

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SAMUEL A. VARCO, *
Plaintiff, *
v. * Civil Action No. RDB 08-1215
TYCO ELECTRONICS CORP., *
et al., *
Defendants. *

* * * * *

MEMORANDUM OPINION

Originally filed in the Circuit Court for Baltimore County, Maryland, Samuel A. Varco (“Plaintiff” or “Varco”) brought this wrongful discharge (Count I) and defamation (Count II) action against Tyco Electronics Corporation, M/A-COM, Inc., Martin T. Cunningham, and a group of John Doe Defendants (collectively “Defendants”). On May 9, 2008, Defendants removed the case from the Circuit Court for Baltimore County to this Court pursuant to 28 U.S.C. § 1441(b), invoking federal question jurisdiction under 28 U.S.C. § 1331.

Pending before this Court are two motions. Within a week after the Notice of Removal was filed, Defendants filed a Motion to Dismiss (Paper No. 11), which seeks dismissal of Plaintiff’s case under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Thirty days after the Notice of Removal was filed, Plaintiff filed a Motion to Remand (Paper No. 17). The parties’ submissions have been fully briefed and no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2008). Because this Court finds that Plaintiff’s Complaint does not raise a substantial question of federal law sufficient to support federal question jurisdiction, Plaintiff’s Motion to Remand is GRANTED. Consequently, Defendants’ Motion to Dismiss is MOOT.

BACKGROUND

The facts contained herein are taken largely from Plaintiff's Complaint and are viewed in the Plaintiff's favor in light of the Defendants' removal of this action from state court. In May 2006, Plaintiff Samuel A. Varco was hired by Tyco Electronics Corp. and its subsidiary M/A-COM, Inc. as a sales representative and placed under the direct supervision of Martin T. Cunningham. (Compl. ¶ 9 & 10.) As a sales representative, Varco was responsible for promoting and selling military surveillance and communications equipment, including M/A-COM SIGNIT products. M/A-COM SIGNIT products are signal intelligence products used by the United States and allied nations to detect, translate, process, analyze, and record complex signals. These products include RF microwave receivers, IF-to-Baseland Converters, and ancillary equipment. (*Id.* ¶ 9.)

Plaintiff alleges that shortly after being hired by Tyco, he regularly witnessed Tyco employees violating International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. §§ 120–130, the implementing regulations for Section 38 of the Arms Export Control Act, 22 U.S.C. § 2778, a statute regulating the offer and sale of military equipment. (Compl. ¶ 15.) Specifically, Varco claims he witnessed employees of Tyco violate licensing agreements issued by the Office of Defense Trade Controls by routinely disseminating technical information about the equipment and selling the equipment to foreign entities. (*Id.* ¶¶ 15–16.) Varco also claims that Tyco employees further instructed him to participate in the alleged illegal conduct.

Instead of complying, Varco encouraged Tyco and its employees, including Cunningham, to disclose the ITAR violations to the proper authorities pursuant to 22 C.F.R. § 127.12(a) (explaining that the United States State Department "strongly encourages" the disclosure of information by persons that believe "they may have violated any export control provision of the

Arms Export Control Act, or any regulation, order, license, or other authorization issued under the authority of the Arms Export Control Act”). (Compl. ¶ 18.) According to Varco, however, his concerns about the ITAR violations were disregarded and the alleged illegal activity continued. Additionally, Varco claims that Cunningham and other Tyco employees began to ostracize him and limit his contact with other sales personnel and customers. (*Id.* ¶ 19.)

In October 2006, Varco decided to report Tyco’s ITAR violations to upper management. Varco claims that Tyco informed him that an investigation would be conducted on the matter. (*Id.* ¶ 20.) Tyco never completed a meaningful investigation and, beginning on March 20, 2007, Tyco began making false and defamatory statements about Varco’s job performance, eventually terminating his employment on March 23, 2007. (*Id.* ¶ 20 & 22.)

On March 18, 2008, Varco filed a complaint against the Defendants in the Circuit Court for Baltimore County alleging defamation and wrongful discharge. Plaintiff’s wrongful discharge claim alleges that his termination was in violation of public policy, pointing specifically to the Defendants’ alleged violations of Section 38 of the Arms Export Control Act and ITAR, as well as Varco’s duty to report the alleged violations under ITAR, 22 C.F.R. § 127.12(a). On May 9, 2008, Defendants filed a Notice of Removal pursuant to 28 U.S.C. § 1441(b), alleging that Plaintiff’s wrongful discharge cause of action presents a substantial question of federal law, thereby creating federal question jurisdiction under 28 U.S.C. § 1331. Plaintiff filed a Motion to Remand on June 9, 2008.

STANDARD OF REVIEW

It is well established that the burden of establishing federal jurisdiction is placed on the party seeking removal. *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994) (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921)). Courts must

narrowly interpret removal jurisdiction because of the significant federalism concerns that are raised by removing proceedings from state court. *Mulcahey*, 29 F.3d 148 at 151 (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941)). All doubts are resolved in favor of remand. *Mulcahey*, 29 F.3d at 151 (citations omitted). This policy favoring remand protects the sovereignty of state governments and state judicial power. *Shamrock*, 313 U.S. at 108–09.

DISCUSSION

The removal statute utilized by Defendants provides that “[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.” 28 U.S.C. § 1441(b). The propriety of Defendants’ Notice of Removal is therefore dependent on whether this Court could have originally exercised federal question jurisdiction over Plaintiff’s Complaint. Federal question jurisdiction exists over all civil actions that “arise under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.

In determining whether a case “arises under the Constitution, laws, or treaties of the United States,” this Court applies the well-pleaded complaint rule, “which holds that courts ‘ordinarily . . . look no further than the plaintiff’s [properly pleaded] complaint in determining whether a lawsuit raises issues of federal law capable of creating federal-question jurisdiction under 28 U.S.C. § 1331.’” *Pinney v. Nokia, Inc.*, 402 F.3d 430, 442 (4th Cir. 2005) (quoting *Custer v. Sweeney*, 89 F.3d 1156, 1165 (4th Cir. 1996)). Applying this rule, section 1331 provides litigants at least two distinct pathways into federal court. The far more common form of federal question jurisdiction is invoked when a plaintiff’s cause of action is itself created by federal law. See *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 (1986)

(stating that “[t]he ‘vast majority’ of cases that come within this grant of jurisdiction are covered by Justice Holmes’ statement that a ‘suit arises under the law that creates the cause of action’ (quoting *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916))).

The second, much narrower pathway under section 1331 permits a federal court to exercise jurisdiction over a plaintiff’s state law cause of action when it “necessarily depends on resolution of a substantial question of federal law.”¹ *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27–28 (1983); *see also Grable & Sons Metal Products, Inc. v. Darue*, 545 U.S. 308, 312 (2005) (stating that federal courts may exercise federal question jurisdiction over “state-law claims that implicate significant federal issues” and “turn on substantial questions of federal law,” as such claims “justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues”). Although there is no “single, precise, all embracing” test for determining jurisdiction under such conditions, *id.* at 314, the Supreme Court has emphasized that this second pathway into federal court is reserved for the rarest of cases, and should be not be permitted as a matter of course. *See, e.g., Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006) (classifying this second pathway as a “special and small category”).

Plaintiff argues simply that removal was improper in this case because his two common law causes of action (*i.e.* wrongful discharge and defamation) arise strictly under Maryland state law, and consequently there is no substantial question of federal law. Defendants respond that removal was appropriate in this case because an element in establishing wrongful discharge is a

¹ Many courts, including this Court, have on occasion referred to this second pathway as an “exception” to the well-pleaded complaint rule. The complete preemption doctrine is also commonly referred to as an exception to the well-pleaded complaint rule. *See, e.g., Hilliard v. Kaiser Found. Health Plan of the Mid-Atlantic States*, 169 F. Supp. 2d 416, 419 (D. Md. 2001).

violation of a clear mandate of public policy,² and Plaintiff has exclusively relied upon the public policy pronouncements contained in a federal statute (*i.e.* Arms Control Export Act) and federal regulations (*i.e.* International Traffic in Arms Regulations). Consequently, in order for this Court to address Plaintiff's wrongful discharge claim, Defendants argue that this Court must necessarily determine the following substantial questions of federal law: (1) whether Plaintiff refused to engage in conduct that was illegal under the Arms Control Export Act and ITAR; and (2) whether this federal statute and its implementing regulations required Plaintiff to report violations of its provisions, as would be required to state a claim under Maryland law.

In *Grable*, the Supreme Court framed the issue as follows: "the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." Because this case does not present a set of circumstances so substantial as to create federal question jurisdiction, and because choosing to exercise jurisdiction in this case would disrupt Congress's intended balance between the federal and state courts, this Court answers this question in the negative.

I. Substantial Federal Question

The parties do not dispute that Plaintiff must establish that his termination from employment violated a clear mandate of public policy in order to recover for wrongful discharge. *See Wholey*, 803 A.2d at 489. It is also undisputed that Plaintiff's Complaint points only to the Arms Export Control Act and ITAR to demonstrate a clear mandate of public policy.

Specifically, Plaintiff alleges that he regularly witnessed Tyco employees violating ITAR

² To establish a wrongful discharge claim, the plaintiff must show that: (1) she was discharged; (2) the basis for her discharge violated a clear mandate of public policy; and (3) there was a nexus between her conduct and the employer's decision to fire her. *Wholey v. Sears Roebuck*, 803 A.2d 482, 489 (Md. 2002).

provisions, that Tyco employees instructed him to participate in the alleged illegal conduct, and that, ultimately, he was terminated for disclosing the violations to upper management. Because the United States State Department “strongly encourages” the disclosure of information by persons that believe “they may have violated any export control provision of the Arms Export Control Act, or any regulation, order, license, or other authorization issued under the authority of the Arms Export Control Act,” 22 C.F.R. § 127.12(a), Plaintiff argues that a clear mandate of public policy was violated when he was terminated. This issue also appears to be legitimately in dispute between the parties.

Therefore, the success of Plaintiff’s wrongful discharge claim does in fact turn in part on whether, under state law, the Arms Export Control Act and ITAR are sufficiently “clear” to support the public policy prong of a common law wrongful discharge claim and, if so, whether the evidence indicates that Tyco’s decision to terminate Plaintiff was linked to conduct covered by the public policy. Nonetheless, the Supreme Court has made it clear that “it takes more than a federal element to open the ‘arising under’ door.” *See Empire Healthchoice*, 547 U.S. at 701 (internal quotations omitted). The federal issue in this case lacks any additional significance other than being a necessary and disputed element in Plaintiff’s state law wrongful discharge claim.

The relief that Plaintiff seeks in this case is available, if at all, only under state common law. In enacting the Arms Control Export Act, Congress provided that the federal government could seek criminal penalties for alleged violations, but it specifically withheld a private cause of action for individuals. *See* 22 U.S.C. § 2778(c) (“Any person who willfully violates any provision of this section or section 2779 of this title, or any rule or regulation issued under either section . . . shall upon conviction be fined for each violation not more than \$1,000,000 or

imprisoned not more than ten years, or both.”). In *Merrell Dow*, the Supreme Court relied heavily on this factor, explaining that the “the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently ‘substantial’ to confer federal-question jurisdiction.” *Merrell Dow*, 478 U.S. at 814. The congressional determination to withhold a private cause of action in the Arms Control Export Act weighs heavily in favor of remand.

In *Grable*, however, the Supreme Court made clear that “*Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the ‘sensitive judgments about congressional intent’ that § 1331 requires.” *Grable*, 545 U.S. at 318. In *Grable*, the Internal Revenue Service seized property belonging to the plaintiff to satisfy a federal tax deficiency. *Id.* at 510. Five years later, the plaintiff filed suit against the purchaser of the property to quiet title, arguing that the purchaser’s title was invalid because the IRS had conveyed the seizure notice improperly under the governing federal statute (26 U.S.C. § 6335(a)). *Id.* at 311. The quiet title action was filed in state court, but the defendant removed to federal court, asserting that federal jurisdiction existed because the plaintiff’s case turned on an interpretation of a federal statutory provision. *Id.* The Supreme Court found that federal jurisdiction was proper.

More recently, however, in *Empire Healthchoice*, the Supreme Court explained that its decision in *Grable* rested on the unique circumstances presented in that case: “The dispute [in *Grable*] centered on the action of a federal agency (IRS) and its compatibility with a federal statute, the question qualified as ‘substantial,’ and its resolution was both dispositive of the case and would be controlling in numerous other cases.” *Empire Healthchoice*, 547 U.S. at 700. The

Court further stated that “*Grable* presented a nearly ‘pure issue of law,’ one ‘that could be settled once and for all and thereafter would govern numerous tax sale cases.’” *Id.* Thus, in *Empire Health*, a case in which a plan administrator brought a subrogation and reimbursement claim against a plan beneficiary pursuant to a contract that incorporated an agreement between the plan and a federal agency, the Supreme Court concluded that “this case cannot be squeezed into the slim category *Grable* exemplifies.” *Id.* at 701.

The unique circumstances presented in *Grable* are likewise absent here. Unlike *Grable*, in which the only contested issue was one of federal law, there are additional dispositive issues in dispute in this case (including a second count based on defamation). The federal issue, therefore, does not predominate over other state law issues. Also unlike *Grable*, this case does not concern any actions taken by a federal agency, as it relates solely to the actions of the two private parties involved in the lawsuit.³ Moreover, this case does not present a pure issue of law that can “be settled once and for all.” *Id.* at 700. Instead, in this case, like *Empire Healthchoice*, the ultimate issue will be “fact-bound and situation-specific.” *Id.* at 701. Lastly, the “federal issue” in this case—whether the Arms Export Control Act and ITAR provide a clear mandate of public policy, and whether that public policy was violated in this case—is actually more of a

³ Defendants have argued that the federal government has a “compelling interest” in evaluating Plaintiff’s allegations because the Arms Control Export Act and ITAR concern the foreign affairs and national security of the United States.” Defs.’ Resp. 6; *see* 22 U.S.C. § 2778 (a)(1) (explaining that “the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services” and that such is to be done in “furtherance of world peace and the security and foreign policy of the United States”).

The statutory scheme crafted by Congress, however, clearly permitted the executive branch of the federal government to evaluate whether Defendants violated the Arms Control Export Act and ITAR by way of a criminal investigation and potentially a criminal enforcement action. It is that branch of government (and certainly not the judiciary) that is primarily tasked with dealing with foreign affairs and protecting the national security of the United States. As between private parties in a wrongful discharge case, there is no “compelling interest” for this Court to evaluate Plaintiff’s allegations.

hybrid analysis involving both a federal issue (*i.e.* an interpretation of the language contained in the federal statute and regulations) *and* a state law issue (*i.e.* whether the federal statute and regulations provide “a clear mandate of public policy” based on state law). *See* Defs.’ Mot. Dismiss 7 (arguing that “the plain language of section 127.12 makes clear that this section was never intended to serve as a statement of public policy in support of a wrongful termination claim, or any other type of claim”).

Therefore, this Court finds that, although there is a necessary and disputed federal issue in this case, the substantiality of the federal issue is not sufficient to convert Plaintiff’s state law wrongful discharge claim into one “aris[ing] under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.

II. Sound Division of Labor Between State and Federal Courts

When a state-law claim hinges on the resolution of a disputed and substantial question of federal law, the exercise of federal jurisdiction under section 1331 is still “subject to a possible veto.” *Grable*, 545 U.S. at 313. The Supreme Court has explained as follows:

[A] federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331 Because arising-under jurisdiction to hear a state-law claim always raises the possibility of upsetting the state-federal line drawn (or at least assumed) by Congress, the presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction.

Id. at 313–14.

In this case, even if the necessary and contested federal issue in this case was substantial, this Court would nonetheless remand back to the Circuit Court for Baltimore County because, fundamentally, Plaintiff’s wrongful discharge claim belongs in state court. The United States

Court of Appeals for the Sixth Circuit addressed the issue at bar in *Eastman v. Marine Mech. Corp.*, 438 F.3d 544 (6th Cir. 2006). The circumstances in the *Eastman* case closely parallel those presented in this case. As in this case, the plaintiff in *Eastman* brought a wrongful discharge claim against his former employer. The plaintiff argued that his former employer terminated him in violation of the public policy contained in federal statutes; specifically, 18 U.S.C. § 287, a criminal statute prohibiting the act of knowingly presenting “false, fictitious, or fraudulent” claims to the government, and 31 U.S.C. § 3729, which allows the federal government to collect civil fines against persons who present false claims or attempt to defraud the government.⁴ *Eastman*, 438 F.3d at 551. The defendant removed the case to federal court based on the same argument presented in this case, and the district court denied a motion to remand. Reversing the district court, the Sixth Circuit held “that a state-law employment action for wrongful termination in violation of federal public policy does not present a substantial federal question over which federal courts may exercise ‘arising under’ jurisdiction under 28 U.S.C. § 1331.” *Id.* at 553. The court explained that accepting jurisdiction over the state law wrongful discharge claim would disrupt the sound division of labor between the state and federal courts:

Employment litigation is a common occurrence in both federal and state courts. Federal legislation has provided access to the federal courts by aggrieved employees under specifically delineated circumstances, *e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*; Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, but our perception is that the bulk of the judicial business in the United States in this area is conducted by the state

⁴ After the *Eastman* case was removed to federal court, the plaintiff amended his complaint to add state statutes as additional sources of public policy. The Sixth Circuit did not consider the state public policy contained in the amended complaint, however, because “the existence of subject matter jurisdiction is determined by examining the complaint as it existed at the time of removal.” *Eastman*, 438 F.3d at 551 (citations omitted).

courts. This balance would be upset drastically if state public policy claims could be converted into federal actions by the simple expedient of referencing federal law as the source of that public policy. We believe such a dramatic shift would distort the division of judicial labor assumed by Congress under section 1331.

Id.

Defendants have argued that this balance would not be upset in this particular case, however, because “a wrongful discharge action in which the underlying public policy is exclusively derived from alleged violations and obligations under the Arms Export Control Act and ITAR is not only uncommon, but apparently is a matter of first impression.” Defs.’ Resp. 7. Wrongful discharge claims, however, *are* commonly asserted and can be premised on any number of statutes and regulations contained in the vast body of federal law. Some statutes and regulations may be invoked less frequently than others, but federal district courts should not be tasked with disentangling, on a case-by-case basis, which federal statutes and regulations convert a state law wrongful discharge claim into a federal cause of action, and which federal statutes and regulations do not. A wrongful discharge claim, regardless of the federal policy at issue, is fundamentally a state common law cause of action, and Congress has specifically delineated the areas of employment law that may be redressed in federal court. Therefore, this Court concurs with the analysis of the Sixth Circuit that “a state-law employment action for wrongful termination in violation of federal public policy does not present a substantial federal question over which federal courts may exercise ‘arising under’ jurisdiction under 28 U.S.C. § 1331.” *Id.* at 553.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Remand is GRANTED and Defendants' Motion to Dismiss is MOOT.⁵

Date: March 16, 2009

/s/

Richard D. Bennett
United States District Judge

⁵ Plaintiff's request for attorney fees and costs under 28 U.S.C. § 1447(c) is DENIED. "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005).

Plaintiff has argued that Defendants lacked an objectively reasonable basis for removing this case because "[t]he Fourth Circuit's opinion in [*King v. Marriot Intern. Inc.*, 337 F.3d 421 (4th Cir. 2003)] is dispositive of this issue in the context of a wrongful termination claim brought pursuant to Maryland law." Pl.'s Mot. Remand 8. In *King*, the plaintiff brought a wrongful discharge action and cited to the Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA") as providing the relevant public policy. The issue before the Fourth Circuit in *King* was whether plaintiff's case was removable to federal court based on ERISA preemption principles.

There are two discrete exceptions to the well-pleaded complaint rule. *See Hilliard*, 169 F. Supp. 2d at 419. One exception, at issue in this case, is that a state law claim can support federal jurisdiction when its resolution necessarily hinges on a substantial issue of federal law. Another exception, at issue in *King*, is that a state law claim is converted into a federal claim when Congress completely preempts the particular area of law. Therefore, *King* is inapposite to the discussion herein, which addressed only the first exception. Under the applicable case law, Defendants clearly had an objectively reasonable legal argument to assert federal jurisdiction under the first exception.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SAMUEL A. VARCO,

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Plaintiff,

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Civil Action No. RDB 08-1215

TYCO ELECTRONICS CORP.,
et al.,

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*

Defendants.

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ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is this 16th day of March 2009, ORDERED that:

1. The Motion to Remand (Paper No. 17) filed by Samuel A. Varco is GRANTED, but the request for attorney's fees and costs under 28 U.S.C. § 1447(c) is DENIED;
2. The Motion to Dismiss (Paper No. 11) filed by Defendants Tyco Electronics Corporation, M/A-COM, Inc., Martin T. Cunningham, and the John Doe Defendants is MOOT;
3. All further proceedings in this case are remanded to the Circuit Court for Baltimore County;
4. Copies of this Order and the accompanying Memorandum Opinion shall be sent to counsel of record and the Clerk of the Circuit Court for Baltimore County; and the Clerk of Court shall forthwith transmit the record herein to the Clerk of the Circuit Court for Baltimore County; and

4. The Clerk of Court shall CLOSE this case.

/s/

Richard D. Bennett
United States District Judge