Not Reported in F.Supp., 1990 WL 320767 (N.D.Cal.), 1991 A.M.C. 2636
**(Cite as: 1990 WL 320767 (N.D.Cal.))**

United States District Court, N.D. California.
Mohamed ABOBAKAR, Plaintiff,
v.
INTEROCEAN MANAGEMENT CORPORATION, and Shipco 2298, Inc., Defendants.

No. C–89–4268 MHP.
Aug. 14, 1990.

Dennis M. O'Bryan, O'Bryan Law Center, P.C., Birmingham, Mich., Jeffrey Kaufman, San Francisco, Cal., for plaintiff.

Frederick W. Wentker, Jr., Oren P. Noah, Lillick & Charles, San Francisco, Cal., for defendants.

*MEMORANDUM AND ORDER*

PATEL, District Judge.

***1** Plaintiff Mohamed Abobakar, a former employee of defendant Shipco 2298, Inc. ("Shipco"), brought this action alleging injuries from exposure to cold weather which plaintiff suffered while employed on defendant's vessel. The parties are now before the court on plaintiff's motion for leave to file a second amended complaint, adding a prayer for punitive damages and a wrongful discharge claim.

*BACKGROUND*

Mr. Abobakar was employed as a crew member aboard the S.S. Thompson Pass in December 1988. He claims that during his employment he was exposed to "inordinately excrutiating [sic] cold weather" which caused him injury. Amended Complt. at para. 5. He was discharged in July 1989, and filed his original complaint in December 1989. In February 1990, plaintiff was given leave to file his first amended complaint identifying Shipco as his employer rather than the managing operator of the vessel, Interocean Management Corporation.

Mr. Abobakar's deposition was taken in April 1990, assisted by an interpreter. Plaintiff's attorney claims it was at that time that he first became aware of the facts which are the basis of the second amended complaint. Specifically, plaintiff now alleges that he was discriminated against by being forced by one of the ship's officers to endure a long watch outside in cold weather. The officer allegedly did not want plaintiff inside with him because plaintiff is of Arabic extraction. Plaintiff further alleges that he was wrongfully discharged because he filed a lawsuit.

*LEGAL STANDARD*

Federal Rule of Civil Procedure 15(a) provides for the amendment of pleadings by leave of court and notes that such leave "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). Although discretion lies within the district court, the Supreme Court has admonished district courts to grant leave to amend absent such reasons for denial as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962). An amendment is considered futile where it could be defeated by a motion to dismiss or for summary judgment. *See Glick v. Koenig*, 766 F.2d 265 (7th Cir.1985).

*DISCUSSION*

The amendments to the pleadings presented by plaintiff's counsel are, unfortunately, no more artfully pled than the original complaint. Nevertheless, the court has considered all the additional factual allegations which are the basis for the claims for punitive damages and wrongful discharge, and the court finds that because the facts do not support those causes of action, plaintiff's amendments would be futile.

The first proposed amendment, the allegation that Mr. Abobakar's injuries were caused by defendant's "reckless conduct," is redundant. The amendment simply restates the allegation that Mr. Abobakar was ordered to work in cold weather, which is already laid out in the first amended complaint. There are no additional facts alleged which would support a claim for punitive damages.

***2** The second proposed amendment is flawed because there is no legal basis for a wrongful discharge claim under the facts alleged. In the Ninth Circuit the law is clear that an employee must first look to any applicable collective bargaining agreement for redress of any grievance or injury, even if the claim is based on maritime law. *See* *Gardiner v. Sea–Land Service, Inc.*, 786 F.2d 943 (9th Cir.1986). Furthermore, if an employee is covered by a collective bargaining agreement, claims for wrongful discharge are preempted, confining plaintiff to his remedy under the agreement. *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 643 (9th Cir.1989). In the present case Mr. Abobakar has not exhausted his remedies under the applicable collective bargaining agreement, and the court therefore cannot consider his claim.

In addition, to the extent that plaintiff claims the adverse action was taken because of his national origin, his claim is preempted by federal and state anti-discrimination laws. *See, e.g.* *Salgado v. Atlantic Richfield Co.*, 823 F.2d 1322, 1325 (9th Cir.1989). Under those laws plaintiff must file a charge with the appropriate agencies and receive a "right to file" letter before bringing a lawsuit. These are jurisdictional prerequisites and they are not alleged. 42 U.S.C. § 2000e(5)(e) and (f). Therefore, plaintiff can state no viable claim for wrongful discharge.

For the above reasons, plaintiff's motion for leave to file a second amended complaint is DENIED.

IT IS SO ORDERED.

N.D.Cal.,1990.
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