Case: 13-17457, 03/03/2016, ID: 9887706, DktEntry: 54-1, Page 1 of 7

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BERNADET GUEVARRA, Plaintiff - Appellant, v. SETON MEDICAL CENTER, et al., Defendants - Appellees.	No. 13-17457 D.C. No. 4:13-cv-02267-CW MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, Senior District Judge, Presiding

Argued and Submitted February 10, 2016
San Francisco, California

Before: HAWKINS and MURGUIA, Circuit Judges and MURPHY,** District Judge.

Plaintiff-Appellant Bernadet Guevarra ("Guevarra") was terminated from her position as a nurse at Seton Medical Center ("Seton") after she posted a message on her Facebook page that contained perceived threats against her supervisor. A

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

** The Honorable Stephen Joseph Murphy III, United States District Judge for the Eastern District of Michigan, sitting by designation.

colleague of Guevarra's reported her post to Seton officials. The California Unemployment Insurance Appeals Board ("CUIAB") subsequently denied her unemployment benefits. After the conclusion of both her unemployment benefits proceedings and a state bench trial in a civil rights suit Guevarra filed against Seton,[1] Guevarra initiated this action against the CUIAB, its Chairman Robert Dresser ("Dresser"), and Seton.

She now appeals the dismissal with prejudice of her federal constitutional due process and freedom of speech claims under 42 U.S.C. § 1983 against the CUIAB and Dresser, and her breach of contract and California Constitution free speech claims against Seton. Guevarra also moves the Court to certify to the California Supreme Court the question of whether a violation of the California Constitution's free speech clause requires state action. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the dismissal and deny Guevarra's motion for certification.

I. Claims Against the CUIAB and Dresser

The CUIAB found Guevarra ineligible for benefits under Unemployment Insurance Code section 1256 because she was fired for "misconduct connected with work." The CUIAB held that Guevarra was let go because her Facebook

[1] At oral argument, the parties informed the Court that the state court ruled for Seton, and Guevarra's appeal is currently pending.

post—visible to all her "friends" on the site, including fellow Seton employees—violated Seton's policy against threatening or using abusive language against co-workers.

Dissatisfied, Guevarra filed a petition for writ of administrative mandate in San Mateo County Superior Court. She hinged her petition on the theory that the CUIAB's decision abridged her constitutional freedoms. Since Guevarra failed to name Seton, a real party in interest, and was precluded from doing so by the statute of limitations, the superior court upheld the CUIAB's decision and dismissed her petition with prejudice.

The *Rooker-Feldman* doctrine now precludes federal subject matter jurisdiction over her claims against the CUIAB and Dresser because they comprise a de facto appeal of the state court's dismissal of Guevarra's petition. *Rooker-Feldman* applies when a plaintiff asserts error by the state court as an injury, and seeks relief from the state court judgment as a remedy. *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004).

Here, Guevarra does both. Adjudication of her constitutional claims would necessitate examining the state court's decision, and granting relief would require disturbing it. *See Bianchi v. Rylaarsdam*, 334 F.3d 895, 901–02 (9th Cir. 2003) (holding that due process claim against state court judge for bias was "inextricably

intertwined" with the state court's decision, and thus beyond the federal court's subject matter jurisdiction).

Second, Guevarra's § 1983 claims fail because the CUIAB enjoys absolute Eleventh Amendment immunity from suits for damages and the injunctive relief Guevarra seeks. *See Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985). The Eleventh Amendment likewise insulates Dresser, named in his official capacity, from Guevarra's claim for damages, and she fails to plead his personal involvement in her case, beyond merely citing his status as Chairman of the CUIAB, that could sustain the claim for equitable relief. *Flint v. Dennison*, 488 F.3d 816, 824–25 (9th Cir. 2007).

Given that Guevarra offered no facts or theories in her briefs or at oral argument that could save these claims by amendment, dismissal with prejudice was appropriate.

II. Claims Against Seton

The district court also properly dismissed Guevarra's claims for breach of contract and breach of the covenant of good faith and fair dealing for Guevarra's failure to exhaust binding grievance arbitration procedures set forth in the Contractual Bargaining Agreement ("CBA") between Seton and her union.

Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, establishes federal jurisdiction over "[s]uits for violation of contracts between an

employer and a labor organization." It displaces state-law claims whose outcomes depend on analysis of a CBA's terms. *See Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 997–98 (9th Cir. 1987).

However, Guevarra cannot sustain a claim under the LMRA because she was party to a collective bargaining agreement with Seton that contained mandatory grievance and arbitration procedures, which she failed to exhaust. Guevarra, in essence, pleads wrongful termination without just cause. Such an allegation falls squarely within the terms of her CBA. According to the CBA, Seton maintains authority to "discharge or assess disciplinary action [against an employee] for just cause." It further states that "a dispute . . . concerning . . . whether or not discipline, including discharge, is for just cause . . . *shall* be handled in accordance with the procedure [the CBA] set[s] forth." It is not in dispute that Guevarra's union did not initiate grievance procedures, nor did she pursue action against her union for failing to do so.[2] This failure bars her from pursuing remedies in district court now, and dismissal with prejudice was proper.

[2] As the district court noted, leave to amend for Guevarra to plead that her union breached its duty of fair representation would be fruitless because the six-month statute of limitations for such a claim long ago expired. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 986 (9th Cir. 2007).

Guevarra's second claim against Seton, for a violation of free speech rights as protected by the California Constitution, likewise succumbs to a fatal deficiency: such a claim must arise from state action. Article I, section 2 states,"[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Guevarra acknowledges that Seton is a private entity.

Guevarra argues that there exists sufficient disagreement among California authorities on whether Article I, section 2 mandates state action to merit certification of the question to the California Supreme Court. We disagree. While this question has not received a square answer, California courts have applied Article I, section 2's protection against private actors only in cases when a private actor owns property that has been opened up to the public such that it becomes a quasi-public forum, and the private actor thereby resembles a state actor. *See, e.g.*, *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 55 Cal. 4th 1083, 1093 (2012); *Fashion Valley Mall, LLC v. NLRB*, 42 Cal. 4th 850, 856–57 (2007). Certification is also inappropriate because it is unlikely that the California Supreme Court's answer would be outcome determinative. *See* Cal. Rule of Court 8.548 (certification is appropriate where there is no controlling precedent, and the decision could determine the outcome of a matter pending in the requesting court).

We do not see a way Guevarra could amend her allegations into viable claims, nor does she suggest one. We therefore affirm the district court's dismissal with prejudice and deny Guevarra's motion for certification.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

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Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk