UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LESLIE BASINGER, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	***Docket No. 98-334-P-H***
	)	
WAL-MART STORES, INC.,	)	
d/b/a WAL-MART, et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The plaintiffs, five former employees of Wal-Mart stores located in Maine, seek summary judgment on the Fourth Claim of their second amended complaint (Docket No. 25), which alleges a violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* This is the only federal-law claim asserted in the second amended complaint in this action which was removed to this court from the Maine Superior Court (Cumberland County) by the defendants. The defendants, Wal-Mart Stores, Inc., Wal-Mart Stores East, Inc., and Wal-Mart Associates, Inc., also seek summary judgment on this count and, in the alternative, seek rulings on the applicable statute of limitations and available damages under the FLSA and the circumstances of this case. I recommend that the court grant the defendants' motion for summary judgment.[1] If the court adopts my

[1] The plaintiffs have requested oral argument on the pending motions. Docket No. 33. I am satisfied that the written submissions of the parties adequately address the issues raised. Therefore, (continued...)

recommendation concerning the federal claim, I further recommend that this case be remanded to the Maine Superior Court (Cumberland County).

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International*

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[1](...continued)
the request for oral argument is denied.

Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr., 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

The mere fact that both parties seek summary judgment does not render summary judgment inappropriate. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* ("Wright, Miller & Kane") § 2720 at 19. For those issues subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720 at 24-25.

II. Factual Background

The following material facts are appropriately supported in the summary judgment record. The plaintiffs are five former employees[2] of defendant Wal-Mart Stores, Inc. Second Amended Complaint ¶¶ 5-6C; Wal-Mart's Answer and Affirmative Defenses to Plaintiffs' Second Amended Complaint ("Answer to Second Amended Complaint") (Docket No. 29) ¶¶ 5-6C. All were so employed "within the meaning of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*." Second Amended Complaint ¶ 17; Answer to Second Amended Complaint ¶ 17; Defendants' Rule 56(e)

[2] The second amended complaint (Docket No. 25), dated November 9, 1998, alleges that plaintiff Abraham Stern "is a current employee of Defendant's Windham store." ¶ 6A. However, Stern's affidavit, dated November 4, 1998, states that he was an employee at that store from October 1997 to October 1998. Affidavit of Abraham M. Stern ("Stern Aff."), attached to Plaintiffs' Statement of Material Facts for Which There is No Genuine Issue to be Tried ("Plaintiffs' SMF") (Docket No. 17), ¶ 2.

Response to Plaintiffs' Statement of Material Facts and Defendants' Statement of Material Facts for Which There Exist No Genuine Issues to be Tried ("Defendants' SMF") (Docket No. 21) ¶ A.6.[3] At all relevant times, Wal-Mart[4] paid the plaintiffs every two weeks, as it did all of its employees in the United States. Affidavit of Stephen Bickart, attached to Plaintiffs' SMF, ¶ 3; Affidavit of Jean Nadeau, attached to Plaintiffs' SMF, ¶ 3; Affidavit of Bonnie Ramsdell, attached to Plaintiffs' SMF, ¶ 3; Stern Aff. ¶ 3; Affidavit of Leslie Basinger, attached to Plaintiffs' SMF, ¶ 3; Affidavit of Diana Lynne Reeves ("Reeves Aff.") (Docket No. 19) ¶ 16. Wal-Mart currently pays its employees every two weeks. Second Amended Complaint ¶ 7; Answer to Second Amended Complaint ¶ 7.

Each of the plaintiffs received the full value of the compensation earned for the services they rendered to Wal-Mart according to the payment schedule in effect when they were hired. Reeves Aff. ¶ 5. Absent special circumstances or calculation errors, none of the plaintiffs ever had any portion of their minimum wages customarily due and payable on their regular payday withheld for an additional two week period after that payday. *Id*. ¶ 8.

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[3] The plaintiffs assert that they all were employed by Wal-Mart Stores within the meaning of the Fair Labor Standards Act. Plaintiffs' SMF ¶ 6. Even though the only record support they cite for this assertion, paragraphs 17 of the first amended complaint and the answer to that complaint, establishes this fact only as to plaintiffs Basinger and Bickart, as do the corresponding paragraphs of the second amended complaint and the corresponding answer noted in the text, the Defendants' SMF admits the assertion as to all plaintiffs. Defendants' SMF ¶ A.6. Accordingly, I will assume that all of the plaintiffs were in fact covered by the Fair Labor Standards Act at all relevant times, despite the lack of appropriate authority in the record.

[4] I will use the term "Wal-Mart" to apply to all three defendants. The parties' statements of material fact include only defendants Wal-Mart Stores, Inc. and Wal-Mart Stores East, Inc., and there is no mention of defendant Wal-Mart Associates, Inc. in any of the parties' submissions on the summary judgment issue. I will proceed on the assumption that the parties' arguments apply equally to all three defendants.

III. Discussion

The Fourth Claim in the second amended complaint asserts that the defendants violated the Fair Labor Standards Act "by failing to pay the Plaintiffs promptly at least the federally mandated minimum wage of $5.15 per hour." Second Amended Complaint ¶ 18. The plaintiffs' motion for partial summary judgment makes clear that the alleged violation of the federal statute consists of a failure to pay them weekly as required by 26 M.R.S.A. § 621. Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment, etc. ("Plaintiffs' Memorandum"), attached to Plaintiffs' Motion for Partial Summary Judgment as to Liability Under the Fair Labor Standards Act, Count IV (Docket No. 16), at 6.

The plaintiffs invoke several sections of the FLSA and its accompanying regulations. The requirement that employers pay a minimum wage is found at 29 U.S.C. § 206(a):

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates . . . .

Overtime pay is governed by 29 U.S.C. § 207(a)(1):

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Violation of these provisions is made unlawful by 29 U.S.C. § 215(a)(2), and penalties for violation are established by 29 U.S.C. § 216. No provision of the FLSA speaks to the timing of payment of the required wages.

Regulations promulgated by the Department of Labor under the FLSA, 29 C.F.R. § 778.0, address the timing-of-payment issue for overtime pay.

> There is no requirement in the Act that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends.

29 C.F.R. § 778.106. The plaintiffs contend that 29 C.F.R. § 778.315 in effect requires that all non-overtime wages must be paid by the next regular pay day after they are earned.

> In determining the number of hours for which overtime compensation is due, all hours worked . . . by an employee for an employer in a particular workweek must be counted. Overtime compensation, at a rate not less than one and one-half times the regular rate of pay, must be paid for each hour worked in the workweek in excess of the applicable maximum hours standard. This extra compensation for the excess hours of overtime work under the Act cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract (express or implied) or under any applicable statute has been paid.

29 C.F.R. § 778.315.

Courts have interpreted the FLSA to require timely payment of the statutory minimum wage. These interpretations begin with a necessary inference drawn from the Supreme Court's holding in *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945), in which the issue was whether employees had waived a claim under the FLSA when they accepted a lump-sum payment of overdue wages. The Court stated that the liquidated damages provision of the FLSA "constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living . . . that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard." 324 U.S. at 707. The Court's holding that the employees could not waive a claim for liquidated damages under the FLSA

necessarily implies that payment of wages was due at a given time.

> The statute must therefore contemplate a time at which § 206 is violated, or, put another way, when minimum wages become "unpaid." "Unpaid minimum wages" have to be "unpaid" as of some distinct point, otherwise courts could not compute either the amount of wages which are unpaid, or the additional "equal" amount of liquidated damages. The only logical point that wages become "unpaid" is when they are not paid at the time work has been done, the minimum wage is due, and wages are ordinarily paid — on payday.

Biggs v. Wilson, 1 F.3d 1537, 1539-40 (9th Cir. 1993).

"[T]here is nothing in the [FLSA] that says a pay period has to be one week only or that employees must be paid weekly." *Marshall v. Allen-Russell Ford, Inc.*, 488 F. Supp. 615, 618 (E.D.Tenn. 1980). "Ordinarily, the relevant pay period is determined from the actual pattern of payments adopted by the parties." *Luther v. Z. Wilson, Inc.*, 528 F. Supp. 1166, 1174 (S.D. Ohio 1981). Here, the plaintiffs argue, the relevant pay period must be determined by state statute rather than by the bi-weekly pattern in effect between them and Wal-Mart.

The Maine statute at issue provides:

> Every corporation . . . engaged in a . . . mercantile . . . business . . . shall pay weekly each employee engaged in its business the wages earned by the employee to within 8 days of that date of that payment; every county shall so pay every employee who is engaged in its business the wages or salary earned by that employee, unless the employee requests in writing to be paid in a different manner. Municipalities shall pay their employees at least once every 2 weeks unless the employee agrees to be paid under a less frequent pay schedule. An employee who is absent from that employee's regular place of employment at a time fixed for payment must be paid on demand.

26 M.R.S.A. § 621(1). Penalties for violation of this provision are set forth at 26 M.R.S.A. § 626-A.

The plaintiffs argue that (i) for Maine employees within the terms of section 621(1), that

statute provides the "regular" or "ordinary" pay day[5] that defines timeliness of payment for purposes of federal case law interpreting the FLSA and (ii) the statute is part of an employment contract between them and Wal-Mart, because "[t]he law in effect at the time of the execution of the contract becomes part of the contract," Plaintiffs' Memorandum at 7, citing *Portland Sav. Bank v. Landry*, 372 A.2d 573, 575 (Me. 1977).

The court's review of the plaintiffs' first argument is governed by the First Circuit's renewed endorsement in *Serapion v. Martinez*, 119 F.3d 982, 988 (1st Cir. 1997), of "the widely accepted principle that, in the absence of plain indication of a contrary intent, courts ought to presume that the interpretation of a federal statute is not dependent upon state law." The Supreme Court established this principle many years ago. "[W]e must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Jerome v. United States*, 318 U.S. 101, 104 (1943). That principle should apply with extra force when the dependency upon state law for which a party argues occurs only through the filter of case law interpreting the federal act.

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[5] The plaintiffs rely on a 1961 opinion letter of the Department of Labor to support their argument that only the word "regular" is involved in determining the date after which wages become "unpaid" for purposes of the timeliness requirement read into the FLSA by case law. Plaintiffs' Memorandum at 7. While the Department's interpretation of the FLSA to require payment of minimum wages due for a particular work week on the "regular payday" for the period in which that work week ends, Wage and Hour Opinion Letter No. 63, [1961-1966 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,581 (Nov. 30, 1961), is entitled to some deference, its use of the word "regular" instead of "ordinary" or another similar term is not and cannot be controlling. *See Warder v. Shalala*, 149 F.3d 73, 83 (1st Cir. 1998). In any event, the plaintiffs' use of a limited dictionary definition in support of their argument that the word "regular" "references a rule or a law," Plaintiffs' Memorandum at 7 n.6, is unduly narrow and inconsistent with the existing case law, a preferable source of authority. *See Keating v. National Union Fire Ins. Co. of Pittsburgh, PA*, 995 F.2d 154, 155 (9th Cir. 1993) (discussing opinion of California Supreme Court). *See also Black's Law Dictionary* (6th ed. 1990) at 1285 (variety of definitions of "regular").

The First Circuit's reasoning in *Serapion* is equally applicable here.

> Linking status determinations [under Title VII] to local law would make an important federal statute mean different things in different states. This sort of checkerboarding would undermine Congress' easily discerned intent that Title VII stand as a national code of conduct in the struggle to ensure equality of treatment in the workplace. . . .
>
> In regard to Title VII, there is no basis for departing from the precept that "federal statutes are generally intended to have uniform nationwide application," *Mississippi Band of Choctaw Indians* [*v. Holyfield*], 490 U.S. [30], 43 [(1989)], and there is every reason for adhering to it.

119 F.3d at 988-89. "Congress intended [the FLSA] to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees governed by the Act." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 741 (1981), quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602-03 (1944).[6] The plaintiffs cite case law in which federal courts have resorted to state law to interpret terms included in federal statutes, but none of those cases presents circumstances sufficiently analogous to the plaintiffs' argument to require the court to deviate from these general principles.[7] *See Holyfield*, 490 U.S. at 43-44 ("[C]ases in which we have found that Congress intended a state-law definition of a statutory term have often been those where uniformity clearly was not intended."). The plaintiffs point to no such clear intention in the language of the FLSA, and courts should be doubly reluctant to link a

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[6] My research has located the following state statutes which require weekly payment of wages to certain employees, in addition to the Maine statute at issue here. Cal. Educ. Code § 52383 (students in summer vocational and technical education); Conn. Gen. Stat. § 31-71b(b); Haw. Rev. Stat. Ann. § 103-54 (laborers on public construction projects); N. H. Rev. Stat. Ann. § 275:43; N. J. Stat. Ann. § 34:11-2 (employees of railroad, express, car-loading and car-forwarding companies); N. M. Stat. Ann. § 13-4-11 (employees on public construction contracts); Tex. Prop. Code § 58.009 (wages for work performed by day or week).

[7] This is particularly the case when the practice attacked by the plaintiffs did not result in evasion of the minimum wage and overtime provisions that are the heart of the FLSA. *See Rogers v. City of Troy, New York*, 148 F.3d 52, 56 (2d Cir. 1998).

requirement of federal statutory law to state-law definitions when that requirement does not appear itself in the statute but has been found by the courts to be a necessary implication of the statutory scheme.

It is particularly important to note that in this case the plaintiffs seek to use state law in the interpretation of a federal statute in a manner that will create a federal remedy for violation of that state statute in addition to one already provided by state law. None of the case law cited by the plaintiffs uses state law to this effect. The plaintiffs argue that "[i]n FLSA actions . . . state statutes have been used by federal courts to fill in the interstices of the Act when it lacked a provision necessary to adjudicate a case." Plaintiffs' Combined Brief in Opposition to Defendant's [sic] Cross Motion for Partial Summary Judgment and Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment as to Liability (Docket No. 26) at 7. The only "interstice" in the FLSA mentioned by the plaintiffs in support of this assertion is the lack of a statute of limitations prior to 1947, *id.*, a situation in which it has been common practice for federal courts to borrow or import a related state-law limitations period. *E.g.*, *Wilson v. Garcia*, 471 U.S. 261, 276-80 (1985) (actions under 42 U.S.C. § 1983). Here, the crucial point is that the asserted "interstice" in the FLSA is not the lack of a provision *necessary to adjudicate a case*, but rather the lack of a provision *creating a cause of action*. Without the state statute, the plaintiffs have no "case" at all under the FLSA. The plaintiffs offer no authority to support a resort to state law under such circumstances. *Serapion* prevents this court from doing so.

The case law cited by the plaintiffs in support of their second argument, that section 621 became part of the implied employment contract between the parties as a matter of law and thereby creates the date upon which payment of wages was due for purposes of the FLSA as construed by

federal case law, deals with written contracts. The plaintiffs have not provided any evidence in the summary judgment record that any written employment contract existed between them and Wal-Mart.[8] At best, the plaintiffs must be claiming that they have implied employment contracts, as evidenced by their citation to *Wormell v. Maine Cent. R. R. Co.*, 79 Me. 397, 403-04 (1887) ("The relationship of master and servant may and most frequently does exist by simple mutual agreement that the servant is to labor in the service of the master. In such case the law holds that the terms of the contract are not fully expressed, and that there exists by implication reciprocal rights and obligations on the part of each which it will protect and enforce equally as if expressed by the parties.") My own research has located no reported Maine cases in which statutes in existence at the time an implied contract arose have been treated as terms of that contract, nor have I found any such cases reported in other jurisdictions. Even if the plaintiffs are correct in asserting that, by operation of law, section 621 became a part of an implied employment contract between them and Wal-Mart,[9] a contract which they cannot enforce as such, they fail to explain how that implied term establishes

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[8] Under Maine law, no action may be maintained "[u]pon any agreement that is not to be performed within one year from the making thereof" unless the contract on which the action is brought "is in writing and signed by the party to be charged therewith." 33 M.R.S.A. § 51. This statute of frauds applies to employment contracts. *E.g., Stearns v. Emery-Waterhouse Co.*, 596 A.2d 72, 74 (Me. 1991). Plaintiffs Stern, Nadeau and Basinger, by the terms of their affidavits, were employed by Wal-Mart for one year or more. Stern Aff. ¶ 2; Nadeau Aff. ¶ 2; Basinger Aff. ¶ 2. While the affidavits of the other two plaintiffs indicate that they were employed by Wal-Mart for less than one year, Ramsdell Aff. ¶ 2, Bickart Aff. ¶ 2, there is no indication that the implied employment contracts upon which they apparently rely were intended to be performed in less than one year. Accordingly, the plaintiffs have no claim against Wal-Mart for breach of contract due to the alleged violation of section 621. *Popanz v. Peregrine Corp.*, 710 A.2d 250, 251-52 (Me. 1998).

[9] *But see General Motors Corp. v. Romein*, 503 U.S. 181, 189 (1992) (dealing with written employment contracts): "For the most part, state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts."

the "regular" or "ordinary" pay day while they worked for Wal-Mart. That day was established by Wal-Mart's unvarying practice of paying wages to the plaintiffs every two weeks. *See Rogers*, 148 F.3d at 57 ("the cases demonstrate that what constitutes timely payment must be determined by objective standards — and not solely by reference to the parties' contractual arrangements.") As noted above, the plaintiffs have a statutory remedy, independent of any contract considerations, for a breach of section 621. The edifice they attempt to construct on the basis of unrelated Maine case law in order to reach a federal statutory remedy, the scope of which is determined by federal case law, simply will not bear the weight that plaintiffs seek to place upon it.

Contrary to the plaintiffs' argument, this court's refusal to base a cause of action for violation of the FLSA on section 621 does not "enforce an agreement which is illegal under state law." Plaintiffs' Memorandum at 11. It merely limits the plaintiffs to the remedies established by state law for violation of a state statute. Those are the remedies deemed adequate by the Maine Legislature. There is no indication in the language of the FLSA or in the case law interpreting it that Congress intended to enlarge those remedies or to provide additional remedies for violation of section 621 or any state statute.

The defendants are entitled to summary judgment on the Fourth Claim in the second amended complaint.

IV. Remand to State Court

The plaintiffs' Fourth Claim is the only count in the second amended complaint that asserts a claim under federal law. The defendants, in their notice of removal, cite only 28 U.S.C. § 1331, which provides jurisdiction in the federal courts for actions arising under federal law, as the basis for the removal. Notice of Removal (Docket No. 1) at 1-2. The state-law claims asserted in the

second amended complaint are before this court by virtue of 28 U.S.C, § 1367(a) (supplemental jurisdiction). If summary judgment is entered on the Fourth Claim, only the state-law claims will remain. While neither the plaintiffs nor the defendants have moved this court to remand this action to the state court in the event of entry of summary judgment on the federal claim, I recommend that the court do so *sua sponte*.

> If . . . the court dismisses the foundational federal claims, it must reassess its jurisdiction, this time engaging in a pragmatic and case-specific evaluation of a variety of considerations that may bear on the issue. Among the factors that will often prove relevant to this calculation are the interests of fairness, judicial economy, convenience, and comity. Comity is a particularly important concern in these cases.

Camelio v. American Fed'n, 137 F.3d 666, 672 (1st Cir. 1998) (citation omitted). The Supreme Court has provided specific direction to the federal courts on this point.

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not unsubstantial in a jurisdictional sense, the state claims should be dismissed as well.

United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966). The First Circuit, after quoting this passage, concludes:

> Accordingly, the balance of competing factors ordinarily will weigh strongly in favor of declining jurisdiction over state law claims where the foundational federal claims have been dismissed at an early stage in the litigation.

Camelio, 137 F.3d at 672.

This standard also applies when the federal claims are brought to a conclusion by summary judgment rather than dismissal, *Pew v. Scopino*, 904 F. Supp. 18, 32 (D. Me. 1995), and when that summary judgment occurs after removal of an action from state court, *Rose v. Baystate Med. Ctr.*,

Inc., 985 F. Supp. 211, 218-19 (D. Mass. 1997). It is appropriate for a court to remand a case under these circumstances on its own motion. *Id*. at 219.

In this case, entry of a full scheduling order addressing discovery and motion practice sequencing and limitations was deferred until resolution of the motions for summary judgment on the federal claim. Report of Scheduling Conference and Order (Docket No. 14) at 2. The state-law claims thus can only be described as remaining at "an early stage in the litigation." Considerations of judicial economy, convenience and comity all weigh in favor of resolution of those claims by the state court. Accordingly, I recommend that the court, if it enters summary judgment on the Fourth Claim of the second amended complaint, remand this action to the state court .

V. Conclusion

For the foregoing reasons, I recommend that the plaintiffs' motion for partial summary judgment be **DENIED**, that the defendants' motion for partial summary judgment be **GRANTED**, and that, if these recommendations are adopted, the remaining (state-law) claims be remanded to the Maine Superior Court (Cumberland County).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 27th day of January, 1999.

David M. Cohen
United States Magistrate Judge