

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

TIFFANY BURROWS,

Plaintiff,

v.

Case No: 8:17-cv-212-T-27AEP

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,**

Defendant.

_____ /

ORDER

BEFORE THE COURT is Plaintiff's Motion to Remand Matter (Dkt. 11), which Defendant opposes (Dkt. 23). Upon consideration, the Motion (Dkt. 11) is GRANTED.

I. Background

Tiffany Burrows initiated this Florida Civil Rights Act employment discrimination action in Polk County Circuit Court. (Dkt. 2). She alleges that State Farm, her former employer, retaliated against her by terminating her employment on August 6, 2015 for engaging in statutorily protected conduct. (Dkt. 2). State Farm removed the case on January 26, 2017 on the basis of diversity jurisdiction.¹ (Dkt. 1). Plaintiff moves to remand, contending that State Farm fails to prove that the amount in controversy exceeds \$75,000.² (Dkt. 11).

II. Standard

In diversity cases, federal courts have original jurisdiction over cases in which the parties are

¹Subsequently, State Farm filed a Motion to Dismiss with Prejudice Based on Judicial Estoppel and Motion to Dismiss for Lack of Subject Matter Jurisdiction (Dkt. 28), and Plaintiff filed a Motion to Intervene and Substitute Party (Dkt. 39), both of which are pending.

² Plaintiff does not challenge diversity of citizenship.

completely diverse and the amount in controversy exceeds \$75,000, exclusive of costs and interest. 28 U.S.C. § 1332(a). Where, as here, a defendant relies on the complaint itself to establish the federal jurisdictional requirements, the removal is governed by the first paragraph of § 1446(b), which provides:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1446.

District courts may make “reasonable deductions, reasonable inferences, or other reasonable extrapolations” from the pleadings to determine whether it is facially apparent that a case is removable. *Roe v. Michelin N. Am., Inc.*, 613 F.3d 1058, 1061–62 (11th Cir. 2010) (quoting *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744 (11th Cir.2010)). If the amount in controversy is not facially apparent from the complaint, the removing defendant may offer additional evidence, such as affidavits, “relevant to the amount in controversy at the time the case [is] removed” to satisfy its burden. *Best Buy*, 269 F.3d at 1320; *see Roe*, 613 F.3d at 1061 n.4. And, the defendant bears the burden of proving that original jurisdiction exists on the date of removal by a preponderance of the evidence when the plaintiff does not plead a specific amount of damages. *Leonard v. Enter. Rent a Car*, 279 F.3d 967, 972 (11th Cir. 2002); *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001).

The amount in controversy is an estimate of the amount that will be put at issue during the litigation, rather than a prediction of how much the plaintiff is likely to recover. *S. Florida Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312, 1315 (11th Cir. 2014). And, “[a] court's analysis of the

amount-in-controversy requirement focuses on how much is in controversy at the time of removal, not later.” *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 751 (11th Cir. 2010). Without specific allegations or facts to consider, the court may not speculate as to the amount in controversy. *Id.* at 754-55. When the parties dispute jurisdiction, “uncertainties are resolved in favor of remand.” *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994) (citations omitted).

III. Discussion

The amount in controversy is not facially apparent from Plaintiff’s complaint. She does not allege the amount of lost wages she seeks or her salary while employed. And, it is not apparent, based on her conclusory allegations, what the nature of her non-economic damages are. In an attempt to meet its burden, State Farm offers as additional evidence an affidavit confirming her annual salary of \$37,236.52 (\$3,103.04 monthly), and relies on her unspecified claims for past and future income, punitive damages, compensatory damages, and attorney’s fees.³ (Dkts. 1-3, 23).

A. Lost Wages

State Farm contends that the amount of lost wages in controversy exceeds \$75,000. Under Florida law, wrongfully discharged employees are awarded lost wages “to make the employee whole by restoring [her] to the economic position [she] would have occupied **but for** the wrongful discharge.” *Caterpillar Logistics Servs., Inc. v. Amaya*, 201 So. 3d 173, 176 (Fla. 3d DCA 2016) (emphasis in original, citations omitted). Back pay and front pay may be awarded as lost wages. Back pay “includes any amounts the employee would have earned between the wrongful discharge and the date of trial, less any amounts earned between the wrongful discharge and the trial.” *Id.* And,

³ State Farm also contends that Plaintiff’s refusal to stipulate that her claims do not exceed \$75,000 should be considered. (Dkt. 23 at 18). But, “a refusal to stipulate standing alone does not satisfy [State Farm’s] burden of proof on the jurisdictional issue.” *Williams*, 269 F.3d at 1320.

“[i]n awarding back pay, ‘the trial court must determine what the employee would have earned had she not been the victim . . . , and must subtract from th[at] figure the amount of actual interim earnings.’” *Aery v. Wallace Lincoln-Mercury, LLC*, 118 So. 3d 904, 914 (Fla. 4th DCA 2013) (quoting *E.E.O.C. v. Joe's Stone Crab, Inc.*, 15 F.Supp.2d 1364, 1378 (S.D.Fla.1998) (alteration in original). Front pay is “‘simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement.’” *Aery*, 118 So. 3d at 914-15 (quoting *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001)). And, if the plaintiff does not return to work for a reason unrelated to the employer’s actions, lost wages may not be awarded. *Caterpillar*, 201 So.3d at 176. This framework for damages underpins the analysis of whether State Farm has met its jurisdictional burden in this case.

State Farm calculates Plaintiff’s lost wages as three years of back pay (eighteen months pre-removal and eighteen months post-removal), plus one year of front pay in calculating what it considers to be the amount in controversy. State Farm contends that back pay should be estimated through the date of trial, rather than the date of removal.

District courts in Florida are divided on whether to calculate back pay through the date of trial rather than the date of removal.⁴ *Compare Hardman v. Zale Delaware, Inc.*, No. 16-CV-62826,

⁴ And, at least one district judge who previously calculated back pay through the date of trial, upon further reflection, calculated back pay through the date of removal. *Compare Sheehan v. Westcare Found., Inc.*, No. 8:12-CV-2544-T-33TBM, 2013 WL 247143, at *2 (M.D. Fla. Jan. 23, 2013) (date of trial), with *Vanterpool v. Amazon.com DEDC, LLC*, No. 8:17-CV-1347-T-33MAP, 2017 WL 2609551, at *2 (M.D. Fla. June 16, 2017) (date of removal), and *Bragg v. Suntrust Bank*, No. 8:16-CV-139-T-33TBM, 2016 WL 836692, at *2 (M.D. Fla. Mar. 4, 2016) (“upon further reflection, the Court believes that back pay should be calculated only to the date of removal”).

The Eleventh Circuit, in an unpublished decision applying a “highly deferential review” for clear error, affirmed a district court’s estimate of damages for jurisdictional purposes, which included an estimation of back pay through the date of the anticipated trial. *Wineberger v. RaceTrac Petroleum, Inc.*, 672 F. App’x 914, 916-17 (11th Cir. 2016). The plaintiff in *Wineberger*, unlike here, did not submit evidence of mitigation to the district court and the court relied on its own previous decisions in calculating back pay through the date of trial. *Wineberger v. Racetrac Petroleum, Inc.*, No. 5:14-CV-653-OC-30PRL, 2015 WL 225760, at *3 (M.D. Fla. Jan. 16, 2015) (citing *see Hallmeyer*, 2013 WL 268643, at *2), *aff’d Wineberger v. RaceTrac Petroleum, Inc.*, 672 F. App’x 914 (11th Cir. 2016)(per curiam); *see also Fusco v. Victoria's Secret Stores, LLC*, 806 F. Supp. 2d 1240, 1244 (M.D. Fla. 2011)). *Wineberger*, however, is not binding authority. *See* 11th Cir. R. 36-2.

2017 WL 759023, at *3 (S.D. Fla. Feb. 28, 2017) (date of removal), *Ogle v. Kauffman Tire, Inc.*, No. 8-16-cv-894-T-17TBM, 2016 WL 3913138, at *2 (M.D. Fla. July 20, 2016), *Ambridge v. Wells Fargo Bank, N.A.*, No. 8:14-CV-1212-T-17TBM, 2014 WL 4471545, at *3 (M.D. Fla. Sept. 10, 2014) (same), and *Davis v. Tampa Ship, LLC*, No. 8:14-CV-651-T-23MAP, 2014 WL 2441900, at *2 (M.D. Fla. May 30, 2014) (same), with *Pope v. 20/20 Commc'ns, Inc.*, No. 8:15-CV-1774-T-30JSS, 2015 WL 5165223, at *2 (M.D. Fla. Sept. 2, 2015) (date of trial), *Hallmeyer v. Gateway Clippers LLC*, No. 8:12-CV-2876-T-30TBM, 2013 WL 268643, at *2 (M.D. Fla. Jan. 24, 2013) (same), and *Cashman v. Host Int'l, Inc.*, No. 8:10-CV-1197-T-30MAP, 2010 WL 4659399, at *2 (M.D. Fla. Nov. 9, 2010) (same).

Turning to the record, Plaintiff worked for State Farm from approximately November 2014 through August 2015. She earned \$37,236.52 annually, or \$3,103.04 monthly. After her termination, she was employed by Infinity Behavioral Health Services Inc. and Alpine Access Inc. (Dkt. 11-1). She earned \$15,149.59 from the unrelated employers in 2016. As State Farm recognizes, these are “jobs that have ended.” (Dkt. 23 at 9). And, there is no evidence that her failure to secure employment after the unrelated jobs ended was due to actions by State Farm or that she was “**ready, willing, and able to accept employment.**” See *Caterpillar*, 201 So.3d at 176 (citing *see Miller v. Marsh*, 766 F.2d 490, 492 (11th Cir.1985); *Bender v. Salvation Army*, 830 F.Supp. 1454 (M.D.Fla.1993)) (emphasis in original).

State Farm contends that her post-removal back pay should be considered through the date of the scheduled trial. As discussed, district courts are divided on this issue, and the Eleventh Circuit has not addressed it in a published decision. State Farm asks the Court to speculate that post-removal

back pay will be put at issue during the litigation even though Plaintiff's subsequent employment ended in 2016 for unknown reasons and her allegations are silent regarding the same. *See Pretka*, 608 F.3d at 751; *Caterpillar*, 201 So.3d at 176. Stated differently, State Farm is asking the Court to consider the monthly salary Plaintiff would have earned post-removal, but not to subtract "the amount of actual interim earnings," which are unknown, *Aery*, 118 So. 3d at 914, and to speculate that post-removal lost wages are in controversy when plaintiff, based on the record, was unemployed at the time of removal. *Caterpillar*, 201 So.3d at 176 ("**To be entitled to an award of lost wages, the employee must be ready, willing, and able to accept employment.**" (citations omitted, emphasis in original)). Without speculating, therefore, the preponderance of the evidence does not support State Farm's contention that post-removal back pay was in controversy at the time of removal.

State Farm contends that Plaintiff's pre-removal earnings of \$15,149.59 should not be deducted because other district courts have not deducted post-termination earnings in determining the amount in controversy. I am not persuaded. The amount she earned after termination is material to the amount in controversy and is therefore properly considered. *Best Buy*, 269 F.3d at 1320; *Amaya*, 201 So.3d at 176; *see Russell v. Nurse-On-Call, Inc.*, No. 8:15-CV-2499-T-30JSS, 2016 WL 125276, at *2 (M.D. Fla. Jan. 12, 2016) (relying on evidence of mitigation in determining amount in controversy); *Wineberger*, 2015 WL 225760, at *3 ("courts will generally 'consider mitigation when calculating back pay if the plaintiff submits affidavits or other evidence specifying the amount of mitigation'" (quoting *Fusco*, 806 F.Supp.2d at 1243)). Her pre-removal earnings will therefore be deducted from her back pay damages in determining the amount in controversy.

State Farm contends that one year of front pay should be considered because courts in this circuit have held that it is reasonable to include front pay in the amount in controversy. (Dkt. 23 at

10). Notwithstanding, State Farm fails to provide specific allegations or facts to support its contention that one year of front pay is in controversy, since Plaintiff's claim is unspecified. Prior court rulings in unrelated cases are not persuasive. See *Pretka*, 608 F.3d at 751; *Federated Mut. Ins. Co. v. McKinnon Motors*, 329 F.3d 805, 809 (11th Cir. 2003). Because State Farm fails to provide evidence to support its contention, front pay will not be included. *Leonard*, 279 F.3d at 972.

Accordingly, at most, State Farm has shown by a preponderance of the evidence that \$40,705.13 (\$55,854.72 (pre-removal back pay), less \$15,149.59 (pre-removal earnings)), of lost wages is in controversy.⁵

B. Punitive Damages

State Farm contends that \$100,000, the maximum amount of punitive damages available under the FCRA, should be considered in the amount in controversy because Plaintiff seeks punitive damages. Punitive damages must be considered in the jurisdictional analysis "unless it is apparent to a legal certainty that such cannot be recovered." *Holley Equip. Co. v. Credit Alliance Corp.*, 821 F.2d 1531, 1535 (11th Cir. 1987). However, State Farm fails to submit evidence or identify facts supporting its contention that \$100,000 of punitive damages is in controversy. *Leonard*, 279 F.3d at 972. "[R]emoval 'cannot be based simply upon conclusory allegations' where the ad damnum is silent." *Williams*, 269 F.3d at 1319 (citation omitted). And, State Farm relies only on Plaintiff's conclusory allegations of willful and malicious conduct and her unspecified claim for punitive damages. State Farm has therefore failed to meet its burden of proving that \$100,000 in punitive

⁵ State Farm is correct that some courts have included one year of front pay in the jurisdictional amount. However, other courts in this circuit have excluded front pay from the amount in controversy. *Davis*, 2014 WL 2441900, at *2. Notably, State Farm includes calculations for six months and twelve months of front pay in its Notice of Removal. (Dkt. 1 at 8). Assuming one year of front pay is included, "[t]he same mitigation of damages analysis applies to back pay and front pay awards." *Richardson v. Tricom Pictures & Prods., Inc.*, 334 F. Supp. 2d 1303, 1318 (S.D. Fla. 2004), *aff'd*, 183 F. App'x 872 (11th Cir. 2006).

damages is in controversy. *Id.*; *Leonard*, 279 F.3d at 972. And any attempt to determine an amount would be speculative.⁶ *Pretka*, 608 F.3d at 754-55.

C. Compensatory Damages

State Farm contends that Plaintiff's unspecified claim for compensatory damages "may include a variety of non-economic losses that can exceed the jurisdictional minimum," without, however, pointing to any specific facts or allegations that support that contention. State Farm relies on cases illustrating recoveries by different plaintiffs. However, rulings in unrelated cases are not evidence of compensatory damages in this case. *McKinnon*, 329 F.3d at 809; *Leonard*, 279 F.3d at 972.

D. Attorney's Fees


In support of including an estimate of reasonable attorney's fees in the jurisdictional amount, State Farm submits two affidavits from two unrelated cases, and argues that district courts have awarded or estimated attorney's fees in employment discrimination cases in a range of \$40,000 to \$212,235. However, State Farm does not submit evidence of the amount of fees that have been or will be incurred in this case. And, "mere citation to what has happened in the past does nothing to overcome the indeterminate and speculative nature" of estimating attorney's fees. *McKinnon*, 329 F.3d at 809; *see also Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955, 958 (7th Cir. 1998) (excluding from the amount in controversy attorneys' fees "that have not been and may never be incurred, and are therefore not 'in controversy' between the parties."). State Farm fails to meet its burden of proving the amount of attorney's fees in controversy.

⁶ Indeed, punitive damage awards vary. *See e.g. Thomas v. Alabama Home Const.*, 271 F. App'x 865, 867 (11th Cir. 2008) (\$25,000 and \$50,000 awarded in punitive damages in sexual harassment case); *Speedway SuperAmerica, LLC v. Dupont*, 933 So. 2d 75, 88 (Fla. 5th DCA 2006) (\$40,000 awarded in punitive damages in sexual harassment case); *Alvarez v. Royal Atl. Developers*, No. 1:07-cv-21333, 2011 WL 4914666 (S.D. Fla. June 8, 2011) (\$19,519.23 awarded in punitive damages in FCRA and Title VII case).

IV. Conclusion

The amount in controversy that has been proven by a preponderance of the evidence is \$40,705.13. Accordingly, Plaintiff's Motion to Remand (Dkt. 11) is **GRANTED**. This case is **REMANDED** to the Circuit Court, Thirteenth Judicial Circuit in and for Hillsborough County, Florida. The Clerk is directed to mail a copy of this Order to the Clerk of the Circuit Court, Thirteenth Judicial Circuit and **CLOSE** the file. State Farm's Motion to Dismiss (Dkt. 28) and Larry Hyman's Motion to Intervene and Substitute Party (Dkt. 39) will carry with the case.

DONE AND ORDERED this 2nd day of August, 2017.


JAMES D. WHITTEMORE
United States District Judge

Copies to: Counsel of Record;
Clerk of the Circuit Court, Thirteenth Judicial Circuit in and for Hillsborough County, Florida