

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK SELIKSON

v.

THE TRUSTEES OF THE
UNIVERSITY OF PENNSYLVANIA

NO. 97-6289

Broderick, J.

November 21, 1997

MEMORANDUM

Plaintiff Mark Selikson ("Selikson") filed this action against Defendant Trustees of the University of Pennsylvania ("the University") in Philadelphia Court of Common Pleas. Defendant removed the action to this Court, pursuant to 28 U.S.C. § 1441, on the ground that the state law claim on the basis of which they are removing to this Court is a claim which arises under federal law. Presently before the Court is Plaintiff's motion to remand the action to state court. For the reasons set forth below, Plaintiff's motion to remand this action to state court will be granted.

I. Background

Plaintiff originally brought this action against his employer, the University of Pennsylvania, in the Philadelphia Court of Common Pleas, alleging, inter alia, a state law claim of wrongful discharge. Under Pennsylvania law, there is a cause of action for wrongful discharge when an employee is discharged for reasons which violate public policy. E.g. Smith v. Calgon Carbon

Corporation & Merck & Co., 917 F.2d 1338 (3rd Cir. 1990). The Plaintiff, who was employed by the University as Director of its Radiation Safety Office, alleges that he was wrongfully discharged for reporting the University's alleged violations of regulations promulgated by the Food and Drug Administration ("FDA") and the Nuclear Regulatory Commission ("NRC"). Plaintiff claims his discharge was in violation of public policy because the Energy Reorganization Act ("ERA") imposed a duty on him to report violations of FDA and NRC regulations, 42 U.S.C. § 5846(a)(2), and because the ERA prohibits an employer from retaliating against employees who report such violations. 42 U.S.C. § 5851(a)(1)(A).

II. Discussion

In Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 106 S.Ct. 3229 (1986), the United States Supreme Court addressed the issue of whether a defendant can remove a state cause of action to federal court when a violation of a federal statute is an element of the state claim. The Court held that such a state claim does not arise under federal law "when Congress has determined that there should be no private, federal cause of action for the violation" of the federal statute. Id. at 817. Following Merrell Dow, the Third Circuit held that "a private federal remedy for violating a federal statute is a prerequisite for finding federal question jurisdiction." Smith

v. Industrial Valley Title Ins. Co, 957 F.2d 90, 93 (3rd Cir. 1992).

In his complaint, Plaintiff makes it clear that he intends to bring a state law claim. However, he bases his claim on a violation of a federal law, the Energy Reorganization Act. This Court finds no authority for the proposition that there is a private federal cause of action under the ERA. Furthermore, the ERA was amended in 1992 to provide that its provisions "may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee's discharge" 42 U.S.C. § 5851(h).

Defendants rely on a provision of the ERA which provides an administrative remedy to an employee who alleges a retaliatory discharge. Under the ERA, such an employee is entitled to an evidentiary hearing before an administrative law judge. Adverse rulings may be appealed to the United States Circuit Court of Appeals, and judgments may be enforced in a United States District Court. 42 U.S.C. § 5851 and 29 C.F.R. 24.1 et seq. However, the Energy Reorganization Act does not provide an employee who alleges retaliatory discharge a cause of action in a U.S. district court.

The administrative remedy available to an employee under the ERA is not the equivalent of a private federal remedy in U.S. district court. Plaintiff could not have originally brought his

claim in federal court, and the ERA's administrative remedy does not allow Plaintiff to try his case before a jury or to seek punitive damages. The Court's research has uncovered only two cases which discuss the issue of whether the administrative remedy under the ERA confers a private federal cause of action for wrongful discharge. In these two cases, both the Northern District of California and the Southern District of Texas held that a state cause of action filed in state court for wrongful discharge based on a violation of the ERA cannot be removed to a United States District Court in view of the fact that the administrative remedy provided in the ERA is not a private cause of action, as held in Merrell Dow. Gaballah v. PG&E et al., 711 F.Supp. 988, 991-92 (N.D. Ca. 1989); Garg v. Narron, 710 F.Supp. 1116, 1118 (S.D. Tx. 1989).

III. Conclusion

Plaintiff's complaint alleges a state law claim for wrongful discharge. That claim is not removable to this Court pursuant to 28 U.S.C. § 1441 in view of the fact that no private federal cause of action has been created by the ERA, as heretofore discussed.

An appropriate Order follows.

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ORDER

AND NOW, this 21st day of November, 1997; Plaintiff having filed this cause of action in the Philadelphia Court of Common Pleas; Defendant having removed the action to this Court pursuant to 28 U.S.C. § 1441; Plaintiff having filed a motion to remand to state court;

IT IS ORDERED: For the reasons set forth in the accompanying Memorandum of November 21, 1997, Plaintiff's motion to remand this action to state court is **GRANTED**.

RAYMOND J. BRODERICK, J.