

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STANLEY WHITNEY,)
)
 Plaintiff,)
)
 v.)
) Civil No. 04-38-P-H
 WAL-MART STORES, INC.,)
)
 Defendant.)

**RECOMMENDED DECISION ON PLAINTIFF'S
MOTION TO DISMISS FOR LACK OF JURISDICTION**

Plaintiff Stanley Whitney sued Wal-Mart Stores in Maine Superior Court for alleged violations of the Maine Human Rights Act. Whitney filed his state court complaint in January 2004. Wal-Mart filed in this court a timely notice of removal based on diversity of citizenship. However, Wal-Mart failed to promptly file a copy of the notice in the Superior Court. On July 16, 2004, roughly contemporaneously with the close of discovery in this matter, the Superior Court entered a routine scheduling order, thereby alerting the parties to the fact that the Superior Court was not on notice of the removal petition. Realizing that the notice of removal had not been properly filed in the state court, Wal-Mart immediately filed a copy of the notice of removal in the Superior Court. (Docket No. 16, Attach. 2.)¹ Whitney, on the other hand, filed a motion to dismiss his case based on a lack of jurisdiction, evidently due to concern over his ability to contact or otherwise rely on one of his designated experts. (Docket No. 16, Attach. 5.)

¹ According to Linda B. Benjamin, a paralegal at the lawfirm of Thompson & Bowie, LLP, she visited the Superior Court clerk's office on February 12, 2004, in order to obtain a certified copy of that court's docket and informed personnel at the office that the matter would be removed to federal court. (Aff. of Linda B. Benjamin, Docket No. 16, Attach. 4.)

As of this date, the Superior Court's docket reflects the following "finding," dated July 20, 2004:
"Removal to Federal Court Entered on 7/20/2004."

There is no suggestion in Whitney's motion that jurisdiction would not be properly exercised in this court based on the parties' diversity and the amount in controversy. The only issue is whether Wal-Mart's failure to file a copy of the notice in the state court deprives this court of the power to proceed to a final disposition. Pursuant to 28 U.S.C. § 1446, a defendant desiring to remove a civil action from state court to federal court must timely file a notice of removal in the federal district court in which the state action is pending, together with a copy of all process, pleadings and papers served on the defendant in the state action. 28 U.S.C. § 1446(a) & (b). Thereafter, the defendant must "promptly" provide adverse parties with written notice of the removal and file in the state court a copy of the notice. Id., § 1446(d). According to the removal statute, it is the provision of notice to adverse parties and the filing of a copy of the notice in the state court "which shall effect removal and the State court shall proceed no further unless and until the case is remanded." Id.

Although it cannot reasonably be said that Wal-Mart's roughly six-month delay in filing a copy of the notice of removal in the Superior Court was prompt, it is apparent that federal jurisdiction exists and that the purpose of the removal statute has not been thwarted in this case. None of the cases cited by the parties suggests that federal jurisdiction turns on 1446(d) as opposed to 1446(a). See, e.g., Mfrs. & Traders Trust Co. v. Hartford Accident & Indem. Co., 434 F. Supp. 1053, 1055 (W.D.N.Y. 1977) ("[T]he filing of a copy of the petition for removal is a procedural and ministerial act, failure of which does not defeat the federal court's jurisdiction."). To the contrary, federal jurisdiction arises upon the defendant's compliance with 1446(a) & (b). Berberian v. Gibney, 514 F.2d 790, 792-93 (1st Cir. 1975) ("[W]e are inclined to

agree with Professor Moore, that the jurisdiction of the federal court attaches as soon as the petition for removal is filed with it, and that both state and federal courts have jurisdiction until the process of removal is completed."). See also Parker v. Malone, 2004 WL 190430, *2, 2004 U.S. Dist. LEXIS 1096, *7 (W.D. Va. Jan. 15, 2004) ("[F]ederal jurisdiction commences when the defendant files the notice of removal with the district court, and filing the notice with the state clerk affects the state's jurisdiction rather than federal jurisdiction.") (citing cases); 14C Charles Alan Wright et al., Federal Practice & Procedure § 3736 (1998) ("The filing of a copy of the notice of removal in the state court is a procedural and ministerial act and a number of federal courts have held that a failure to do so will not defeat the district court's subject matter jurisdiction.").

As for the statutory purpose, the requirement that defendants promptly file a copy of the notice with the state court is designed to avoid duplicative labor and possible inconsistent results by bringing an end to the state court's exercise of concurrent jurisdiction. See Berberian, 514 F.2d at 792-93; Delavigne v. Delavigne, 530 F.2d 598, 601 n.5 (4th Cir. 1976); Hampton v. Union Pac. R.R., 81 F. Supp. 2d 703, 705 (E.D. Tex. 1999). It is apparent here that the Superior Court has not engaged in any proceedings and merely issued a preliminary scheduling order. Perhaps more importantly, the Superior Court's docket reflects a willingness to cede jurisdiction to the federal court. Thus, the purpose of the removal statute is not undermined in any way by this court's exercise of jurisdiction.² Under these circumstances, I **RECOMMEND** that the court **DENY** the plaintiff's motion and proceed to judgment in this matter.

² Theoretically, Wal-Mart's failure to promptly file a copy of the notice with the state court might permit that court to proceed with the case, given its concurrent jurisdiction, since the state court's jurisdiction was not properly extinguished, but any concerns that might arise under such circumstances are not present in light of the Superior Court's July 20, 2004, docket entry to the effect that it does not intend to proceed with the matter.

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, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated August 31, 2004

WHITNEY v. WAL-MART STORES
INCORPORATED
Assigned to: JUDGE D. BROCK HORNBY

Referred to:

Demand: \$

Lead Docket: None

Related Cases: 03-CV-65

Case in other court: Maine Superior Court, Androscoggin
County, 04-CV-25

Cause: 42:1983 Civil Rights (Employment
Discrimination)

Date Filed: 02/11/04

Jury Demand: Plaintiff

Nature of Suit: 442 Civil Rights: Jobs

Jurisdiction: Federal Question

Plaintiff

STANLEY WHITNEY

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