does not contemplate the payment of wages, which is at the heart of Kane's claim. Again, Matson has

not connected the dots between its argument and the allegations underlying this claim.

Additional argument or further discovery may ultimately prove this claim futile. For now, however, it may proceed.

CONCLUSION

Matson's motion to dismiss is GRANTED in part and DENIED in part. Kane's first, second, and third claims are DISMISSED with prejudice. His sixth claim for unpaid wages may proceed as pleaded.

IT IS SO ORDERED.

Dated: March 26, 2023

William H. Orrick
United States District Judge