NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BYRON LEE,

Plaintiff-Appellant,

v.

AT&T SERVICES, INC., a Delaware Corporation; et al.,

Defendants-Appellees,

and

JAIME V. BENAVIDES, individually and as agent/employee/supervisor of AT&T Services, Inc./Pacific Bell; LEE VAGATAI, individually and as agent/employee/supervicor of AT&T Services/Pacific Bell,

Defendants.

No. 18-56415

D.C. No. 2:17-cv-04642-FMO-SS

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Fernando M. Olguin, District Judge, Presiding

Submitted March 3, 2020**

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

MIME-Version:1.0 From:cacd_ecfmail@cacd.uscourts.gov To:ecfnef@cacd.uscourts.gov Message-Id:<26324021@cacd.uscourts.gov>Subject:Activity in Case 2:17-cv-04642-FMO-SS Byron Lee v. AT&T Services, Inc./Pacific Bell, et al Order on Motion for Summary Judgment Content-Type: text/html

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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Case Number:	2:17-cv-04642-FMO-SS
Filer:	
Document Number:	82

Docket Text:
MINUTES (IN CHAMBERS) ORDER RE: PENDING MOTIONS by Judge Fernando M. Olguin. Defendants' Motion for Summary Judgment [30] is granted. Plaintiff's Motion for Summary Judgment [50] is denied as moot. (iv)

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	**CV 17-4642 FMO (SSx)**	Date	**September 24, 2018**
Title	**Byron Lee v. AT&T Services, Inc./Pacific Bell, et al.**		

Present: The Honorable	Fernando M. Olguin, United States District Judge	
Vanessa Figueroa	None	None
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorney Present for Plaintiff:	Attorney Present for Defendants:	
None Present	None Present	

Proceedings: **(In Chambers) Order Re: Pending Motions**

Having reviewed and considered all the briefing filed with respect to defendants AT&T Services, Inc. ("AT&T") and Pacific Bell Telephone Company's ("Pacific Bell") (collectively "defendants") Motion for Summary Judgment or, in the Alternative, Summary Adjudication (Dkt. 30, "Motion"), and plaintiff Byron Lee's ("plaintiff" or "Lee") Motion for Summary Judgment (Dkt. 50, "Plf. Motion"), the court finds that oral argument is not necessary to resolve the Motions, see Fed. R. Civ. P. 78; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and concludes as follows.

INTRODUCTION

Lee, proceeding pro se, filed this action in Los Angeles County Superior Court on January 25, 2017, (see Dkt. 4-2, Complaint), against AT&T, Pacific Bell, Jaime V. Benavides ("Benavides"), and Lee Vagatai ("Vagatai"), asserting claims for: (1) violation of the California Fair Employment and Housing Act ("FEHA"), Cal. Gov. Code §§ 12940, et seq., (see id. at ¶¶ 28-31); (2) intentional infliction of emotional distress ("IIED"), (see id. at ¶¶ 32-43); (3) negligent infliction of emotional distress ("NIED"), (see id. at ¶¶ 44-48); and (4) breach of contract.[1] (See id. at ¶¶ 49-57). On June 23, 2017, defendants removed the action to this court. (See Dkt. 4, Notice of Removal).

[1] On August 18, 2017, plaintiff dismissed Benavides and Vagatai from this action. (See Dkt. 23, Notice of Dismissal).

STATEMENT OF FACTS[2]

On November 9, 1998, Lee began his employment with Pacific Bell as a service technician. (Dkt. 30-2, Statement of Uncontroverted Facts ("SUF") at P1). From May 14, 2004, through September 2015, plaintiff worked as a Communications Technician, (id. at P5), a position in which he was expected to drive a Pacific Bell company vehicle. (Id.; Dkt. 31-2, Deposition of Byron Lee ("Lee Depo") at 119-120; Dkt. 32, Declaration of Debra Paniagua in Support of Defendants' [] Motion for Summary Judgment ("Paniagua Decl.") at ¶¶ 3 & 5). Vagatai was plaintiff's supervisor from approximately 2011 until about September 25, 2015. (Dkt. 30-2, SUF at P9; Dkt. 32, Paniagua Decl. at ¶ 4).

Plaintiff received Pacific Bell's Network Operations GFS West Region Standards ("Standards") on at least two occasions – February 1, 2012, and January 19, 2015 – and understood that they applied to his employment. (Dkt. 30-2, SUF at P11 & P12; Dkt. 31-2, Lee Depo at 125-26 ("Q: . . . And you understood that the network operations GFS standards policies applied to you as an employee of the company? A: Sure."); id. at 127-28 & 136-37; Dkt. 31-7 ("Acknowledgments"); Dkt. 31-8 ("Standards"); Dkt. 32-4, Loss of Driver's License Through Suspension or Revocation ("Driver's License Policy"); Dkt. 32-5, AT&T's Code of Business Conduct). Among other things, the Standards advise employees that they may be disciplined if they drive a company vehicle without a valid driver's license:

> If you are found driving a company vehicle or driving your personal vehicle while performing company business and you do not have a valid license you would be subject to disciplinary action up to and including dismissal. . . . GFS West has a Loss of Driver's License policy that applies to [all] employees, salaried and non-salaried. . . . The employee is responsible for notifying their supervisor of the impending loss of their driving privilege before the effective

[2] Unless otherwise indicated, the following facts are undisputed or contain disputes that are not material. However, the court notes that Lee failed to comply with the court's local rules relating to motions for summary judgment. The party opposing summary judgment must submit a"Statement of Genuine Disputes" that sets forth the material facts as to which it is contended there is a genuine dispute that needs to be litigated. Local Rule 56-2. Although Lee submitted a "Statement of Genuine Issues of Material Fact in Dispute," (Dkt. 38), he did not attempt to dispute the facts set forth in defendants' Statement of Uncontroverted Facts ("SUF"). (See, generally, Dkt. 38, "Statement of Genuine Issues"). Rather, he sets out facts disputing the grounds upon which defendants seek summary judgment. (See, generally, id.). Because Lee does not contest any of the facts set forth in defendants' SUF, the court may deem those facts as undisputed if they are adequately supported. See Local Rule 56-3. The court recognizes that Lee is proceeding pro se. However, pro se litigants are still expected to comply with applicable court rules. See Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995).

date of the suspension or revocation.

(Id.; Dkt. 31-8, Standards at 14) (emphasis added).

Lee also received a copy of the company's Driver's License Policy. (See Dkt. 31-2, Lee Depo at 129-131; Dkt. 32-4, Driver's License Policy; Dkt. 31-4, Acknowledgment re Company Vehicle Driving; Dkt. 31-15, Acknowledgment re Driver's License Policy[3]). Under that policy, if three conditions are satisfied, including that the "employee notifies supervision of the impending loss of their driving privilege, or the Company is informed of the impending loss through the Department of Motor Vehicles (DMV) Pull Notice Program, on/or before the effective date of the suspension of revocation[,]" (Dkt. 32-4, Driver's License Policy at 1), then "[o]n the date of suspension or revocation, [the Company should] place the employee on an unpaid absence for a maximum of 30 calendar days." (Id.; see Dkt. 30-2, SUF at P20). Among other things, the employee may during the 30-day period "[o]btain a valid . . . driver's license."[4] (Dkt. 30-2, SUF at P20).

Lee understood he needed to have a valid driver's license to be able to operate a company vehicle, that it was against company policy to drive with a suspended license, and that if he violated such policies, it could result in disciplinary action, including termination.[5] (See Dkt. 30-2,

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[3] The 2015 acknowledgments state that "Employee decline[d] to sign." (See Dkt. 31-4, Acknowledgment re Company Vehicle Driving; Dkt. 31-15, Acknowledgment re Driver's License Policy). In his deposition, plaintiff did not dispute that he received the acknowledgments and that he declined to sign them. (See Dkt. 31-2, Lee Depo at 128-29 & 137-38). Plaintiff testified that he had a practice of refusing to sign documents "out of caution[,]" (id. at 123), but he understood that even if he refused to sign an acknowledgment, he was still obligated to comply with the policies. (See id.).

[4] Another option an employee has is to use the "Automated Upgrade and Transfer System (AUTS) to transfer or upgrade to another job that does not require a . . . driver's license" or request temporary placement in a lateral or downgraded job "identified by the employee." (Dkt. 32-4, Driver's License Policy at 1-2). Lee testified that he did not seek such options. (See Dkt. 31-2, Lee Depo at 134-35).

[5] Lee testified as follows during his deposition:

"Q: And you understood that you needed a valid driver's license to be able to operate [a company] vehicle, correct?
A: Yes.
Q: And that license could not be suspended, correct?
A: Correct.

SUF at P16 & P21-22; Dkt. 31-2, Lee Depo at 96-97, 121, 126-28, 139; see also Dkt. 31-7, Acknowledgments; Dkt. 31-15, Acknowledgment re Driver's License Policy).

While working for Pacific Bell, Lee was a member of the Communications Workers of America ("CWA") Union, Local 9504. (Dkt. 30-2, SUF at P23; Dkt. 31-2, Lee Depo at 53; Dkt. 32, Paniagua Decl. at ¶ 6). Between April 8, 2012 and April 9, 2016, Pacific Bell and CWA were parties to a collective bargaining agreement ("CBA"). (Dkt. 30-2, SUF at P24; see also Dkt. 32, Paniagua Decl. at ¶ 6; Dkt. 32-6 - 33, Exh. U ("CBA")). Aside from the CBA, Lee did not have a contract or employment agreement with Pacific Bell. (Dkt. 30-2, SUF at P26; Dkt. 31-2, Lee Depo at 221-22). Lee knew that as a member of the CWA Union, the CBA governed the terms and conditions of his employment. (See Dkt. 30-2, SUF at P25; Dkt. 31-2, Lee Depo at 57). Lee was familiar with the terms of the CBA, and served as a union steward, which included advocating for the rights of other employees. (Dkt. 30-2, SUF at P27; Dkt. 31-2, Lee Depo at 53-60).

The CBA contains grievance procedures. (Dkt. 30-2, SUF at P28; Dkt. 32-6 - 33, Exh. U, CBA at 79-91). Lee understood that all disciplinary actions against him would be subject to the CBA. (Dkt. 30-2, SUF at P29; Dkt. 31-2, Lee Depo at 60). Specifically, he understood the grievance procedures and deadlines, and that the grievance process included an arbitration proceeding. (Dkt. 30-2, SUF at P30-P31; Dkt. 31-2, Lee Depo at 58-62).

Lee's driver's license was suspended from September 17, 2014, to December 2, 2015. (Dkt. 30-2, SUF at P33; Dkt. 31-11, DMV Records at ECF 918; see also Dkt. 31-2, Lee Depo at 157-58 (not disputing DMV records); Dkt. 33-1, DMV Driver Record Information). Lee did not inform anyone at Pacific Bell about his suspended license prior to its suspension, that is, prior to September 17, 2014. (Dkt. 30-2, SUF at P34; Dkt. 31-2, Lee Depo at 154-55 & 215 (testifying he became aware of the suspension in December 2014)). Lee continued to drive Pacific Bell's company vehicles in violation of the Standards. (Dkt. 30-2, SUF at P35; Dkt. 31-2, Lee Depo at 157-58, 171-72, 215; Dkt. 32, Paniagua Decl. at ¶ 8).

On December 15, 2014, plaintiff was stopped by a police officer for driving over the speed limit. (See Dkt. 37, [Plaintiff's] Declaration in Support of Opposition to Motion for Summary

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> Q: And did you understand that these were the policies and procedures of the company?
> A: Correct.
> Q: And did you understand that if you were in violation of these policies and procedures, that could result in disciplinary action that would include termination of your employment?
> A: Correct."

(Dkt. 31-2, Lee Depo at 121).

Judgment [] ("Plf. Decl."), Exh. D ("Police Courtesy Report") at ECF 1405; Dkt. 41, [Plaintiff's] Exhibit: Amendment to Plaintiff Declaration ("Amendment") at ECF 1436; see also Dkt. 36, [Plaintiff's] Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment ("Plf. Opp. Memo") at 3; Dkt. 4-2, Complaint at ¶ 15). According to the Police Courtesy Report provided to plaintiff, plaintiff was cited for driving with a suspended license. (See Dkt. 37, Plf. Decl., Exh. D, Police Courtesy Report at ECF 1405). Because the officer noticed that the vehicle belonged to AT&T/Pacific Bell, he allowed plaintiff, as a courtesy, to call his supervisor to retrieve the vehicle, in lieu of having the vehicle impounded. (See id.). Plaintiff called his supervisor who retrieved the vehicle. (See id.). According to plaintiff, Vagatai was the supervisor who plaintiff called and picked up the vehicle. (See Dkt. 36, Plf. Opp. Memo at 3).

Pacific Bell's Standards require all technicians to submit to an annual road observation audit with their managers. (See Dkt. 30-2, SUF at P37; Dkt. 32, Paniagua Decl. at ¶ 7). In August 2015, plaintiff's department was informed of their impending audit. (See Dkt. 30-2, SUF at P37). Lee sought to schedule time off work while his audit was pending, raising the suspicion of Debbie Paniagua, a Pacific Bell Supervising Manager. (Id. at P38; Dkt. 32, Paniagua Decl. at ¶ 7). On or about September 3, 2015, Paniagua requested the status of plaintiff's driver's license from the California DMV. (Dkt. 30-2, SUF at P39; Dkt. 32, Paniagua Decl. at ¶ 8). The next day she received the DMV Driver Record Information report, indicating that plaintiff's driver's license had been suspended since September 17, 2014. (Dkt. 30-2, SUF at P39-P40; Dkt. 32, Paniagua Decl. at ¶ 8; Dkt. 33-1, DMV Driver Record Information)). Paniagua contacted the DMV and spoke with a DMV representative, who confirmed that plaintiff's license had been suspended since September 17, 2014. (Dkt. 30-2, SUF at P39-P40; Dkt. 32, Paniagua Decl. at ¶ 8). Paniagua then contacted Vagatai and asked him to contact plaintiff to determine if the DMV report was correct, and if it was, plaintiff would need to be suspended.[6] (Dkt. 30-2, SUF at P41; Dkt. 32, Paniagua Decl. at ¶ 9).

On or about September 5, 2015, Vagatai asked Lee for his driver's license. (Dkt. 30-2, SUF at P42; Dkt. 32, Paniagua Decl. at ¶ 9; Dkt. 31-2, Lee Depo at 175-78). Lee told Vagatai that he did not have his license because he did not have his wallet. (Dkt. 30-2, SUF at P42). He told Vagatai that he would go home and look for it since he was out the previous night and could not find the "little plastic group of cards" in which he kept his license. (Id.; Dkt. 32, Paniagua Decl. at ¶ 9; Dkt. 31-2, Lee Depo at 178). Later that same day, Lee called Vagatai and told him, "hey, Lee, I don't have it, but I'll go into the D.M.V., which was – it was Labor Day weekend so I couldn't get into the D.M.V. until the next workday[.]" (Dkt. 30-2, SUF at P43; Dkt. 31-2, Lee Depo at 178-79; Dkt. 32, Paniagua Decl. at ¶ 9; Dkt. 33-3, September 5, 2015, Vagatai Email ("September 5 Email")). Lee was immediately placed on suspension, pending an investigation, and the CWA was

[6] Paniagua confirmed that Lee had been driving Pacific Bell's company vehicle while his license had been suspended. (Dkt. 30-2, SUF at P40; Dkt. 32, Paniagua Decl. at ¶ 8; Dkt. 33-2, Plaintiff's Attendance Records)

notified of the suspension. (Dkt. 30-2, SUF at P44; Dkt. 32, Paniagua Decl. at ¶ 9; Dkt. 33-3, September 5 Email; Dkt. 31-2, Lee Depo at 179 & 181). Lee was represented by CWA during the investigation, (Dkt. 30-2, SUF at P45), which confirmed that Lee had been driving a company vehicle with a suspended license. (Dkt. 30-2, SUF at P46; Dkt. 32, Paniagua Decl. at ¶ 10).

On September 15, 2015, plaintiff inadvertently received an email communication which appeared to be directed to Vagatai which stated that "we now have support from both Labor and Legal for the termination of Byron Lee." (See Dkt. 37, [Plaintiff's] Declaration in Support of Opposition to Motion for Summary Judgment [] ("Plf. Decl."), Exh. C (September 15 Email), at ECF 1400-01). The email noted that a meeting needed to be scheduled with plaintiff to "ask him about the citation that he received for driving on a suspended license on 12/15/2014 while driving a company vehicle, which he failed to report as per guidelines." (Id.). The email also stated: "You can simply ask him about this citation as a continuation of the investigation, take your notes and recess, and then come back and re-convene as a disciplinary meeting and terminate him." (Id.). Attached to the email was a document that appeared to be talking points. (See id.) ("Included please find the talk piece for you all.").

In a September 17, 2015, letter to Lee, Vagatai confirmed Lee's suspension as of September 5, 2015, and requested that Lee return to work on September 24, 2015. (Dkt. 30-2, SUF at P47; Dkt. 32, Paniagua Decl. at ¶ 11; Dkt. 33-4, September 17, 2015, Letter). Lee returned to work on September 24, 2015, and attended a meeting with Vagatai, Jose Martindelcampo, another manager, and Rick Kennedy ("Kennedy"), Lee's CWA representative and the president of CWA. (Dkt. 30-2, SUF at P48). Plaintiff did not produce a valid driver's license at the meeting. (See Dkt. 30-2, SUF at P49; Dkt. 32, Paniagua Decl. at ¶ 12). Pacific Bell representatives told Lee that he was terminated, effective September 25, 2015, for operating company vehicles with a suspended driver's license. (See Dkt. 30-2, SUF at P50; Dkt. 32, Panigua Decl. at ¶ 12). Lee filed grievances through the CWA, which were denied. (Dkt. 30-2, SUF at P52). Lee did not submit his dispute to arbitration. (Id. at P54).

On September 4, 2015, before he was fired from Pacific Bell, Lee filed a voluntary Chapter 13 bankruptcy petition.[7] (Dkt. 30-4, RJN at Exh. A; Dkt. 31-2, Lee Depo at 103). Lee admits that he did not list the claims in this case as assets in his bankruptcy case. (Dkt. 30-2, SUF at P57). He understood that he had a duty to disclose all assets to the bankruptcy trustee during the

[7] Defendants request that the court take judicial notice of several filings in Lee's bankruptcy case. (Dkt. 30-3, Defendants [] Request for Judicial Notice ("RJN")). Having reviewed the documents attached to the RJN, the court will take judicial notice of the subject documents. See Fed. R. Evid. 201(b); United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) (court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue") (internal quotation marks and citation omitted).

proceedings in his case. (Id. at P62). Plaintiff also filed a complaint with the Equal Employment Opportunity Commission on February 26, 2016 before filing the complaint in this case on January 25, 2017.[8] (Id. at P59).

LEGAL STANDARD

Rule 56(a) of the Federal Rules of Civil Procedure authorizes the granting of summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The standard for granting a motion for summary judgment is essentially the same as for granting a directed verdict. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). Judgment must be entered "if, under the governing law, there can be but one reasonable conclusion as to the verdict." Id.

The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). If the moving party fails to carry its initial burden of production, "the nonmoving party has no obligation to produce anything." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1102-03 (9th Cir. 2000) ("Nissan Fire").

If the moving party has sustained its burden, the burden then shifts to the nonmovant to identify specific facts, drawn from materials in the file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. See Celotex, 477 U.S. at 324, 106 S.Ct. at 2553; Anderson, 477 U.S. at 256, 106 S.Ct. at 2514 (A party opposing a properly supported motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial.").[9] A factual dispute is material only if it affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth. SEC v. Seaboard Corp., 677 F.2d 1301, 1306 (9th Cir. 1982). Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322, 106 S.Ct. at 2552; see Anderson, 477 U.S. at 252, 106 S.Ct. at 2512 (parties bear the same substantive burden of proof as would apply at a trial on the merits).

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[8] Although plaintiff is proceeding pro se, an attorney prepared the Complaint in this action. (See Dkt. 1, Civil Cover Sheet at 3).

[9] "In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." Local Rule 56-3.

In determining whether a triable issue of material fact exists, the evidence must be considered in the light most favorable to the nonmoving party. See Barlow v. Ground, 943 F.2d 1132, 1134 (9th Cir. 1991), cert. denied, 505 U.S. 1206, 112 S.Ct. 2995 (1992). However, summary judgment cannot be avoided by relying solely on "conclusory allegations [in] an affidavit." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188 (1990); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986) (more than a "metaphysical doubt" is required to establish a genuine issue of material fact). "The mere existence of a scintilla of evidence in support of the plaintiff's position" is insufficient to survive summary judgment; "there must be evidence on which the [fact finder] could reasonably find for the plaintiff." Anderson, 477 U.S. at 252, 106 S.Ct. at 2512.

DISCUSSION

I. STANDING.

Defendants assert that Lee does not have standing to pursue his claims, arguing that his claims belong to the bankruptcy estate. (Dkt. 30-1, Defendants['] Memorandum of Points and Authorities in Support of Motion for Summary Judgment or, in the Alternative, Summary Adjudication ("Memo") at 13-15). When a debtor declares bankruptcy, "all legal or equitable interests of the debtor in property as of the commencement of the case" becomes property of the estate. See 11 U.S.C. § 541(a)(1). A trustee serving as the representative of the bankruptcy estate is the only proper party with standing to prosecute a cause of action that belongs to the estate. See In re Eisen, 31 F.3d 1447, 1451 n. 2 (9th Cir. 1994). A plaintiff-debtor does not have standing to pursue a claim that belongs to the bankruptcy estate unless he can show that his claims were: (1) exempt from the bankruptcy estate or (2) abandoned by the bankruptcy trustee. See Rowland v. Novus Fin. Grp., 949 F.Supp. 1447, 1453 (D. Haw. 1996).

Many courts, however, have allowed a plaintiff-debtor to proceed with his or her claim when the underlying bankruptcy is based on Chapter 13 rather than Chapter 7. See, e.g., Wilson v. Dollar Gen. Corp., 717 F.3d 337, 343 (4th Cir. 2013); Smith v. Rockett, 522 F.3d 1080, 1082 (10th Cir.2008); Crosby v. Monroe Cty., 394 F.3d 1328, 1331 n. 2 (11th Cir. 2004); Cable v. Ivy Tech State Coll., 200 F.3d 467, 470 (7th Cir. 1999), overruled on other grounds by, Hill v. Tangerlini, 724 F.3d 965, 967 n.1 (7th Cir. 2013); Olick v. Parker & Parsley Petroleum Co., 145 F.3d 513, 515 (2d Cir. 1998); Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1210 n. 2 (3d Cir.1991). This is because "Chapter 13 . . . provides a different framework. Under Chapter 13, the debtor remains in possession of the property of the estate and cures his indebtedness, under the supervision of the trustee, by way of regular payments to creditors from his earnings through a court approved payment plan." Wilson, 717 F.3d at 343-44 (citing 11 U.S.C. §§ 1306(b), 1322); Olick, 145 F.3d at 516). Because a Chapter 13 debtor retains possession of his property, the debtor ordinarily will have the right to sue in his or her own name. See Fed. R. Civ. P. 17(a)(1)(G); Wilson, 717 F.3d at 344. In contrast, Chapter 7 is a "much more radical solution," as it requires debtors to relinquish possession of their estate to the trustee for liquidation and distribution to

creditors. See Wilson, 717 F.3d at 343 (quotation marks and citation omitted). Under Chapter 7, "the trustee's management of the estate – including causes of action that are part of the estate – must necessarily be free from interference by the debtor." Id.

Although the Ninth Circuit has not addressed whether a Chapter 13 debtor has standing to pursue claims initiated after filing for bankruptcy, see Edwards, 2013 WL 3467215, at *9, the court follows the overwhelming appellate authority allowing a debtor to do so. See Wilson, 717 F.3d at 343 (collecting cases). Thus, it is not fatal to Lee's case that he did not disclose his claims to the bankruptcy court, because the causes of action in this case belong to him, not the bankruptcy trustee.[10] See 11 U.S.C. § 1306(b).

II. LABOR MANAGEMENT RELATIONS ACT.

A. Preemption.

The next issue is whether the Labor Management Relations Act ("LMRA") preempts plaintiff's claims. If the LMRA does not preempt any of plaintiff's claims, then the court lacks subject matter jurisdiction over this action because plaintiff does not have a federal cause of action. See Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429 (1987). "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Id. at 392, 107 S.Ct. at 2429. The "well-pleaded complaint rule" makes the plaintiff the "master of the claim" and allows him to "avoid federal jurisdiction by exclusive reliance on state law." Id. It is settled law that a case generally may not be removed to federal court on the basis of a federal defense, including a defense of preemption. Id., 482 U.S. at 393, 107 S.Ct. at 2430.

However, the "complete preemption rule" applies when the "preemptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for the purposes of the well-pleaded complaint rule." Id. (quoting Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65, 107 S.Ct. 1542, 1547 (1987)). When complete preemption applies, a defendant may remove a state claim to federal court. Beneficial Nat. Bank v. Anderson, 539 U.S. 1, 8, 123 S.Ct. 2058, 2063 (2003). Complete preemption applies to claims arising out of § 301 of

[10] Similarly, the court declines to find judicial estoppel because plaintiff failed to disclose his claims to the bankruptcy court. See New Hampshire v. Maine, 532 U.S. 742, 750, 121 S.Ct. 1808, 1814 (2001). First, Lee's position in this case is not clearly inconsistent with anything he presented to the bankruptcy court. Second, Lee did not successfully persuade the bankruptcy court of anything; in fact, the bankruptcy court dismissed his case. (See Dkt. 30-12, RJN, Exh. I). Third, defendants have not provided any evidence showing that Lee would receive an unfair advantage if he is allowed to proceed with this case.

the LMRA. See Caterpillar, 482 U.S. at 394, 107 S.Ct. at 2430. "The preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization." Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 23, 103 S.Ct. 2841, 2853 (1983) (internal quotation marks, footnote, and citation omitted).

Defendants argue that complete preemption applies to plaintiff's entire action because all of his claims relate to how defendants fired him in violation of his rights under the CBA. (See Dkt. 30-1, Memo at 17). Specifically, defendants argue that Lee's breach of contract claim is preempted by the LMRA because it is really a claim that Pacific Bell violated the CBA.[11] Indeed, Lee concedes that his breach of contract claim is really a claim that Pacific Bell breached its obligations under the CBA. (See Dkt. 31-2, Lee Depo at 222 ("Q: So when you . . . allege a claim for breach of contract, do you mean that the breach of the obligations under that collective bargaining agreement? A: Yes."). The LMRA preempts state-law claims that are substantially dependent upon analysis of a collective bargaining agreement. Adkins v. Mireles, 526 F.3d 531, 539 (9th Cir. 2008). Here, the LMRA preempts Lee's breach of contract claim because Lee is alleging that Pacific Bell did not comply with its obligations under the CBA.

Next, defendants assert that Lee's FEHA claim is preempted because Lee admits that the CBA covers all disciplinary actions taken against him – specifically requiring him to utilize the grievance process. (Dkt. 30-2, SUF at P29; Dkt. 30-1, Memo at 17). Defendants' assertion is unpersuasive because FEHA provides a free-standing claim independent of the CBA. See Cal. Gov. Code §§ 12940, et seq.; Klausen v. Warner Bros. Television, 158 F. Supp. 3d 925, 930 (C.D. Cal. 2016) ("[T]he rights conferred by FEHA are defined and enforced under state law without reference to the terms of any collective bargaining agreement.") (internal quotation marks and citation omitted). As such, it is not preempted by the LMRA.

Lee's IIED and NIED claims are also not preempted. Plaintiff's IIED claim is based on his allegation that Pacific Bell did not give him 30 days to correct any error relating to the suspension of his driver's license. (Dkt. 4-2, Complaint at ¶ 33), while his NIED is based on Pacific Bell's failure to properly investigate whether his license was valid. (Id. ¶ 45). IIED and NIED claims are generally preempted by the LMRA if a collective bargaining agreement specifically covers the claims. See Humble v. Boeing Co., 305 F.3d 1004, 1013-15 (9th Cir. 2002) (stating that "if the CBA specifically covers the conduct at issue, the claim will generally be preempted. . . . [whereas], if the CBA does not 'cover' the allegedly extreme and outrageous conduct, the intentional infliction claim will not [be] preempted[,]" and that same reasoning applies to NIED claims) (footnotes omitted). Here, plaintiff's claims arise out of Pacific Bell's alleged failure to comply with the

[11] Although Lee is a non-signatory to the CBA, he has standing to allege that Pacific Bell violated the CBA. See Milne Emps. Ass'n v. Sun Carriers, Inc., 960 F.2d 1401, 1407 (9th Cir. 1992), cert denied, 508 U.S. 959 (1993).

Standards and Loss of Driver's License Policy in that plaintiff alleges that the policies allowed him to cure his suspended driver's license within 30 days. (See Dkt. 4-2, Complaint at ¶¶ 33 & 45). But there is nothing in the CBA discussing these policies. (See, generally, Dkt. 32-6 - 33, Exh. U CBA). Because Lee's IIED and NIED claims are not based on the CBA and do not require an interpretation of the CBA, the claims are not preempted by the LMRA.

In short, since Lee's breach of contract claim is preempted by the LMRA, the court has subject matter jurisdiction over this action.[12] See 29 U.S.C. § 185(a). Although Lee's FEHA, IIED, and NIED claims are not preempted, the court has supplemental jurisdiction to consider the merits of these claims. See 28 U.S.C. § 1367.

B. Merits of LMRA Claim.

Before filling suit under the LMRA, Lee was required to have exhausted available grievance procedures and arbitration remedies. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220, 105 S.Ct. 1904, 1915 (1985). "A rule that permit[s] an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." Id. (internal citation omitted).

Defendants argue that Lee's LMRA claim fails because he did not exhaust his grievance procedures before filing suit. (Dkt. 30-1, Memo. at 18-19). The court agrees. The CBA allows unresolved grievances to be submitted to an arbitrator. (See Dkt. 30-2, SUF at P28 & P31; Dkt. 32-6, Exh. U, CBA at § 7.08). Although the arbitration provision is optional, (Dkt. 32-6, Exh. U, CBA at § 7.08) ("Any grievance not resolved under Subsections 7.05A and 7.05B may be taken to arbitration under the provisions of Section 7.10 or 7.15."), a litigant must use available arbitration proceedings to satisfy the exhaustion requirement. See Lueck, 471 U.S. at 204 n.1, 105 S.Ct. at 1908 n. 1 ("The use of the permissive 'may' is not sufficient to overcome the presumption that parties are not free to avoid the contract's arbitration procedures."). Since Lee did not submit his claim to arbitration, (Dkt. 30-2, SUF at P54), his LMRA claim is barred.

[12] The court notes that even if plaintiff's claim was not preempted by the LMRA, the claim still fails because the undisputed evidence establishes that plaintiff's license was suspended as of September 2014, (Dkt. 31-11, DMV Records at ECF 918; see also Dkt. 31-2, Lee Depo at 157-58 (not disputing DMV records); Dkt. 32, Paniagua Decl. at ¶ 8; Dkt. 33-1, DMV Driver Record Information), and that plaintiff's failure to report the suspension prior to the suspension becoming effective violated the Standards and Driver's License Policy. (See Dkt. 31-8, Standards at 14; Dkt. 32-4, Driver's License Policy at 1).

Therefore, court grants defendants summary judgment on Lee's LMRA claim.[13] See Lueck, 471 U.S. at 220-21, 105 S.Ct. at 1915-16.

III. FEHA.

FEHA's purpose is to "protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, color, sex, national origin, and other enumerated characteristics." Sheffield v. L.A. Cty. Dep't of Soc. Servs., 109 Cal.App.4th 153, 160 (2003). Plaintiff, however, does not allege that he was terminated for any discriminatory purpose. (See, generally, Dkt. 4-1, Complaint). Further, no evidence has been produced suggesting or indicating such a purpose. (See, generally, Dkt. 30-2, SUF; Dkt. 31-2, Lee Depo)

Although Lee's complaint is not completely clear, it appears that he is alleging that defendants wrongfully terminated him in violation of the public policy underlying the FEHA – not that defendants violated the FEHA by firing him. (See Dkt. 4-2, Complaint at ¶ 29; Dkt. 30-1, Memo at 19-21). However, Lee has not identified a public policy that was violated by his termination. (See, generally, Dkt. 4-2, Complaint at ¶ 29); see Keshe v. CVS Pharmacy, Inc., 2016 WL 1367702, *4 (C.D. Cal. 2016) ("To recover in tort for wrongful discharge in violation of public policy, the plaintiff must show the employer violated a public policy affecting society at large rather than a purely personal or proprietary interest of the plaintiff or employer. In addition, the policy at issue must be substantial, fundamental, and grounded in a statutory or constitutional provision.") (internal quotation marks omitted) (quoting Holmes v. Gen. Dynamics Corp., 17 Cal.App.4th 1418, 1426 (1993)); Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1238, 1256 (1994). "Claims of wrongful termination in violation of public policy generally fall into one of four categories:

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[13] This determination moots Lee's motion with respect to his breach of contract claim. (See Dkt. 51, Memorandum of Points and Authorities in Support of Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56 ("Plf. Memo.") at 4) ("Plaintiff summary judgment motion is based on breach of contract and punitive damage (abusive investigation.)"). To the extent plaintiff contends that the LMRA claim should survive because Kennedy and defendants conspired to have him fired, (see, e.g., id. at 4; Dkt. 52, Declaration in Support of Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56 ("Lee MSJ Decl.") at 2-3); Dkt. 60, Plaintiff['s] Reply to Defendants['] Opposition to Plaintiff['s] Motion for Summary Judgment ("Plf. Reply") at 3), such contention is without merit as it is unsupported by any facts or evidence. (See, generally, Dkt. 50, Plf. Memo; Dkt. 52, Lee MSJ Decl.; Dkt. 60, Plf. Reply). The court agrees with defendants' assessment that the "sum total of Plaintiff's Motion is a conjured conspiracy theory, summarized in the following statement: 'corruption, collusion and conspiracy between Local 9504 President Rick Kennedy and AT&T Manager Lee Vagatai, Jorge Moreno.'" (Dkt. 57, Defendants AT&T Services, Inc. and Pacific Bell Telephone Company's Opposition to Plaintiff's Motion for Summary Judgment ("Def. Opp.") at 7).

the employee was terminated because (1) he refused to violate a statute; (2) he performed a statutory obligation; (3) he exercised a constitutional or statutory right or privilege; or (4) he reported a statutory violation for the public's benefit." Keshe, 2016 WL 1367702, at *4. Here, the evidence is undisputed that defendants terminated Lee for operating a company vehicle without a valid driver's license, in violation of the Standards, Driver's License Policy, and state law. (See Dkt. 31-2, Lee Depo at 96-97 & 121-22; Dkt. 31-8, Standards at 14; Dkt. 32-4, Driver's License Policy at 1; Dkt. 33-1, DMV Driver Record Information; Dkt. 32, Paniagua Decl. at ¶¶ 10-12; see also Dkt. 31-11, DMV Records at ECF 918[14]). Thus, the court finds there is no genuine issue of material fact regarding plaintiff's FEHA claim.

IV. IIED AND NIED CLAIMS.

The elements of an IIED claim are: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." Miller v. Fortune Commercial Corp., 15 Cal.App.5th 214, 228-29 (2017) (internal quotation marks and citation omitted). The outrageous conduct "must be so extreme as to exceed all bounds of that usually tolerated in a civilized society." Id. "The negligent causing of emotional distress is not an independent tort, but the tort of negligence. The traditional elements of duty, breach of duty, causation, and damages apply. Whether a defendant owes a duty of care is a question of law." Spates v. Dameron Hosp. Ass'n, 114 Cal.App.4th 208, 213 (2003) (internal quotation marks, alterations, and emphasis omitted).

Here, defendants have put forth undisputed evidence showing that Lee was required to notify the company before his license was suspended to be eligible for the 30-day grace period and that Lee was fired for not following this requirement, i.e., driving a company vehicle with a suspended license. (See Dkt. 31-8, Standards at 14; Dkt. 31-7, Acknowledgments; Dkt. 32-4, Driver's License Policy at 1; Dkt. 31-4, Acknowledgment re Company Vehicle Driving; Dkt. 31-15, Acknowledgment re Driver's License Policy). Lee has not provided any evidence showing defendants misrepresented their policy. Under the circumstances, no reasonable jury could conclude that Pacific Bell's decision to fire Lee was "extreme and outrageous." See Yurick v. Superior Court, 209 Cal.App.3d 1116, 1129 (1989) ("Depending on the idiosyncracies of the plaintiff, offensive conduct which falls along the remainder of the spectrum may be irritating, insulting or even distressing but it is not actionable and must simply be endured without resort to legal redress."). The court finds there is no genuine issue of material fact regarding Lee's IIED claim.

[14] DMV Records indicate that the DMV mailed a notice to plaintiff in August 2014, notifying him of the impending suspension of his license. (See Dkt. 31-11, DMV Records at ECF 918).

Finally, Lee argues that Pacific Bell is liable for NIED for firing him before conducting a thorough investigation into the status of his license. Assuming Pacific Bell had a duty not to fire Lee before conducting a thorough investigation into the status of his license, the undisputed evidence shows that defendants did not breach this duty. Pacific Bell inquired into the status of Lee's driver's license after they became suspicious of his attempts to avoid an automobile audit. The undisputed evidence shows that Pacific Bell contacted the DMV multiple times, held multiple meetings with Lee's supervisors to determine the status of his license, and engaged in a union grievance procedure before firing him for operating a company vehicle without a license. In short, the court finds that there is no genuine issue of material fact regarding Lee's NIED claim.[15]

This Order is not intended for publication. Nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT:

1. Defendants' Motion for Summary Judgment **(Document No. 30)** is **granted**.

2. Plaintiff's Motion for Summary Judgment **(Document No. 50)** is **denied as moot**.

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[15] Because the court has granted summary judgment to defendants on all of Lee's claims, the court does not consider defendants' remaining arguments. Moreover, given that none of plaintiff's claims survive defendants' Motion, plaintiff's claim for punitive damages is moot, and thus his summary judgment motion related to this remedy is moot.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 2 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BYRON LEE,

Plaintiff-Appellant,

v.

AT&T SERVICES, INC., a Delaware Corporation; et al.,

Defendants-Appellees,

and

JAIME V. BENAVIDES, individually and as agent/employee/supervisor of AT&T Services, Inc./Pacific Bell; LEE VAGATAI, individually and as agent/employee/supervisor of AT&T Services/Pacific Bell,

Defendants.

No. 18-56415

D.C. No. 2:17-cv-04642-FMO-SS
Central District of California,
Los Angeles

ORDER

Before: MURGUIA, CHRISTEN, and BADE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Lee's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 24) are denied.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BYRON LEE,

Plaintiff-Appellant,

v.

AT&T SERVICES, INC., a Delaware Corporation; et al.,

Defendants-Appellees,

and

JAIME V. BENAVIDES, individually and as agent/employee/supervisor of AT&T Services, Inc./Pacific Bell and LEE VAGATAI, individually and as agent/employee/supervicor of AT&T Services/Pacific Bell,

Defendants.

No. 18-56415

D.C. No.
2:17-cv-04642-FMO-SS
Central District of California,
Los Angeles

ORDER

Before: CANBY and GRABER, Circuit Judges.

A review of the district court docket reflects that on October 25, 2018, the district court granted appellant leave to proceed in forma pauperis on appeal. Appellant's motion to proceed in forma pauperis on appeal (Docket Entry No. 2) is therefore unnecessary.

AC/MOATT

Appellant's motion for appointment of counsel (Docket Entry No. 5) is denied. No motions for reconsideration, clarification, or modification of this denial shall be filed or entertained.

The opening brief is due April 29, 2019. The answering brief is due May 29, 2019. The optional reply brief is due within 21 days after service of the answering brief.

Because appellant is proceeding without counsel, the excerpts of record requirement is waived. *See* 9th Cir. R. 30-1.2. The supplemental excerpts of record are limited to the district court docket sheet, the notice of appeal, the judgment or order appealed from, and any specific portions of the record cited in the answering brief. *See* 9th Cir. R. 30-1.7.