

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Mary Helton,	:	Case No. 1:16-cv-318
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
Leavitt Management Group, Inc., et al,	:	
	:	
Defendants.	:	

ORDER

Before the Court is Plaintiff's motion to remand this case to the Hamilton County Court of Common Pleas. (Doc. 5) Plaintiff argues that Defendants' notice of removal is untimely, because it was filed more than 30 days after she filed her state court complaint. She also contends the notice is defective because 28 U.S.C. §1445(c) forbids removal of her claim arising under Ohio's worker's compensation law. Plaintiff seeks an order remanding this case and an award of costs and fees.

The record establishes that Plaintiff filed her state court complaint on April 2, 2015, following the termination of her employment. Her complaint alleges that Defendants are employers "within the meaning of Americans With Disabilities Act, as amended, and the Family Medical Leave Act, Ohio Rev. Code section 4112.01(A)(2), and pursuant to the Ohio Workers Compensation Act ...". (Doc. 2 at ¶ 4) She generally alleges that she worked for a dermatology practice beginning in 1996. That practice was sold in late 2013, and the prior owner and all employees continued working for the new owners, Defendants Leavitt Management Group and Advanced Dermatology of Ohio, Inc. Plaintiff was assured by the prior owner that she would be able to keep her

job as financial manager.

In September 2014 she sustained work-related injuries to her hands and arms. She notified Defendants of her serious medical condition and her work-related injury, but they told her not to file a workers compensation claim and that she would not be compensated for her injuries. She was working under restrictions due to her injury when she was terminated on October 8, 2014, allegedly for unsubstantiated reasons. Her complaint further alleges: "The actions by the employer and ultimately the decision to terminate Plaintiff were done in direct retaliation and discrimination for Plaintiff's having a workers' compensation injury, making a workers' compensation claim, having need for accommodation in the work place, being perceived as having a disability, anticipating need to take family medical leave pursuant to the FMLA and/or Workers Compensation leave, and for participating in a workers' compensation claim pursuant to the Ohio Workers' Compensation Act and in violation of the FMLA, and Ohio Revised Code 4123.90." (Doc. 2 at ¶ 21, PAGEID 79-80)

The first two claims in Plaintiff's complaint allege state law claims for sex and disability discrimination, and gross negligence. Her third claim alleges a state law claim for retaliatory discharge and breach of contract, where she specifically alleges: "Defendants, and each of them, breached the express and implied employment contract by failing to maintain a workplace free of sexual, disability harassment, and discrimination based on disability, injury, use of FMLA leave, and workers' compensation and retaliation." (Doc. 1 at 2) Her fourth claim alleges retaliation under Ohio's workers compensation statute, Ohio Rev. Code 4123.90. And her fifth claim is brought against several fictitious Defendants, alleging respondeat superior liability

against them as agents or employees of her employer.

Defendants filed a notice of removal on February 16, 2016. (Doc. 1) The notice asserts that after she filed her complaint, Plaintiff filed an EEOC charge claiming her termination violated the Americans with Disabilities Act and the Family and Medical Leave Act. The EEOC issued Plaintiff a notice of right to sue on January 19, 2016. As of February 16, the date the removal notice was filed, Plaintiff had not sought to amend her state court complaint to specifically allege claims under either federal statute. (The Court notes that she has not sought to do so since the case was removed.) On February 10, 2016, Plaintiff filed a pre-trial statement in anticipation of a March 14, 2016 trial date in the state court. The statement is attached to the notice of removal. A section of that statement entitled "Legal Issues" states:

Plaintiff claims that termination was in retaliation or discrimination for having a workers' compensation claim and/or making a workers' compensation claim or in retaliation for requesting anticipated use of FMLA leave. She further claims that [Defendants] violated their contract and promise of continued employment. Plaintiff had continued to work for almost twenty years for the same employer.

(Doc. 1 at 67)

Defendants' notice of removal asserts that Plaintiff's pretrial statement was the "first time that Plaintiff has asked the court to determine whether Plaintiff was terminated in retaliation for anticipated FMLA use, and therefore, the first time Defendants have had knowledge of such a federal claim." (Doc. 1 at 3) They argue that removal was timely because it was filed within 30 days of Plaintiff's pretrial statement. They rely on 28 U.S.C. §1446(b)(3), which states that removal must be filed within 30 days of a defendant's receipt of a pleading, motion, order "... or other paper from which it may first

be ascertained that the case is one which is or has become removable."

DISCUSSION

A case may be removed to federal court based on federal question jurisdiction only if the plaintiff could have filed the case originally in federal district court. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005). The plaintiff's complaint controls whether federal jurisdiction exists, and any federal issue must be an essential element of the plaintiff's cause of action. Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 10-11 (1983). "[T]he fact that the wrong asserted could be addressed under either state or federal law does not . . . diminish the plaintiff's right to choose a state law cause of action." Alexander v. Electronic Data Sys. Corp., 13 F.3d 940, 943 (6th Cir. 1994) (citations omitted). In determining whether removal was proper, the Court must resolve any doubt in favor of keeping the case in state court, because removal interferes with the state court's jurisdiction. Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 534 (6th Cir. 1999).

Defendants argue that Plaintiff's original complaint was not removable, because she pled claims arising exclusively under state law. They contend that the complaint's reference to the FMLA was not sufficient to reasonably ascertain the existence of a federal claim under that statute. Defendants contend that it was Plaintiff's pre-trial statement that triggered its right to remove. They argue that for the first time, the statement explicitly stated a cause of action for FMLA retaliation that is "articulated as completely separate" from her contract and other state law claims. (Doc. 7 at 7) Plaintiff responds that Defendants were on notice of her reference to the FMLA from the

start, as it is cited several times in her complaint. Plaintiff argues that the timing of the removal suggests that Defendants wanted to avoid the upcoming trial and attendant deadlines. The mere fact that the alleged FMLA or ADA violations are cited in her pretrial statement does not make the case removable. And simply referring to federal law or alleged violations of federal law is not sufficient to support federal question jurisdiction.

The Court concludes that Plaintiff's pre-trial statement is not sufficient to satisfy the strictures of 28 U.S.C. §1446(b)(3). Plaintiff's complaint specifically alleges that Defendants were "employers" subject to the FMLA. Defendants knew that Plaintiff filed an EEOC claim shortly after she filed her complaint. And they concede that despite her EEOC notice, Plaintiff has not sought to amend her complaint to specifically allege any claim under federal law. Her reference to the FMLA in her pre-trial statement simply echoes her reference to the FMLA in her original complaint.

A district court in this circuit granted a motion to remand in a case involving analogous facts. In Parks v. University Hospitals Case Medical Center, 2010 U.S. Dist. LEXIS 134778 (N.D. Ohio, December 10, 2010), plaintiff filed suit in state court alleging she was terminated due to her age in violation of Ohio Rev. Code 4112.02(A). In preparation for trial, plaintiff disclosed her exhibit list which included defendant's FMLA policy and correspondence to her approving her FMLA leave. The trial court denied defendant's motion to exclude these exhibits, allowing plaintiff to use them to try to prove pretext for purposes of her discrimination claim. Defendant then removed the case to federal court, arguing that the trial court's order allowed plaintiff to litigate an FMLA claim at trial. The district court disagreed, noting that plaintiff's complaint alleged

only a state law discrimination claim, and the question of what evidence might be admissible to prove that claim was a question for the state court. The district court also found the notice of removal was untimely under Section 1446(b). The court noted that a defendant has "an affirmative duty to make reasonable inquiry to ascertain the existence of federal jurisdiction and pursue 'clues' of potential federal jurisdiction as soon as they are uncovered." *Id.* at *11 (internal citations omitted). There had been numerous "clues" raised in the case, including plaintiff's request to defendant to produce documents concerning her FMLA history; deposition testimony from a hospital employee that defendant should have classified plaintiff's time off as FMLA leave; and plaintiff's identification of her trial exhibits that included the FMLA policy and correspondence.

Here, Plaintiff's original complaint certainly provided Defendants with a "clue" that she was contemplating federal claims under the ADA and/or the FMLA. Paragraph 4 of her complaint specifically alleged that Defendants are employers within the meaning of those statutes. Her additional allegations of discrimination and/or retaliation, as quoted above, also gave Defendants notice about the facts giving rise to her state law claims. Plaintiff's pre-trial statement does not substantively differ from the allegations in her original complaint. And contrary to Defendants' assertion, she did not explicitly articulate a separate federal FMLA claim in her statement, and has not sought leave to do so. The Court therefore concludes that federal question jurisdiction does not exist, because Plaintiff's complaint does not arise under federal law nor implicate a substantive federal interest that could support jurisdiction.

The Court also concludes that Defendants' notice was untimely under Section

1446(c), because Defendants were aware of Plaintiff's citation to the FMLA when they were served with her original complaint. In view of this conclusion, the Court need not address the parties' arguments concerning jurisdiction over Plaintiff's worker's compensation claim. Defendants' removal notice is clearly untimely with respect to that claim, which was alleged in the original complaint.

Plaintiff also seeks an award of costs and fees under 28 U.S.C. §1447(c), which states that an order remanding a case "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The Supreme Court has held that fees should not be awarded "... when the removing party has an objectively reasonable basis for removal." Martin v. Franklin Capital Corp., 546 U.S. 132, 136 (2005). This Court has discretion to determine whether fees should be awarded under this standard. Warthman v. Genoa Twp. Bd. Of Trs., 549 F.3d 1055, 1059 (6th Cir. 2008). In Warthman, the defendant removed a complaint that alleged exclusively state law claims, citing plaintiff's reference to the Fourteenth Amendment's Due Process Clause to argue she was also raising a federal claim. The Sixth Circuit held that the removal was objectively unreasonable; a reference to a federal constitutional provision or a statute must be read in context of the entire complaint and the claims actually alleged, and is not sufficient by itself to confer federal question jurisdiction.

Moreover, the Sixth Circuit observed that "... if the defendant has a legitimate doubt as to whether a complaint raises a federal cause of action, there is no law that prohibits the defendant from simply contacting the plaintiff and requesting a written confirmation that only state-law claims are being asserted." Id. at 1064. There is no

suggestion that Defendants did so in this case. Defendants' decision to remove the case a few weeks prior to a scheduled trial date, combined with the absence of a clearly articulated federal claim, supports a conclusion that Defendants' decision to remove the case was objectively unreasonable, entitling Plaintiff to an award of fees and costs. Plaintiff shall submit her request, together with an affidavit supporting the amount of fees and costs requested, within fourteen days of the date of entry of this order, no later than May 16, 2016. Defendants may respond to Plaintiff's request within fourteen days thereafter, no later than May 31, 2016.

For all of these reasons, Plaintiff's motion to remand this case (Doc. 5) is GRANTED.

SO ORDERED.

DATED: May ____, 2016

Sandra S. Beckwith, Senior Judge
United States District Court