UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NERISSA DEL ROSARIO, Plaintiff, vs. BATES TECHNICAL COLLEGE, and RONALD LANGRELL, Defendants.	NO. 3:18-CV05551-BHS **PLAINTIFF'S UNOPPOSED MOTION TO REMAND** **Note on Motion Calendar: LCR 7(d)() August 7, 2018**

I. MOTION & SUMMARY OF ARGUMENT

Plaintiff moves to remand the above-captioned action to Pierce County Superior Court because the Court lacks jurisdiction. On August 7, 2018, counsel for Defendants (after being presented with this motion) informed Plaintiff's counsel that while Defendants disagreed with the motion's legal analysis it did not oppose Plaintiff's motion to remand.

II. FACTS

1. On June 5, 2018, Plaintiff filed the above-captioned action in Pierce County Superior Court claiming that Defendants violated Plaintiff's rights under 38 U.S.C. § 4301 et. seq. (USERRA), 29 U.S.C. § 2611 et. seq. (FMLA), and the Washington Law Against Discrimination. (Dkt. 1-2, p. 13, 17, 18)

2. On July 11, 2018, Defendants removed the above-captioned action to this court. (Dkt. 1)

3. Defendants admit that Bates Technical College is an Agency of the State of Washington and an employer under USERRA. (*Compare* Dkt. 1-2¶2 *with* Dkt. 14¶2) Defendants also admit that Mr. Langrell, Bates' former President, is an employer under USERRA. (*Compare* Dkt. 1-2¶3 *with* Dkt. 14¶3)

III. ARGUMENT

A. Improper Removal

The Court lacks subject matter jurisdiction over Ms. Del Rosario's USERRA and FMLA claims. As such, this case should be remanded to the Pierce County Superior Court. *See* 28 U.S.C. § 1447(c), which provides:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). **If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.** A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. § 1447(c)(emphasis added in bold)

As to Ms. Del Rosario's USERRA claims, the Ninth Circuit's decision in *Townsend v. University of Alaska*, 543 F.3d 478 (9th Cir. 2008) held that a federal district court lacked subject matter jurisdiction over USERRA claims brought against a state agency, the University of Alaska, as well as a state supervisor. *Townsend*, 543 F.3d at 481, 487. The *Townsend* court

concluded that USERRA's jurisdictional provision, 38 U.S.C. § 4323(b)[1], does not confer jurisdiction on federal courts to hear individual claims against states or individual state supervisors. *Id*. at 484, 487. Because USERRA does not explicitly abrogate state sovereign immunity from suit, USERRA claims by individuals against states (and their agents, like Mr. Langrell) must be brought in state court. *Id*. at 483. States are only subject to USERRA claims in federal court if the claim is brought by the United States. *Id*. The *Townsend* court also explicitly rejected the argument that 28 U.S.C. § 1331, the general federal question jurisdiction statute, grants jurisdiction over USERRA claims brought against a state by an individual. *Id*. at 485. To that end, the *Townsend* court found § 1331 "does not itself purport to direct federal courts to ignore a State's sovereign immunity." *Id.*

Following this exact analysis, Judge Lasnik remanded a very similar case, *sua sponte*, because the court lacked subject matter jurisdiction over the USERRA claims brought by an individual against the University of Washington. *Lukenhart v. University of Washington*, No. 09-cv-00512-RS, order on remand (W.D. Wash. January 31, 2011). Like the case at bar, the State of Washington removed the case from state to federal court under the auspices of 28 U.S.C. §§ 1441 and 1331. The District Court held that it is without subject matter jurisdiction to hear the case, and, thus the case was remanded to state court.

Here, Bates Technical College admits that it is an agency of the State of Washington and that Mr. Langrell is an employer as defined under USERRA. Ms. Del Rosario is an individual

---

[1] 38 U.S.C. § 4323(b)(2) provides that "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State."

suing in her individual capacity. Thus, the Federal District Court is without subject matter jurisdiction to hear this case. *Id.*

The same holds true for Mr. Del Rosario's FMLA claims. While Congress abrogated states' sovereign immunity with respect to the FMLA's "family-care" provision, it has not done so with respect to the statute's "self-care" provision. *Nev. Dept. of Human Res. v. Hibbs,* 538 U.S. 721, 735 (2003); *Coleman v. Court of Appeals of Maryland,* 566 U.S. 30, 37 (2012)("Standing alone, the self-care provision is not a valid abrogation of the States' immunity from suit."). Ms. Del Rosario's FMLA claims are "self-care" claims, meaning that she is not claiming that Defendants violated the FMLA on account of her requesting leave to care for family member. (Dkt. 1-2, pg. 19) *See Miller v. California Dep't of Corr.,* 2011 WL 4433165, at *3 (E.D. Cal. Sept. 21, 2011)("FMLA's 'self-care' provision…permits an employee to take leave '[b]ecause of a serious health condition.").

Thus, the Federal District Court is without subject matter jurisdiction to hear this case, and it must be remanded to state court.

B. Attorney Fees

If a district court remands a case removed from state court it may "require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. 1447(c). "[A]bsent unusual circumstances, attorney's 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, 141 (2005). A frivolous removal action that provides no basis for removal is not objectively reasonable. *See Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1066 (9th Cir. 2008) (citing *Patel v. Del Taco, Inc.*, 446 F.3d 996, 999-1000 (9th Cir.2006)). Here, there is no objectively reasonable basis for seeking removal because the court's

jurisdiction over this case is foreclosed by the Ninth Circuit's decision in *Townsend*, 543 F.3d 478 (9th Cir. 2008), 38 U.S.C. § 4323(b), and the Supreme Court's decision in *Coleman*, 566 U.S. at 37 (2012). Accordingly, Ms. Del Rosario respectfully requests that the Court award her the attorneys' fees incurred in bringing this motion.

IV. CONCLUSION

Plaintiff's motion should be granted.

DATED this 7th day of August 2018.

CROTTY & SON LAW FIRM, PLLC

By: *Matthew Z. Crotty*
Matthew Crotty, WSBA #39284
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2018 I caused the forgoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

Matthew Z. Crotty
Matthew Z. Crotty
Crotty & Son Law Firm, PLLC
905 W. Riverside Ave. Ste. 404
Spokane, WA 99201
(509) 850 – 7011
matt@crottyandson.com