

No. 14-56297

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Gary B. Jefferson

Plaintiff -Appellant,

vs.

Time Warner Cable, Inc.; et al.

Defendant-Appellee.

Appeal from the United States

District Court for Central

California, Los Angeles

D.C. No. 2:14--CV-01345-GW-(CW)

APPELLANT'S PETITION FOR PANEL REHEARING

Gary B. Jefferson, EJD

Los Angeles, CA 90043

Tele: (323) 295-7012

Fax: (323) 295-7012

Email: legaldee@llaps.com

In Pro Se

STATEMENT OF JURISDICTION

The final judgment issued by the Panel on October 4, 2016 is the basis for appellate jurisdiction. 28 U.S.C. § 1291 authorizes the Court of Appeals jurisdiction over post-judgment orders where a final decision disposes all of the claims in favor of a party.

PURPOSE OF PETITION FOR PANEL REHEARING

A material point of fact was overlooked in the decision.

There is a window that predates and precludes ERISA jurisdiction which, as a consequence, would nullify the Court's affirmation(s).

INTRODUCTION

The material point of fact stated in the "Purpose section" invalidates the affirmation by the Court as stated herein and therefore, compels resolution in order for justice to prevail.

1. There is a window that predates and precludes ERISA jurisdiction over [b]oth Time Warner Cable's "admitted acts of FMLA Retaliation" and the charge of Hostile Work Environment.
2. This window revives the Continuous Tort Doctrine, and quashes the Court's affirmations of res judicata and "no abuse of discretion" in dismissing Jefferson's action without leave to amend.
3. To avoid both judicial error and prejudice capable of effecting the outcome of a case, "confirmation of when the ERISA action commenced is paramount." [**Emphasis**]

STATEMENT OF FACTS

1. The relevant dates of *ERISA non-applicability* began on July 5, 2011 and ended on July 26, 2011.
2. Plaintiff's *ERISA* claim for Short Term Disability began on July 27, 2011. "See 3 page attachment: Short Term Disability Claim Overview; Claim Number 6877240" for verification of the commencement date.
3. The applicable days of *ERISA non-applicability* (July 5, 2011 through July 26, 2011) is a total of "16 days." Thus, a total of "128 hours" of the 480 hours allocated under the Act. [**Emphasis**]
4. UNUM, Time Warner Cable's third party administrator, wore two hats:
 - a. FMLA Eligibility Administration
 - b. ERISA Claims Administration
5. The relevant period of *ERISA non-applicability* falls under UNUM'S FMLA Eligibility Administration.
6. UNUM'S authority under the FMLA Eligibility Administration hat was limited to "approval of FMLA eligibility and, FMLA absence determination and confirmation." [**Emphasis**]
7. UNUM was not empowered to discipline the plaintiff for his use of approved FMLA absences.
8. Discipline was always the purview of Time Warner Cable.

CONCLUSION

Due to facts 1 through 8 stated supra in the Statement of Facts, the claims of FMLA Retaliation and Hostile Work Environment *during the ERISA non-applicability window* do not fall under ERISA jurisdiction and therefore, do not

provide an ERISA remedy. Therefore, *Stewart v. U.S. Bancorp*, 297 F.3d 953 (9th Circuit 2002) is not an endorsement of res judicata where claims could not have been raised in a prior action because the claims predate ERISA commencement.

Because the claims do not arise from an ERISA action, the Continuous Tort Doctrine is available for the charges of FMLA Retaliation and Hostile Work Environment during the *ERISA non-applicability window* under the facts stated herein, as well as, in the Appellant's Reply Brief under *National Railroad Passenger Corporation v. Morgan*, No. 00-1614, (9th Cir 2002), 536 U.S. 101 (2002), 232 F.3d 1008 (2000). The record confirms that the defendant's acts are unlawful under [b]oth the FMLA Statute and FMLA Regulations and their [c]ontinuous nature, create a hostile environment where the Plaintiff and "any reasonable person" would naturally contemplate the unlawful termination of their employment for the inability to perform as a consequence of using their lawful FMLA protected absences.

For the purpose of ERISA preemption, *Stewart v. U.S. Bancorp* does not absolve the court of its responsibility to [b]oth confirm and take into account when Jefferson's ERISA action began. *Stewart v. U.S. Bancorp* empowers the Court to disregard claims only "if they were or could have been raised in a prior action." Pursuant to the facts stated herein, the unlawful employment actions committed by Time Warner Cable during the *ERISA non-applicability window* are insufficient for preemption. **[Emphasis]**

Thus, the district court ruling constitutes judicial error and prejudice capable of effecting the outcome of the case. Under the facts stated herein, the district court's dismissal of Jefferson's action without leave to amend is an abuse of discretion

because amendment would not be futile according to *Serra v. Lappin*, 600 F.3d 1191, 1200 (9th Cir 2010). The facts stated herein shows that the claims averred in the complaint during the *ERISA non-applicability window* are not preempted by ERISA. **[Emphasis]**

PRAYER FOR RELIEF

For the reasons set forth above, Plaintiff respectfully request that the Court grant this petition for rehearing by panel.

Dated: October 17, 2016

Signature: s/Gary B. Jefferson
In Pro Se