

FILED
San Francisco County Superior



SEP 14 2017

CLERK OF THE COURT

BY: [Signature] Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

JOHN DOE, ET AL,
Plaintiffs,
vs.
GOOGLE, INC., et al.,
Defendants.

Case No. CGC – 16-556034

**ORDER SUSTAINING IN PART WITH
LEAVE TO AMEND ADECCO'S
DEMURRER TO THIRD AMENDED
COMPLAINT**

I heard argument September 13, 2017 on Defendant Adecco's Demurrer to Third Amended Complaint (TAC). Google previously demurred to this complaint, contending counts 1-17 are preempted by the National Labor Relations Act (NLRA), and the claims are subject to the exclusive jurisdiction of the National Labor Relations Board (NLRB). I sustained Google's demurrer without leave to amend as to counts 1-17. Order Sustaining in Part and Overruling in Part Google's Demurrers (entered June 27, 2017) at 14 ("Order"). Adecco now demurs to the TAC on the same basis, i.e., that counts 1-17 are preempted. Adecco also contends that count 18 is time-barred.

I assume here familiarity with the Order and won't repeat its discussions.

1 **Requests For Judicial Notice**

2 Plaintiffs request judicial notice of (1) a March 17, 2017 letter from Google’s counsel to
3 the LWDA, (2) the April 28, 2017 NLRB complaint against Google, (3) plaintiffs’ opposition to
4 Google’s demurrer to the First Amended Complaint, (4) plaintiff’s opposition to Google’s
5 demurrer to the TAC, (5) the complaint filed against Adecco in the matter of *Moniz v. Adecco*
6 *USA, Inc.*, Case No. 17CIV1736 (San Mateo Superior Court), (6) the complaint filed against
7 Binary Capital Management in the matter of *Lai v. Binary Capital Management LLC*, Case No.
8 17CIV2882 (San Mateo Superior Court), and (7) the complaint filed in the matter of *Veeva*
9 *Systems Inc. v. Medidata Solutions, Inc. et al.*, Case No. 17CIV2882 (San Mateo Superior
10 Court). Except for the opposition to Google’s demurrer to the TAC, none of the other documents
11 are helpful to the determination here. The opposition to Google’s demurrer to the TAC is only
12 marginally relevant. It is noticed. The rest of the requests are denied. *Cuevas v. Contra Costa*
13 *Cty.*, 11 Cal. App. 5th 163 n. 14 (2017) (no notice if not necessary to the decision); *Duran v.*
14 *Obesity Research Inst., LLC*, 1 Cal. App. 5th 635, 653 (2016) (same).

17 In a footnote, Adecco requests judicial notice of documents related to the NLRB
18 complaint against Google that were submitted in support of Google’s demurrer to the TAC.
19 MPA at 1 n.1. It is not permissible to seek judicial notice in a footnote in a memorandum of
20 points and authorities. CRC 3.1113 (I) (separate document requirement). The request is denied.

22 **Counts 1–17 – NLRA Preemption**

23 Plaintiffs contend that there is no preemption, because the NLRA has no jurisdiction over
24 Correa (the only plaintiff alleged to have also worked for Adecco). Plaintiffs argue former
25 employees are not within the NLRA’s definition of an “employee.” I dealt with this in the
26 Order, which noted that former *nonsupervisory* employees have had their claims preempted by
27

1 the NLRA. Correa is not alleged to be a supervisory employee, nor can it be reasonably inferred
2 from the TAC that she was a supervisor or manager. Instead, she was subject to the control of a
3 supervisor. TAC ¶ 15. And under the NLRA, an “employee” includes “any individual whose
4 work has ceased” 29 U.S.C. § 152(3). Former employees are contemplated by NLRA
5 preemption.
6

7 Plaintiffs alluded to, but did not flesh out, a possibly distinct issue, which is that Correa
8 was not terminated as a result of a “protected activity.” Opposition at 2. The NLRA states that
9 an employee includes any individual whose work has ended “as a consequence of, or in
10 connection with, any current labor dispute or because of an unfair labor practice.” 29 U.S.C.
11 § 152(3). This was not previously raised in Google’s demurrer. It is not alleged why Correa’s
12 employment ended. It is not clear that Correa’s work ended in connection to a current labor
13 dispute or due to an unfair labor practice. Plaintiffs contend this is something they can allege if
14 granted leave to amend. Opposition at 4.
15

16 **“Concerted activities” under the NLRA**

17 I have held that each of the activities complained of in causes of action 1 through 17 are
18 “concerted activities” under the NLRA, and that plaintiffs’ claims are within the purview of the
19 NLRB. Order at 11–14. The same allegedly unlawful activities are found in both Google’s and
20 Adecco’s policies and agreements. TAC ¶¶ 22, 24, 26–34, 45–53. The policies and agreements
21 are alleged to impose similar restrictions and prohibitions. TAC ¶¶ 22, 24, 26–34. Plaintiffs
22 have not identified any distinction between Google and Adecco’s policies.
23

24 **Count 18 – Illegal “Social Event” and “GBike” Releases**

25 This cause of action, alleging violation of Labor Code § 432.5, is barred by the one year
26 statute of limitations under PAGA. C.C.P. § 340(a). Correa executed the allegedly illegal Social
27

1 Event and GBike Releases in August 2015. TAC ¶ 95. She sent a PAGA letter to the LWDA on
2 February 14, 2017. *Id.* ¶ 101. She first asserted her claims against Adecco in the Second
3 Amended Complaint filed on March 23, 2017.
4

5 The parties agree that the statute of limitations for a PAGA claim is one year, and that the
6 statute begins to run when the agreement is first executed. MPA at 7–8; Opposition at 13–14.

7 Plaintiffs contend that because the releases that Correa was required to sign “never went
8 away” and continued throughout her employment without being rescinded and without her
9 obligations under the releases being released, liability existed for each new pay period.

10 Opposition at 13. Accordingly, continuous accrual doctrine applies. *Id.*

11 But the cause of action here accrues when the employer “require[s] any employee . . . to
12 agree, in writing, to any term or condition which is known . . . to be prohibited by law.” Lab.
13 Code § 432.5. Correa executed the Social Event and GBike releases once, in 2015. There is also
14 no allegation or inference that Correa signed *any* releases or agreements (with Google or
15 Adecco) after this one event. This cause of action as to Adecco is time-barred.
16

17 **Leave to Amend**

18 Plaintiffs assert that they will be able to amend the TAC, if the demurrer is sustained, to
19 “untether” Correa’s claims from Google’s policies, and focus on Adecco’s policies and
20 agreements. Opposition at 10, 12. They contend that they will be able to amend the complaint
21 such that the Court can determine whether Adecco’s policies and agreements are unlawful
22 without making any decision as to the restrictive impact of those policies and agreements, which
23 would be addressed by the NLRB.
24

25 It is unclear how the proposed amendments would avoid overlap with the NLRB’s
26 jurisdiction, or avoid a determination of the crucial element of the claims (which the NLRB will
27

1 address). Perhaps an amendment may take Correa out of the NLRA’s definition of an
2 “employee”. At argument, plaintiffs’ counsel seemed to offer to rewrite most of the complaint to
3 distinguish the Google from the Adecco policies. This will not necessarily obviate factual
4 allegations made in the TAC. Weil & Brown, et al., CALIFORNIA PRACTICE GUIDE: CIVIL
5 PROCEDURE BEFORE TRIAL ¶¶ 7:48-7:48a (Rutter: 2017). Nevertheless, the issue of amendment,
6 at least at this stage, generally, favors the pleader, and leave to amend will be granted.
7

8
9 **Conclusion**

10 The demurrers are sustained. No leave to amend is granted for count 18. Leave to
11 amend for counts 1–17 is granted and an amended complaint is due not later than September 25,
12 2017 and responses to it are due not later than 14 calendar days after service.
13

14
15
16
17
18 Dated: September 14, 2017



Curtis E.A. Karnow
Judge of The Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

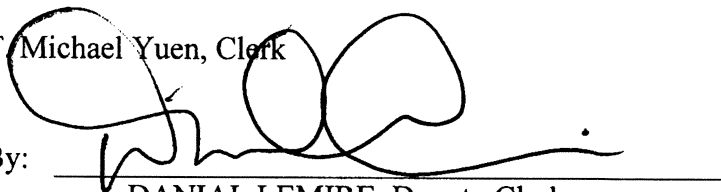
I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On **SEP 15 2017**, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: **SEP 15 2017**

T. Michael Yuen, Clerk

By:



DANIAL LEMIRE, Deputy Clerk