

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SAMUEL M. KOREN,)
)
 Plaintiff)
)
 v.)
)
 NORTH EAST INSURANCE COMPANY,)
 et al.,)
)
 Defendants)

Docket No. 99-326-P-C

RECOMMENDED DECISION ON PLAINTIFF’S MOTION FOR ORDER OF REMAND

The plaintiff moves to remand this case to the Maine Superior Court (Cumberland County), from which it was removed by the defendants pursuant to 28 U.S.C. § 1441 on October 21, 1999. I recommend that the court grant the motion.

The complaint in this action, Exhibit 2 to the Affidavit of Michael G. Messerschmidt, Esq. (Docket No. 2), includes nine counts arising out of the plaintiff’s employment relationship with defendant North East Insurance Company. The only claim invoking federal law is an allegation in Count VIII that the defendants’ actions violated the Family and Medical Leave Act of 1993 (“FMLA”), 29 U.S.C. § 2611 *et seq.* Complaint, ¶ 47. All of the other claims arise under Maine law: breach of contract, promissory estoppel, equitable reformation, negligent misrepresentation, tortious interference with contract, intentional infliction of emotional distress, negligent infliction of emotional distress, violation of the Maine Family Medical Leave Requirements Act, 26 M.R.S.A. § 843 *et seq.*, and breach of fiduciary duty. The federal-law claim provides the basis for removal of

the action to this court. 28 U.S.C. §§ 1331, 1441.

The plaintiff contends that the action should be remanded to state court for two reasons: first, because the defendants failed to comply in a timely fashion with the requirements of 28 U.S.C. § 1446 applicable to removal; and second, because state-law claims predominate over federal-law claims. Plaintiff's Motion for Order of Remand, etc. (Docket No. 5) at 3-6. The defendants respond that they have remedied the defects in removal, albeit only after being notified of the existence of those defects by the plaintiff's motion, and that their temporary failure to execute all procedural requirements should not result in remand; and that the nature of the single federal-law claim requires resolution of all issues by this court. Defendants' Opposition to Plaintiffs' Motion for Order of Remand ("Opposition") (Docket No. 9).

The defendants did not notify the clerk of the Maine Superior Court of the removal of this action¹ until November 24, 1999, Opposition at 2, more than a month after they filed a notice of removal with this court. They did not file evidence of the service of process until November 26 and 29, 1999.² Opposition at 2. However, the plaintiff apparently was notified immediately when the defendants undertook to remove the action. *Id.* Jurisdiction attached in this court as soon as the notice of removal was filed here. *Berberian v. Gibney*, 514 F.2d 790, 792-93 (1st Cir. 1975). Other courts have held that the procedural "promptness" requirements of 28 U.S.C § 1446 should not be

¹ 28 U.S.C. § 1446(d) provides, in relevant part: "Promptly after the filing of such notice of removal of a civil action the defendant . . . shall file a copy of the notice with the clerk of such State court, which shall effect the removal."

² 28 U.S.C. § 1446(a) provides, in relevant part: "A defendant . . . desiring to remove any civil action . . . from a State court shall file in the district court of the United States . . . a notice of removal . . . together with a copy of all process, pleadings, and orders served upon such defendant . . . in such action."

so strictly construed as to warrant sending the case back to state court. *E.g., Barrett v. Southern Ry. Co.*, 68 F.R.D. 413, 422 (D.S.C. 1975); *Master Equip., Inc. v. Home Ins. Co.*, 342 F. Supp. 549, 551-52 (E.D.Pa. 1972). Under the circumstances, I see no reason to impose remand as a sanction for the regrettable oversights of defendants' counsel in complying with the procedural requirements of section 1446. The defects have been cured, no action appears to have been taken by the state court in the interim and the plaintiff has not been prejudiced.

The plaintiff's second argument is based on 28 U.S.C. § 1441(c), which provides:

Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

The defendants concede that this court may remand the entire action, including the federal claim, under this statute. Opposition at 6. *See, e.g., Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 328 (5th Cir. 1998); *In re City of Mobile*, 75 F.3d 605, 612 (11th Cir. 1996). They argue only that, because the First Circuit has not addressed the question whether a plaintiff may be compelled to arbitrate a claim under the FMLA, and the defendants are seeking arbitration of all of the plaintiff's claims under a written agreement, Answer of Defendants North East Insurance Company and Ronald Libby and Affirmative Defenses (Docket No. 3), Affirmative Defenses ¶ 5, this "novel and important" issue of federal law should not be decided by a state court. Opposition at 6-7.

The only case law cited by the defendants in support of this argument, *Alexander v. Goldome Credit Corp.*, 772 F. Supp. 1217 (M.D.Ala. 1991), to the extent that it remains good law, *see Reneau v. Oakwood Mobile Homes*, 952 F. Supp. 724, 727 (N.D.Ala. 1997) (stating that *Alexander* was

overruled by *In re City of Mobile*), is inapposite. The court in *Alexander* held that state law issues “uniquely fit for the . . . state courts to confront” should not be decided by a federal court when the only issue bringing the case to federal court is “relatively insignificant.” 772 F. Supp. at 1225. Should it be necessary for the Maine Superior Court to resolve the question of arbitrability of the plaintiff’s FMLA claim,³ I am confident that the court will give the question full and careful consideration and that resolution of this narrow issue will not result in a flood of piecemeal litigation in either the federal courts or the courts of the State of Maine.

Courts have differed on the appropriate manner in which to determine whether issues of state law predominate in a removed action so that remand is indicated. In *City of Mobile*, the Eleventh Circuit directed trial courts to decide the question

by examining the nature of the claims as set forth in the pleading and by determining whether the state law claims are more complex or require more judicial resources to adjudicate or are more salient in the case as a whole than the federal law claims.

75 F.3d at 613 (internal quotation marks and citation omitted). In contrast, the district court in *McKinney v. City of Grosse Pointe Park*, ___ F.Supp.2d ___, 1999 WL 1066876 (E.D.Mich. Nov. 15, 1999), held that state law claims predominated in a case merely “because the majority of claims for relief in this case are based on state law.” *Id.* at *2. By the latter measure, state law predominates in this case. The same is true if the former measure is applied. A claim under the FMLA is not so complex that it would require more judicial resources to resolve than the nine state-law claims presented by the complaint. The state-law claims in this case are “more salient” in the

³ The plaintiff states that he “will concede that if Defendant is entitled to arbitrate all of Plaintiff’s other claims, then it is entitled to arbitrate the FMLA claim as well.” Reply Memorandum in Support of Plaintiff’s Motion for Order of Remand (Docket No. 11) at 1.

case as a whole than is the FMLA claim.

For the foregoing reasons, I recommend that the plaintiff's motion be **GRANTED** and that this action 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 6th day of January, 2000.

*David M. Cohen
United States Magistrate Judge*