

1 **** E-filed August 19, 2010 ****

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7 NOT FOR CITATION

8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 SAN JOSE DIVISION

11 NANCY C. RAY,

No. C10-02177 HRL

12 Plaintiff,

ORDER OF REMAND

13 v.

14 DIANIA SOTO,

15 Defendant.

16 _____/

17 *Pro se* plaintiff Nancy Ray (“Ray”), an employee of the United States Postal Service

18 (“USPS”), filed an application for a “Request for Orders to Stop Harassment” with respect to her

19 supervisor, Diania Soto (“Soto”), in Santa Clara County Superior Court. (Docket No. 1, Ex. A.)

20 Ray’s application states that Soto “threaten[ed] to grab my arm and walk me out the door,” causing

21 Ray to suffer “a major panic attack” for which she sought medical treatment. (*Id.*) It further states

22 that Soto “yelled” at her for finishing her mail route early but also “accused” her of never finishing

23 her route in eight hours. (*Id.*) Ray alleges that Soto did these things because Ray previously

24 complained that Soto was “tampering” with Ray’s witnesses in relation to several administrative

25 actions that she has filed.¹ (*Id.*)

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27 ¹ Ray has filed two actions with the Merit System Protection Board (“MSPB”): one for failure to

28 restore Ray to full-time employment (and which is currently on appeal) and one involving disciplinary action taken against Ray (the appeal of which was withdrawn by Ray). (Docket No. 6, Ex. C.) She has also filed three Equal Employment Opportunity Commission (“EEOC”) actions, two of which are pending and apparently claim disability discrimination and/or the failure to

1 Before the scheduled hearing in state court on Ray’s application, Soto removed the action to
2 federal court. (Docket No. 1.) Soto then filed an opposition to Ray’s application and a motion to
3 dismiss the action, to which Ray did not respond. (Docket No. 5.) Ray did not appear at the hearing
4 on Soto’s motion to dismiss on the morning of August 3 because she mistakenly believed the
5 hearing to be in the afternoon, and so she filed an administrative motion for a new hearing. (Docket
6 No. 18.) As described below, the Court will remand this action to state court and declines rule on
7 either of the parties’ motions.²

8 LEGAL STANDARD

9 In the absence of diversity between the parties, a civil action filed in state court may be
10 removed to federal court only if the claim “arises under” federal law. *Beneficial Nat’l Bank v.*
11 *Anderson*, 539 U.S. 1, 6, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003) (citing 28 U.S.C. § 1441(b)). “The
12 presence or absence of federal-question jurisdiction is governed by the ‘well-pleaded complaint
13 rule,’ which provides that federal jurisdiction exists only when a federal question is presented on the
14 face of the plaintiff’s well-pleaded complaint.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392-93,
15 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (citing *Gully v. First Nat’l Bank*, 299 U.S. 109, 112-13, 57
16 S.Ct. 96, 81 L.Ed. 70 (1936)); *see also Abada v. Charles Schwab & Co., Inc.*, 300 F.3d 1112, 1118
17 (9th Cir. 2002) (quoting same). “The plaintiff is the ‘master of the claim,’ and ‘may avoid federal
18 jurisdiction by exclusive reliance on state law.’” *Abada v. Charles Schwab & Co., Inc.*, 300 F.3d at
19 1118 (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. at 392-93). “A plaintiff may also choose to
20 invoke federal jurisdiction by pleading a federal claim. However, the choice belongs to the plaintiff.
21 ‘[A] case may not be removed to federal court on the basis of a federal defense, including the
22 defense of preemption, even if the defense is anticipated in the plaintiff’s complaint, and even if both
23 parties concede that the federal defense is the only question truly at issue.’”³ *Id.* at 1118 (quoting

24
25 provide reasonable accommodation and a third which involved the denial of a parking space but was
26 withdrawn by Ray. (*Id.* at ¶ 6.) Ray also filed two worker’s compensation stress claims, both of
27 which were denied but not appealed by Ray. (*Id.* at ¶ 8.)

² Pursuant to 28 U.S.C. § 636(c) and FED. R. CIV. P. 73, all parties have expressly consented that all
proceedings in this matter may be heard and finally adjudicated by the undersigned.

³ There is an exception to the well pleaded complaint rule. Under the “artful pleading” exception,
28 when a plaintiff has drafted the complaint to avoid naming a federal statute as a basis for federal
jurisdiction, but the complaint is nonetheless based on such statute, the federal court will have

1 *Caterpillar, Inc. v. Williams*, 482 U.S. at 392-93 (citing *Franchise Tax Bd. v. Constr. Laborers*
2 *Vacation Trust*, 463 U.S. 1, 12, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983))).

3 **DISCUSSION**

4 Soto removed this action to federal court because she was apparently acting within the
5 course and scope of her employment with the USPS within the meaning of 28 U.S.C. § 2679(d)(2).
6 This statute is a part of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (“FTCA”). It allows
7 the Attorney General to certify that a defendant employee was acting within the scope of his office
8 or employment for purposes of removing a tort claim against the United States and for the United
9 States to be substituted as the defendant in such an action. Soto contends that the underlying harm
10 alleged by Ray probably states a cause of action under the FTCA.⁴

11 Ray, however, filed her “Request for Orders to Stop Harassment” against Soto pursuant to
12 California Code of Civil Procedure § 527.6. The USPS was not named as a defendant and Ray’s
13 papers do not present any federal question on their face. In other words, Ray’s application did not
14 “arise under” federal law. *See Davis v. Evans*, No. C 94-1806-VRW, 1994 WL 374546 (N.D. Cal.
15 July 12, 1994) (determining that a plaintiff’s petition for a restraining order under California Code
16 of Civil Procedure § 527.6 fell entirely within state law despite the defendant’s counterclaim
17 involving federal law). This action was therefore not removable under the general removal statute
18 (28 U.S.C. § 1441) or the other statutes cited by Soto which relate to actions against the USPS as a
19 party (28 U.S.C. § 1339; 39 U.S.C. § 409). Accordingly, as it appears that this Court lacks subject-
20 matter jurisdiction, the action must be remanded. 28 U.S.C. § 1447(c).

21 **CONCLUSION**

22 Based on the foregoing, IT IS ORDERED THAT this action be remanded to the Superior
23 Court for County of Santa Clara pursuant to 28 U.S.C. § 1447(c). Because the Court does not have
24 subject-matter jurisdiction over this action, the Court declines to rule on Soto’s motion to dismiss
25 (Docket No. 5) or Ray’s administrative motion for a new hearing (Docket No. 18), which shall be
26 terminated. The Clerk shall transmit the file to the Santa Clara Superior Court.

27 jurisdiction. There is no indication of such “artful pleading” by Ray in her restraining order
28 application, though.

⁴ Soto also contends that Ray’s application may state a cause of action under Title VII of the Civil Rights Act of 1964 (“Title VII”) for retaliation against protected conduct.

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IT IS SO ORDERED.

Dated: August 19, 2010



HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

1 **C10-02177 HRL Notice will be electronically mailed to:**

2 James A. Scharf james.scharf@usdoj.gov, mimi.lam@usdoj.gov

3 **Notice will be provided by other means to:**

4 Nancy C Ray
5 1438 Gordy Drive
6 San Jose, CA 95131

7 **Counsel are responsible for distributing copies of this document to co-counsel who have not
8 registered for e-filing under the court's CM/ECF program.**

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