

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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KATHARINA GERUM,

Plaintiff,

v.

MEMORANDUM and ORDER  
07-C-340-S

NATIONWIDE MUTUAL INSURANCE  
COMPANY,

Defendant.

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Plaintiff Katarina Gerum commenced this action by filing a "Family and Medical Leave Complaint" with the Equal Rights Division of the Wisconsin Department of Workforce Development. Defendant Nationwide Mutual Insurance Company removed the action to this Court on June 27, 2007.

On July 5, 2007 the Wisconsin Department of Workforce Development moved to intervene for a limited purpose and to remand the above entitled action. Plaintiff who is proceeding pro se joins this motion which has been fully briefed.

FACTS

For purposes of deciding this motion the Court finds that the following facts are uncontested:

Plaintiff Katharina Gerum is an adult resident of the State of Wisconsin. Defendant Nationwide Mutual Insurance Company is a

property and casualty insurance company. The Wisconsin Department of Workforce Development is an agency of the State of Wisconsin.

On or about February 6, 2007 plaintiff requested intermittent family leave under the Wisconsin Family and Medical Leave Act (WFMLA) to bond with her child. She also requested to substitute time available to her through the defendant's short term disability benefit for her family leave. Defendant granted plaintiff's request for leave but denied her request to substitute her short term disability benefits.

In a March 22, 2007 letter defendant stated that plaintiff does not qualify for short term disability benefits because she is not disabled within the meaning of the policy and that benefits payable under the plan are not considered accrued paid leave for purposes of WFMLA substitution.

On April 18, 2007 plaintiff filed a Family and Medical Leave Complaint with the Wisconsin Department of Workforce Development Equal Rights Division claiming that defendant denied her request to substitute short term disability benefits for her family leave.

On May 1, 2007 defendant filed its response to plaintiff's complaint with the Department for Workforce Development. On May 21, 2007 the Equal Rights Division of the Department found there was probable cause to believe that defendant had violated the Wisconsin Family and Medical Leave Act. A hearing before an

Administrative Law Judge was scheduled for July 13, 2007. On June 20, 2007 defendant removed the case to this Court.

MEMORANDUM

**MOTION TO INTERVENE**

Presently before the Court is the motion by the Wisconsin Department of Workforce Development to intervene for the limited purpose of remand. Plaintiff has joined this motion.

The Wisconsin Department of Workforce Development moves to intervene in this action under 28 U.S.C. §2403(b), which states:

In any action, suit or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn into question, the court shall . . . permit the State to intervene for presentation of evidence . . . and for argument on the question of constitutionality. . . .

Defendant is not arguing that the leave act is unconstitutional. It is arguing that the statute is preempted as it applies to plaintiff's claim. A finding of preemption would not render the statute unconstitutional or call its constitutionality into question. 28 U.S.C. §2403(b) does not give the Wisconsin Department of Workforce Development a right to intervene in this case.

In the alternative the Wisconsin Department of Workforce Development moves to intervene under Rule 24(b), Federal Rules of Civil Procedure which provides that:

Upon timely application anyone may be permitted to intervene in an action ...when an applicant's claim or defense and the main action have a question of law or fact in common... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In this case the Wisconsin Department for Workforce Development moves to intervene only for the limited purpose of pursuing a motion to remand which would not delay or prejudice the adjudication of these proceedings. The Wisconsin Department of Workforce Development's interest in this action has a question of law in common with plaintiff's claim. The question is whether under the Wisconsin Family Medical Leave Act plaintiff can substitute her short term disability benefits for leave under the Act. Since plaintiff is proceeding pro se it may be that she cannot adequately represent the state agency's interest. Accordingly, the Court will allow the Wisconsin Department of Workforce Development to intervene in this action for the limited purpose of pursuing the motion to remand.

#### **MOTION TO REMAND**

The Wisconsin Department of Workforce Development and plaintiff argue that defendant's motion for removal is untimely. 28 U.S.C. §1446(b) provides that the notice of a removal of a civil action shall be filed within thirty days after the receipt of the defendant through service or otherwise a copy of the initial

pleading setting forth the claim for relief. Plaintiff's complaint was filed on April 18, 2007. Defendant filed its response on May 1, 2007 but did not file its notice of removal until June 30, 2007.

Defendant argues that plaintiff's complaint did not become a state court action until it was scheduled for a hearing before an administrative law judge. This argument is not persuasive. If an action before the Equal Rights Division of the Wisconsin Department of Work Force Development is a "civil action" that is removable then it is removable from the date the plaintiff filed her complaint with the agency. Accordingly, defendant's removal is untimely and remand is required.

In the alternative the Court will address the merits of the motion to remand. The Wisconsin Department of Workforce Development and plaintiff move to remand because plaintiff's claim concerning the denial of her request to substitute short term disability benefits for family leave under the WFMLA is a question of state law which is not preempted by ERISA. Defendant contends that plaintiff's sole claim is whether she is entitled to short term disability benefits which would be an ERISA claim.

Plaintiff's claim in her April 18, 2007 complaint concerns what leave may be substituted under the WMFLA which is clearly a question of state law. See Aurora Medical Group v. Department of Workforce Development, Equal Rights Division, 236 Wis. 2d 1, 612 N.W.2d 646 (2000). The Court in Aurora determined that Congress in

enacting the federal FMLA in 1993 expressly conveyed its intent to insulate the Wisconsin FMLA substitution provision, and similar provisions in other State family and medical leave laws, from ERISA preemption. Id., at 19-25.

Defendant argues that plaintiff's claim is not actually a substitution claim which is insulated from ERISA preemption because its short term disability benefits were not available for substitution under the WFMLA as accrued leave. This is a determination, however, for the state agency to make pursuant to the WFMLA.

In Lehman v. Brown, 230 F. 3d 916, 919 (7<sup>th</sup> Cir. 2000), the United States Court of Appeals for the Seventh Circuit held that a state law claim which might be preempted by ERISA because it is related to a pension or welfare plan does not mean it may be removed to the federal court. The potential that a removed State law claim may fail on the merits is irrelevant to the remand analysis.

According to Lehman, the above entitled action will be remanded to state court for determination of plaintiffs' state law claim.

ORDER

IT IS ORDERED that the motion to intervene for the limited purpose of pursuing a motion to remanded by the Wisconsin Department of Workforce Development is GRANTED.

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IT IS FURTHER ORDERED that the motion to remand by the Wisconsin Department of Workforce Development and plaintiff is GRANTED.

IT IS FURTHER ORDERED that the above entitled matter is REMANDED to the Wisconsin Department of Workforce Development Equal Rights Division.

Entered this 13<sup>th</sup> day of August, 2007.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge