

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

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MICHAEL FIALHO,

Plaintiff,

vs.

APPLE CORPS, LP, d/b/a APPLEBEE'S  
NEIGHBORHOOD GRILL & BAR; TERRY  
DAVIS; JEREMIAH HAMILTON; MATTHEW  
WALTERS; and LINDSEY FITZGERALD,

Defendants.

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**No. 4:13-cv-00352 – JEG**

**O R D E R**

This matter comes before the Court on Motion by Plaintiff Michael Fialho (Plaintiff) to Remand this case to the Iowa District Court for Polk County. Defendants Apple Corps, LP, d/b/a Applebee's Neighborhood Grill & Bar (Applebee's), Terry Davis (Davis), Jeremiah Hamilton (Hamilton), Matthew Walters (Walters), and Lindsey Fitzgerald (Fitzgerald) (collectively Defendants) resist the Motion. A hearing was not requested, and the Court finds that a hearing is not necessary. The matter is fully submitted and ready for disposition.

**I. BACKGROUND**

**A. Factual Background**

Plaintiff, a homosexual male, alleges that while employed as a server at Applebee's in Ankeny, Iowa, he was subjected to various forms of harassment based upon his sexual orientation. Plaintiff alleges derogatory comments and harassing behavior were directed toward him by his supervisors, Walters and Fitzgerald, as a result of his sexual orientation. Plaintiff further alleges that his supervisor, Hamilton, shortened Plaintiff's hours, gave him unequal shares of tables during shifts as compared to other servers, and disciplined him for similar conduct for which heterosexual employees were not disciplined. Finally, Plaintiff alleges that he reported these harassing activities to the general manager, Davis, who failed to take prompt remedial

action. Plaintiff states that the last alleged discriminatory act occurred on February 3, 2012. Plaintiff was terminated from his job on February 3, 2012.

## **B. Procedural Background**

On October 22, 2012, Plaintiff filed a Complaint with the Iowa Civil Rights Commission (ICRC) and the Equal Employment Opportunity Commission alleging sexual orientation discrimination, harassing conduct, hostile work environment, and retaliation. Plaintiff received his “Right to Sue” Letter from the ICRC on April 17, 2013.

On July 16, 2013, Plaintiff filed a Petition and Jury Demand in the Iowa District Court for Polk County alleging claims against Defendants under the Iowa Civil Rights Act (ICRA), Iowa Code Chapter 216, for sexual orientation discrimination, hostile work environment, and retaliation. Plaintiff also alleged a sexual orientation discrimination claim under Title VII, 42 U.S.C. § 2000e-2. Prior to formal service of the Petition and Summons, Defendants became aware of the lawsuit and filed a Notice of Removal on August 15, 2013. Also on August 15, 2013, following removal, Plaintiff filed an Amended Petition and withdrew his Title VII claim. On August 22, 2013, Plaintiff filed a Motion to Remand for lack of subject matter jurisdiction. On September 9, 2013, Defendants filed a Resistance to the Plaintiff’s Motion. On September 12, 2013, Defendants waived service of process. Plaintiff filed his Reply on September 19, 2013.

## **II. DISCUSSION**

### **A. Motion to Remand**

To the extent that Plaintiff argues the Court does not have subject matter jurisdiction over this case, the Court addresses this argument.<sup>1</sup>

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<sup>1</sup> Defendants’ Notice of Removal provides that “[o]riginal federal question jurisdiction exists in this Court pursuant to 28 U.S.C. § 1331,” but goes on to state that “[r]emoval jurisdiction exists in this Court pursuant to 28 U.S.C. §§ 1441(a) and (b).” Notice of Removal ¶¶ 4- 5, ECF No. 1. Section 1441(a) is the general removal provision, which states that any civil action brought in state court over which the federal court has original jurisdiction may be removed, and

When a case filed in state court includes a claim over which the federal courts may exercise jurisdiction, a defendant has the right to remove the case to federal court pursuant to 28 U.S.C. § 1441 on the basis of claims alleged in the Petition at the time of removal.<sup>2</sup> See 28 U.S.C. § 1441(a) (“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.”). Defendants argue that because they “became aware of the lawsuit on July 18, 2013,” they “were *required* to remove the lawsuit by August 19, 2013, at the latest.” Defs.’ Resist. 1, ECF No. 6 (emphasis added). Upon a careful reading of the applicable removal statutes, the Court must disagree.

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§ 1441(b) sets out the provisions for removal based upon diversity of citizenship. Diversity of citizenship is lacking in this case because Plaintiff and one or more Defendants reside in Iowa.

Plaintiff’s Motion to Remand states that because Plaintiff withdrew the Title VII claim, the “Amended Complaint does not assert any theory involving a question of federal *law* as required pursuant [to] 28 USC § 1441(c),” and since “[f]ederal *claims* are not asserted in this case and that federal *question* jurisdiction does not exist in this case. . . . Plaintiff requests remand to be made to the Polk County Iowa District Court.” Pl.’s Mot. to Remand ¶¶ 9-10, ECF No. 4 (emphasis added). However, in his prayer for relief, Plaintiff asks “the Court to enter a remand order remanding this case to state court for handling due to a lack of federal *court* jurisdiction of this matter.” Pl.’s Mot. to Remand 2, ECF No. 4 (emphasis added). While the body of Plaintiff’s Motion to Remand advocates remand based on the absence of federal question jurisdiction, the prayer for relief suggests the court lacks *any* basis of federal jurisdiction. Plaintiff’s Reply to the Defendants’ Resistance shifts focus once again, only discussing the Court’s discretion to refrain from exercising supplemental jurisdiction under § 1367(c). See Pl.’s Reply 5, ECF No. 8.

Given the mixed jurisdictional allegations presented by both sides, the Court necessarily addresses the jurisdictional question.

<sup>2</sup> At the time of removal, Plaintiff’s Petition included a Title VII claim. On this basis, Defendants properly removed the case under 28 U.S.C. § 1441 based on federal question jurisdiction. “[W]hether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the time the petition for removal was filed.” Van Beek v. Ninkov, 265 F. Supp. 2d 1037, 1041 (N.D. Iowa 2003); see also Hargis v. Access Capital Funding, LLC, 674 F.3d 783, 789-90 (8th Cir. 2012) (“[The plaintiff’s] First Amended Complaint redefined her class . . . but her original complaint controls this determination, as it was the operative complaint at the time of removal.”).

A defendant's mere knowledge of a lawsuit filed against him does not trigger the thirty-day time limit for removal under the statute. See State Farm Fire & Cas. Co. v. Valspar Corp., Inc., 824 F. Supp. 2d 923, 930 (D.S.D. 2010) (“[A] district court need not inquire into the subjective knowledge of the defendant when determining whether the defendant first ascertained the action had become removable.”). Rather, the thirty-day time limit for removal begins either upon receipt of service of process, see Kreinbring v. Alternative Claims Servs., Inc., No. C03-123-LRR, 2004 WL 1293927, at \*2 (N.D. Iowa May 27, 2004) (“[I]f the case stated by the initial pleading is removable, then notice of removal must be filed within thirty days from the receipt of the initial pleading by the defendant.”), or is recommenced after service of process upon “receipt of a copy of an ‘amended pleading, motion, order or other paper’ which supplies a basis . . . from which ‘it may first be ascertained that the case is or has become removable.’” See Dahl v. R.J. Reynolds Tobacco Co., 478 F.3d 965, 968 (8th Cir. 2007) (quoting 28 U.S.C. § 1446(b)(3)). Because Defendants in this case were not served, they were not “required” to remove this case by August 19, 2013. In fact, at the time of removal, the Defendants’ deadline for removing the case to federal court could not be determined.

While Defendants were not required to remove by August 19, 2013, that does not mean removal at that time was improper.<sup>3</sup> Section 1441(a) states that “any civil action *brought* in State court of which the district courts of the United States have original jurisdiction, may be removed

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<sup>3</sup> The Eighth Circuit is largely silent in this area of law; consequently, consideration of other federal district court cases is instructive. See Johnson v. Emerson Elec. Co., No. 4:13-cv-1240-JAR, 2013 WL 5442752, at \*4 (E.D. Mo. Sept. 30, 2013) (“Because orders remanding cases are generally not appealable, there is no circuit court authority directly on point to guide districts.”). To this end, district courts generally apply a plain language analysis to the federal removal statutes to find their meaning. See, e.g., Perez v. Forest Labs., Inc., 902 F. Supp. 2d 1238, 1245 (E.D. Mo. 2012) (“The principle of statutory construction, calling for courts to apply the plain meaning of the statute in the absence of ambiguous language, is well established.” (citing United States v. Am. Trucking Ass’n, 310 U.S. 534, 542-43 (1940))); Johnson, 2013 WL 5442752, at \*4 (“[T]he Eighth Circuit is clear that absent some ambiguity in the language of a statute, a court’s analysis must end with the statute’s plain language.”).

by the defendant or the defendants . . . .” 28 U.S.C. § 1441(a) (emphasis added). A plain reading of this language permits a defendant’s removal of a case filed in state court to federal court at the time the plaintiff “brought” their action to state court, via the filing of his or her petition – and not at the time of service. See Taylor v. Cottrell, Inc., No. 4:09-cv-536-HEA, 2009 WL 1657427, at \*2 (E.D. Mo. June 10, 2009) (“[A]s courts have recognized, nothing in 28 U.S.C. § 1441 or any other statute requires defendants to have been served themselves prior to removing a case to federal court.”); Watanabe v. Lankford, 684 F. Supp. 2d 1210, 1214-15 (D. Haw. 2010) (“[T]here is no statutory requirement that a defendant must formally receive the Complaint before removing the case.”); Arthur v. Litton Loan Servicing LP, 249 F. Supp. 2d 924, 931 (E.D. Tenn. 2002) (“Service of process is not a prerequisite to the defendants exercising their right of removal under 28 U.S.C. § 1446.”).

Next, turning to the language of 28 U.S.C. § 1446(b), the statute states “[t]he notice of removal of a civil action or proceeding shall be filed within 30 days of receipt by the defendant, through service or otherwise.” Thus, a defendant may not file a notice of removal after the thirty-day window provided in 28 U.S.C. § 1446(b) has passed, and the statute says nothing about limiting a defendant’s ability to file such a notice before service of process has been completed. The date of service, therefore, is relevant only to the extent that it sets a deadline for removal. See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 354 (1999) (“[T]he defendant’s period for removal will be no less than 30 days from service, and in some categories, it will be more than 30 days from service, depending on when the complaint is received.”). For the reasons stated above, and in light of the plain language of the removal statutes, the Court finds that 28 U.S.C. §§ 1441(a) and 1446(b) permit Defendants’ removal of this case to this Court prior to formal service of process, though they do not require Defendants’

removal within 30 days of their mere knowledge of the lawsuit without service or another act that falls into the “or otherwise” language of the statute.<sup>4</sup>

### **B. Supplemental Jurisdiction**

This Court has discretion to exercise supplemental jurisdiction over state law claims when the claims establishing its original jurisdiction have been dismissed, and it may remand those claims if the Court determines that exercising supplemental jurisdiction would be inappropriate for any reason provided under 28 U.S.C. § 1367(c). See Carnegie Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988) (“We conclude that a district court has discretion to remand to state court a removed case involving pendent claims upon a proper determination that retaining jurisdiction over the case would be inappropriate.”); see also Lindsey v. Dillard’s, Inc., 306 F.3d 596, 598 (8th Cir. 2002) (“[A] district court may decline jurisdiction over supplemental claims if it ‘has dismissed all claims over which it has original jurisdiction . . . .’” (quoting 28 U.S.C. § 1367(c)(3))); Gregoire v. Class, 236 F.3d 413, 419 (8th Cir. 2000) (“Once claims over which a district court has original jurisdiction are dismissed, it is left to the court’s discretion whether to exercise supplemental jurisdiction.”).<sup>5</sup>

Pursuant to 28 U.S.C. § 1367(c), federal courts are given the authority to refuse to exercise supplemental jurisdiction in several circumstances. Section 1367(c) provides as follows:

- (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –
  - (1) the claim raises a novel or complex issue of State law,

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<sup>4</sup> Because the Court finds no material distinction between receipt of a courtesy copy and the manner in which the Defendants learned of the lawsuit herein, it is unnecessary to further pursue the scope and effect of the “or otherwise” language.

<sup>5</sup> As the issue is where this case should proceed upon the dismissal of the jurisdictional hook, the Court sees no distinction between a dismissal by the Court or a voluntary dismissal. This seems particularly true where the removal and the voluntary dismissal occur on the same day.

- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

The Eighth Circuit has stated that “novel, complex, and important issues of state law on which the [state] appellate courts have given us little or no prior guidance . . . are precisely the types of issues as to which federal courts should hesitate to exercise § 1367 supplemental jurisdiction.” Fielder v. Credit Acceptance Corp., 188 F.3d 1031, 1038 (8th Cir. 1999) (holding that because the remaining state law claims involved “many complex substantive and remedial issues of first impression,” declining to exercise supplemental jurisdiction was appropriate). “If the claim giving original jurisdiction is dismissed early in the action, ‘before any substantial preparation has gone into the dependent claims, dismissing or remanding the [state claims] upon declining supplemental jurisdiction seems fair enough.’” Gregoire, 236 F.3d at 419 (citation and internal quotation marks omitted). Further, “[t]he judicial resources of the federal courts are sparse compared to the states. We stress the need to exercise judicial restraint and avoid state law issues wherever possible.” Id. (alteration in original) (quoting Condor Corp. v. City of St. Paul, 912 F.2d 215, 220 (8th Cir. 1990)).

The ICRA was amended in 2007 to recognize sexual orientation as a protected characteristic of individuals entitled to statutory protection. See 2007 Iowa Legis. Serv. 202 (West). Since the amendment became enforceable in 2007, neither the Iowa Supreme Court nor the Iowa Court of Appeals has decided a single case concerning sexual orientation discrimination to provide guidance for this Court in applying the ICRA to this case. The Court finds that this case presents a “novel or complex issue of State law” and therefore declines to exercise supplemental jurisdiction over the pendent state law claims. 28 U.S.C. § 1367(c); see also E.E.O.C. v. Con-Way Freight, Inc., 622 F.3d 933, 938 (8th Cir. 2010) (“After careful study, we are unsure how

the Missouri courts would view this claim. . . . [W]e have discovered no guidance in the Missouri law on what kinds of damages a claim of this sort could support . . . . In the circumstances, we think that the better course is to allow the state courts to decide the matter since ‘the claim raises . . . novel [and] complex issue[s] of State law.’” (second and third alterations in original) (quoting 28 U.S.C. § 1367(c)(1)); Felder, 188 F.3d at 1038 (8th Cir. 1999) (declining to exercise supplemental jurisdiction over state claims with complex issues of first impression); Quick v. EMCO Enters., Inc., 251 F.R.D. 371, 375-76 (S.D. Iowa 2008) (refusing to exercise supplemental jurisdiction over the ICRA and City of Des Moines Municipal Code for a sexual orientation discrimination and harassment case due to the lack of state law guidance on the issue).

### III. CONCLUSION

For the reasons stated above, the Plaintiff’s Motion to Remand, ECF No. 4, must be **granted**. This case is **remanded** to the Iowa District Court for Polk County.

**IT IS SO ORDERED.**

Dated this 14th day of November, 2013.

  
JAMES E. GRITZNER, Chief Judge  
U.S. DISTRICT COURT