UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONNA RADASZEWSKI,
Guardian, on behalf of Eric Radaszewski,

Plaintiff,

vs.

JACKIE GARNER,
Director, Illinois Department of
Public Aid,

Defendant.

No. 0I C 9551
Judge John W. Darrah

PLAINTIFF'S REPLY BRIEF – MOTION FOR REMAND

1. Introduction: The futility of removal

If Eric Radaszewski's nursing services are cut to the level defendant seeks to impose, Eric risks serious injury and even death. (Judge Byrne's December 19, 2000, Memorandum Opinion and Order, p. 5). Defendant meets the gravity of the case with procedural maneuvering. She agrees that the Eleventh Amendment bars federal courts from deciding the five claims stated in the Supplemental Complaint which are based on violations of state law. Of plaintiff's two federal claims, defendant's Answer has asserted an Eleventh Amendment defense to plaintiff's claim under the Americans with Disabilities Act. Although defendant does not state here her position on the Eleventh Amendment with respect to plaintiff's Rehabilitation Act claim, in the state court briefing over the extension of the temporary restraining order she also argued that the

Eleventh Amendment barred this remaining federal claim. In short, defendant's purpose in removing this case to federal court appears to be to turn around and argue that the court cannot hear the claims because they are barred by the Eleventh Amendment. Since under 28 U.S.C. §1447(c), the outcome in that event would be remand of the claims to state court, removal appears an exercise in futility, exploiting this Court's and the parties' resources. Remand is appropriate because defendant has waived her right to removal and raised the Eleventh Amendment bar prior to the removal.

2. 30 day removal period began when motion for TRO filed in state court

Defendant states in her memorandum that the Seventh Circuit's case of *Sullivan v. Conway*, 157 F.3d 1092 (7th Cir. 1998), "definitively resolved any uncertainty in this jurisdiction" over the question of when the 30 day period begins to run for removal when a case which was not initially removable subsequently becomes removable. While superficially *Sullivan v. Conway* may be similar to the present case, it by no means provides a definitive resolution of the present case. The question presented in *Sullivan* was simply whether the 30 day removal period began to run when the plaintiff filed a motion to amend his complaint or when the motion to amend was granted. The appellate court determined the 30 day period began when the state court granted the motion to amend. *Sullivan*, however, did not involve a situation comparable to the present case where in addition to filing a motion to amend her complaint, the plaintiff filed a motion for extension of TRO in which the merits of her two federal law claims were litigated by the parties. *Sullivan*, therefore, does not provide guidance for resolution of the present case since *Sullivan* did not involve the question of litigation of a TRO.

Rather, *Butts v. Hansen*, 650 F.Supp. 996 (D.Minn. 1987), cited in plaintiff's opening brief, provides a much closer factual parallel to the present case, and its reasoning and outcome are, therefore, of much greater relevance to this case than is *Sullivan*. In *Butts* the plaintiff filed a motion for TRO in which federal claims were alleged. The court decided that the 30 day removal period began upon the plaintiffs' filing of the motion for TRO, because that is when their claim for relief under federal law was stated and thereby gave defendants notice of removability. 650 F.Supp. 996, 998.

This reasoning was followed recently by an Indiana federal court in the case of *Bezy v. Floyd County Plan Commission*, 199 F.R.D. 308 (S.D. Ind., March 8, 2001). In *Bezy* the court approved of the reasoning in *Butts v. Hansen* and stated that the filing of a motion for TRO asserting federal claims starts the 30 day removal period because it permits the defendants the opportunity to present or defend those federal rights. The *Bezy* court pointed out that the case before it, which presented merely the question of whether a motion for amended complaint started the 30 day clock, was quite different from *Butts* where the plaintiff had filed a motion for TRO asserting federal claims. *Bezy* held that the 30 day clock does not begin upon the mere filing of a motion for amended complaint because litigation based on the amended complaint has not begun until the amended complaint is actually filed. However, *Bezy* states that the filing of a motion for TRO does present the defendant with the opportunity to present or defend federal claims and therefore begins the removal period. This is precisely the factual situation before this Court. Not only did the plaintiff's filing of her motion for extension of TRO present the defendant with the opportunity to defend against federal claims, but the parties argued the merits of the federal claims before the state court and the state court judge made a decision on

plaintiff's motion for TRO based on both state and federal claims prior to defendant's removal to federal court. It should be noted that the *Bezy* case was decided subsequent to *Sullivan v. Conway.*

3. Defendant waived the right to remove by answering in state court

Defendant characterizes the Supreme Court's statement in *Wisconsin Department of Correction v. Schacht*, 524 U.S. 381, 391, 118 S.Ct. 2047 (1998), quoting from previous opinion in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586 (1938), that a defendant must file a removal petition before the time to file an answer in state court or forever lose the right to remove as just dictum, but lower courts are not free to ignore principles of law articulated by the Supreme Court. Moreover, as described in plaintiff's opening memorandum and in further detail below, this point was a key part of the Court's rationale in *Schacht*, which defendant otherwise relies on to support her argument for removal jurisdiction.

Defendant next asserts that the mere filing of affirmative defenses without more is insufficient to constitute waiver. Defendant again cites several out-of-jurisdiction district court cases in support of this assertion. (See defendant's memo, p. 11.) However, these are merely selective cases in an area in which there is considerable difference of opinion in the published cases. The plaintiff has already cited several cases which support her view. (See pp. 9-11 of her opening brief.) What makes the present case different from the cases cited by defendant is that defendant did not merely file an answer and then remove to federal court; she actively litigated the merits of the case in her opposition to plaintiff's motion to extend TRO as well. Indeed, it was only after defendant lost on the motion for extension of TRO that she sought removal to

federal court. The motion for extension of TRO was fully briefed by the parties and defendant argued against the federal claims on the merits. The state court judge made a ruling in which he indicated there was a probability of success on the merits of plaintiff's state and federal claims.

4. Defendant waived right to remove by vigorously opposing motion for injunctive relief

Defendant at page 13 of her brief cites *Baker v. National Boulevard Bank of Chicago*, 399 F.Supp. 1021 (N.D.Ill. 1975) and *Rothner v. City of Chicago*, 879 F.2d 1402 (7th Cir. 1989) for the proposition that opposition to a motion for TRO in state court is insufficient to constitute waiver. However, both these cases involved perfunctory and formal opposition to preliminary injunctive motions and thus did not really involve litigation on the merits. For example, in *Baker* the court pointed out that the defendant had merely filed a motion to vacate the preliminary injunction and upon motion of the defendant it was continued until resolution of the removal question in federal court. Thus, defendant's "actions only amount to its protecting its interest in the state court action. They are not sufficient participation to waive removal." 399 F. Supp. at 1022. Similarly, in *Rothner v. City of Chicago* the plaintiff filed an emergency motion for TRO with less than two hours' notice to defendant before defendant had answered the complaint. The state court judge allowed no oral argument and took no evidence before he issued the TRO. Shortly thereafter the defendant removed to federal court. Not surprisingly the appellate court found that no waiver had occurred.

In marked contrast to these two cases, the defendant in the present case answered the complaint, offered several affirmative defenses, and mounted a vigorous defense of the motion for extension of TRO including participation in a full briefing schedule and oral argument in

which she argued the merits of plaintiff's federal claims. This is a far greater level of participation in the state court litigation than occurred in either *Baker* or *Rothner*. Similar levels of participation in state court litigation have been found to constitute waiver of the right of removal. See, especially, *Fate v. Buckeye State Mutual Insurance Co.*, 174 F.Supp.2d 876 (N.D.Ind. 2001), which found waiver where the defendant had sought a stay or dismissal of Count I of the complaint and a stay of discovery of Count II of the complaint, and had conducted some discovery.[1]

5. The Effect of the Schacht decision

Defendant agrees that the present case is different from *Schacht* but suggests that any differences do not matter to removal jurisdiction. As plaintiff discussed in her opening memorandum at pages 11-12, the differences are central to this case, since the rationale in *Schacht* was based on the Court's conclusion that the Eleventh Amendment defense was merely a "potential" defense which the state defendant might not raise and the federal court need not raise *sua sponte*. As part of its rationale the Court stated that defendant must remove prior to filing her answer in state court or forever waive the right to do so. 524 U.S. at 390. Implicit in the Court's rationale is that if the Eleventh Amendment is raised prior to removal, then there is no jurisdiction and the plaintiff avoids being ensnared in litigating in federal court the issue of

[1] The court in *Fate* explained why the *Rothner* analysis regarding the doctrine of waiver of removal no longer applied. It states that *Rothner* construed the removal statutes prior to their amendment in 1988, and thus its reasoning no longer applied to the post-1988 removal statutes. Whereas under the old version of the statute, the Seventh Circuit found waiver only in rare circumstances, the change in the language of the statutes removed that obstacle to waiver, and thus waiver of the right to removal remains a viable doctrine. See *Fate v. Buckeye State Mutual Insurance Co.*, 174 F.Supp.2d at 880-81.

whether that court has jurisdiction, when the plaintiff had not sought out the federal forum in the first instance.

At the time of the removal action here, Eleventh Amendment issues were not just "potential," they were already asserted in state court in defendant's Answer and in her briefing on the extension of the temporary restraining order. Defendant clearly has not waived Eleventh Amendment immunity and, under the Seventh Circuit's precedents, would have no authority to do so. Defendant does not contend she has statutory authority to consent to suit, and she is silent on the principle stated by the Seventh Circuit in *Power v. Summers*, that state officials cannot remove to federal court and thus consent to suit absent such a statutory waiver of sovereign immunity. *Power v. Summers*, 226 F.3d 815 at 818 (2000).

6. The Eleventh Amendment and State Court Jurisdiction

Citing *Alden v. Maine*, 527 U.S. 706 (1999), defendant says her Eleventh Amendment defense to plaintiff's claim under Title II of the ADA should be heard in federal court. (Defendant's memorandum, p. 14). In *Erickson v. Board of Governors*, the Seventh Circuit held that private litigants may assert in Illinois' courts their ADA claims that would be barred in federal court, consistent with *Alden*, because Illinois allows similar claims through its Human Rights Act. The court reasoned that "having opened its courts to claims based on state law, including its own prohibition of disability discrimination by units of state government . . . Illinois may not exclude claims based on federal law." 207 F.3d 945, 952 (7th Cir. 2000), citing, *inter alia, Howlett v. Rose*, 496 U.S. 356, 367-75(1990). Although *Erickson* involved Title I of the ADA and the employment relationship, the Illinois Human Rights Act also prohibits

discrimination in the provision of services by public officials, 775 ILCS 5/1-102(A), (G), 775 ILCS 5/5-102(C), similar to plaintiff's claim under Title II of the ADA here. In that regard, see *Walker v. Snyder*, 213 F.3d 344, 347 (2000), where the Seventh Circuit affirmed its statement from *Erickson* that the plaintiff should pursue his Title II ADA claim in state court.

7. Plaintiff's Claim Under the Rehabilitation Act

Defendant does not clearly state whether she continues to pursue the Eleventh Amendment defense with respect to plaintiff's claim under the Rehabilitation Act that she originally stated in the preliminary relief briefing in state court. To the extent that she intends to do so, the foregoing analysis regarding Title II of the ADA is equally applicable. Finally, the waiver arguments presented above in sections 2 through 4 apply equally to the Rehabilitation Act claim and the ADA claim.

Conclusion

For the foregoing reasons, and for the reasons set out in her opening memorandum, plaintiff requests that this Court grant her Motion for Remand.

Respectfully submitted,

Eliot Abarbanel
One of plaintiff's attorneys

PRAIRIE STATE LEGAL SERVICES, INC.
Eliot Abarbanel
Sarah Megan
Bernard H. Shapiro
350 S. Schmale Road
Suite 150
Carol Stream, IL 60188
630-690-2130

Certificate of Service

The undersigned certifies that on March 6, 2002, she served a copy of the attached Plaintiff's Reply Brief -- Motion for Remand, upon:

James O'Connell
David Adler
Christopher Gange
Assistant Attorneys General
160 N. LaSalle Street
Suite N-1000
Chicago, IL 60601
FAX No. 312-793-3195

by depositing a copy thereof, enclosed in an envelope, in the United States Mail at Carol Stream, Illinois, with proper postage prepaid as addressed above, and by transmitting a copy thereof by facsimile to the facsimile number noted under the respective names above.

Cynthia A. Autry

SUBSCRIBED AND SWORN TO
before me this 6th day
of March, 2002.

Susan E. Beard

NOTARY PUBLIC

OFFICIAL SEAL
SUSAN E BEARD
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES:09/06/05