

BENCH MEMO: Sharon Carper v. Dominion Bankshares Mortgage Corp.,
CA No. 88-327-R; Motion to Remand, Motion for Clar-
ification of Scheduling Order.

ATTORNEYS

Plaintiff: Jay Levit (Levit & Mann)
Defendant: Anne Greever (Hunton & Williams)

Judge, this case comes before you on two motions: (1) the plaintiff's motion to remand the case back to state court; and (2) the defendant's motion for clarification of your scheduling order. You have already seen the second motion, which I will not discuss. The motion to remand, however, needs more discussion. I suggest you read the plaintiff's brief, which is short. There is apparently no love lost between Jay Levit and Anne Greever, as Mr. Levit is hot about this removal. You'll see why from his brief. After you read that, you should read the rest of this memo, which summarizes defendant's brief and why you probably should not remand this action back to state court.

Plaintiff's primary argument for remand is waiver--that the defendant should be held to have waived its right to federal jurisdiction when it urged plaintiff to dismiss her first action for lack of diversity. I think the argument, while emotionally appealing, is weak; plaintiff cites no case law to support the argument, and I doubt that a party can fairly be held to have waived federal jurisdiction, given the defendant's statutory right to remove all actions raising federal questions.

Defendant sees four claims in the Motion for Judgment:

- (1) a claim for denial of accrued sick leave and disability benefits;
- (2) a claim that she was unlawfully discharged for the purpose of depriving her of accrued sick leave and disability benefits;
- (3) a claim that she was discharged in violation of "just cause" and progressive discipline provisions in her employment contract; and,
- (4) a claim for fraud in inducing her to resign.

All four claims are framed in terms of state law contract and tort causes of action. However, the defendant is correct that the first two claims are preempted by ERISA. They therefore present federal questions which entitle Dominion to remove this action to federal court under 28 U.S.C. § 1441(b)--unless you agree that defendant has waived its right to removal.

ERISA creates a cause of action which may be brought by a participant under an employee benefit plan, to recover benefits or to enforce rights under the plan. 29 U.S.C. § 1132(a)(1)(B). Federal district courts have original jurisdiction of these claims. 29 U.S.C. § 1132(e). State courts have concurrent jurisdiction. However, the claim itself is exclusively federal in nature. ERISA preempts state law causes of action which "relate to" any employee benefit plan. § 1144(a). An "employee benefit plan" is defined to include "any plan, fund, or program . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing its participants . . . benefits in the event of sickness, accident, [or] disability. . . ." 29 U.S.C. § 1002(1).

Carper's claim for wrongful denial of sick leave and disability benefits thus relates to an employee benefit plan. It is therefore preempted by federal law and it forms the basis for federal question jurisdiction in this Court.

As Dominion points out, Carper's second claim, that she was wrongfully discharged for the purpose of depriving her of accrued sick leave and disability benefits, also is an exclusively federal claim. ERISA makes it unlawful for an employer to discharge a benefit plan member for exercising rights under the plan, or to prevent a member from attaining rights under the plan. 29 U.S.C. § 1140. The rights created by this section are enforceable in a civil action brought under § 1132(a)(3). Jurisdiction of claims of this nature belongs exclusively to federal courts. 29 U.S.C. § 1132(e)(1).

Therefore, claims which assert a retaliatory discharge cognizable under § 1140 are preempted, even if they are framed as state law claims for wrongful discharge, fraud, breach of contract, or any other state law theory. Sorosky v. Burroughs Corp., 826 F.2d 794, 800 (9th Cir. 1987).

Carper seems to argue, on one hand, that there is no basis for removal because her claims are predicated on state law and she has not raised a federal question on the face of her complaint. This argument was expressly rejected by the Supreme Court in Metropolitan Life Ins. Co. v. Taylor, 107 S.Ct. 1542 (1987). In that case, plaintiff alleged that his former employer had wrongfully denied his claim for disability benefits and terminated his employment. On its face the complaint alleged only state

law claims. The Supreme Court, reversing the appeals courts' ruling that removal jurisdiction was lacking, held that the state law claims were preempted by ERISA pursuant to 29 U.S.C. § 1144. The Court also held that as a suit for denial of benefits under a covered plan, the complaint fell directly under § 1132(a)(1)(B) of ERISA, which provides the exclusive remedy for resolution of such disputes. 107 S.Ct. at 1546.

Here, at least one of Carper's claims is for denial of benefits, just as in Taylor. Even though it is couched in terms of state common law, the action is removable. Suits for denial of benefits under an ERISA plan, § 1132(a), are removable to federal court notwithstanding the fact that only state law causes of action are mentioned in the complaint. Taylor, 107 S.Ct. at 1548.

Thus, the holding in Taylor disposes of the question about whether there is federal jurisdiction. There clearly is. Plaintiff's claim that she was wrongfully denied disability benefits to which she was entitled, falls under an ERISA employee welfare benefit plan. Carper cannot avoid ERISA coverage by failing to mention it in her complaint.

Carper cites the case of Schlenz v. United Airlines, Inc., 108 Lab.Cas. ¶ 10,423 (N.D.Ca. 1988). However, that case only held that state law claims for wrongful discharge that were unrelated to employee benefits, were not preempted by ERISA. The court noted, though, that "plaintiff concedes that to the extent her claim is based on a wrongful denial of covered benefits,

ERISA is her exclusive avenue of relief." This is the same type of claim as one asserted by Carper in the present case.

In summary, then, all of Carper's claims relating to denial of accrued benefits and retaliatory discharge for asserting her ERISA-protected rights, are clearly preempted by ERISA. There is a clear basis for federal question jurisdiction.

As defendant notes, Carper's argument regarding concurrent jurisdiction in state court misconceives the right to removal that is granted by 28 U.S.C. § 1441. It is within the discretion of the defendant to remove a case raising a federal question. The fact that a state court may have concurrent jurisdiction of the same claim does not prevent removal and is not a basis for remand.

Finally, as to Carper's waiver argument, Judge, she has cited no case in support of this. The defendant only says that the decision to dismiss the original action was made only by Carper's own counsel, and that defendant did not force them to do it. Defendant denies that it has waived any rights.

I recommend that you DENY the motion to remand, because there is no basis for the waiver argument--unless, of course, you choose to create one.

DRW, 6/27/1988