

Motions

5:07-cv-00146-FPS Stenger v. Carelink Health Plans, Inc. et al

U.S. District Court

Northern District of West Virginia [Live]

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Case Name: Stenger v. Carelink Health Plans, Inc. et al

Case Number: 5:07-cv-146

Filer: Christine Stenger

Document Number: 7

Docket Text:

MOTION to Stay re [5] MOTION to Dismiss by Christine Stenger. (Attachments: # (1) Attachment Judge Goodwin Order Loss v. Kendle)(Tucker, Paul)

5:07-cv-146 Notice has been electronically mailed to:

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[STAMP dcecfStamp_ID=1079362125 [Date=12/14/2007] [FileNumber=440439-0] [814537974d9245a553e275ede20d07bb244974da15cb56e3813e04c372cc3f4836d99d1daeab3aa74385a6b08f2c0108776f5d66231b85f841b50e890f46853f]]

Document description:Attachment Judge Goodwin Order Loss v. Kendle

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[STAMP dcecfStamp_ID=1079362125 [Date=12/14/2007] [FileNumber=440439-1] [512ac210460f813ade7da22d33d707233d11663de49f09b090b0ae07ae420c18188e67d06c1315d97ac3639df06a723d3816e8abc36370ebaf4d072f7303750d]]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
at Wheeling

CHRISTINE STENGER,

Plaintiff,

vs.

CIVIL ACTION NUMBER: 5:07-CV-146
(Judge Frederick P. Stamp, Jr.)

CARELINK HEALTH PLANS, INC., and
PATRICK W. DOWD

Defendants.

MOTION TO STAY AND/OR TO ENLARGE
RESPECTING DEFENDANTS' MOTION TO DISMISS

Plaintiff, Christine Stenger, by counsel Paul T. Tucker, hereby moves that the Court stay or enlarge the time period for briefing and judicial consideration of *Defendants' Motion to Dismiss* (Docket No. 5), based upon the following:

1. This is an action for state law claims of disability discrimination, intimidation, and negligent and intentional infliction of emotional distress filed by Plaintiff in the Circuit Court of Ohio County, West Virginia. The Complaint contends that defendant Carelink, acting through its President, defendant Patrick Dowd, discriminated against the plaintiff "by refusing, withholding from, or denying the accommodations, advantages, privileges or services of a place of public accommodation," (Complaint, ¶ 8), attempted to intimidate her "with the intent to impede or obstruct plaintiff from testifying as a witness in an official proceeding," (Complaint, ¶ 11), and in so doing, inflicted emotional distress upon her, knowing her to be particularly susceptible to such distress by virtue of her disability.

2. On November 16, 2007, all defendants removed the action to this Honorable Court

alleging federal question jurisdiction pursuant to 28 U.S.C. § 1331, contending that the Complaint is pre-empted by the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 et seq.

3. Plaintiff contends the action is not pre-empted by ERISA and is currently preparing a Motion To Remand, to be filed according to law.

4. On November 20, 2007, defendants filed what they denominated a *Motion to Dismiss*. Submitted with exhibits and unsupported factual assertions that transcend the pleadings, this motion is in actuality a motion for summary judgment and would not be ripe for disposition until a proper course of discovery is undertaken. Even were it actually confined to the pleadings, addressing it should nevertheless be deferred until after the Court resolves Plaintiff’s Motion to Remand, which implicates the jurisdiction and power of the Court over the action generally.

5. This Court may not grant the substantive relief sought by Defendants through this motion pending a motion to remand. Before addressing the merits of a dispositive motion, the Court must first determine whether it has subject matter jurisdiction over the cause of action. *See, Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). (“The requirement that jurisdiction be established as a threshold matter ‘spring[s] from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’”) Under these circumstances, requesting a stay of briefing on dispositive motions pending a ruling on the motion to remand is the “prudent” course. *See, Brennan Law Firm, P.C. v. Norfolk Southern Railway, Co.*, 2005 WL 3358889, *1, n. 3 (S.D.Ill. 2005). Based upon these doctrines, the Federal Courts sitting in West Virginia have granted motions to stay briefing and rulings on dispositive motions pending a ruling on a motion to remand. *See attached, Loss v. Kendle International CPU, LLC*, No. 1:07-CV-48 (Goodwin, J.) (N.D.W.Va. May

23, 2007) (staying briefing on dispositive motions until 10 days following ruling on motion to remand). *See also, McWilliams v. Monarch Rubber Co.*, 70 F.Supp.2d 663, 665, n. 3 (S.D.W.Va. 1999) (Haden, C.J.). (“The Court’s first duty is to resolve the motion to remand, a jurisdictional inquiry. . .”)

6. The Court has the inherent power to stay the briefing, or in the alternative, pursuant to FR.Civ.P 6(b) and LR Civ P 7.1(c), it may enlarge the time period for submitting response briefs.

WHEREFORE, for the reasons set forth herein, plaintiff prays that this Motion be granted. If denied, then Plaintiff prays to be given a reasonable date certain by which to file a brief in response to the defense motion.

s/Paul T. Tucker
Of Counsel for Plaintiff

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CERTIFICATE OF SERVICE

Service of the foregoing **MOTION TO STAY AND/OR TO ENLARGE RESPECTING DEFENDANTS' MOTION TO DISMISS** was had upon defendants by electronically forwarding a true and complete copy thereof to their counsel this 14th day of December, 2007, as follows:

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

MICHAEL LOSS, *et al.*,

Plaintiffs,

v.

CIVIL ACTION NO. 1:07CV48
Judge Joseph R. Goodwin

KENDLE INTERNATIONAL CPU LLC, *et al.*,

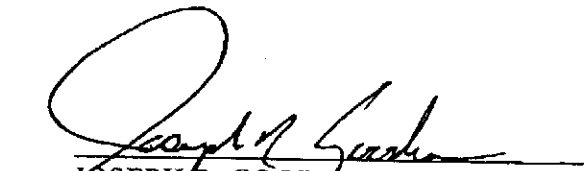
Defendants.

ORDER

The Court has before it plaintiffs' "Motion To Extend Time for Plaintiffs' to File Their Response to Defendants' Motion to Dismiss" (Docket No. ____). Good cause having been shown, the Court hereby **GRANTS** plaintiffs' Motion and **ORDERS** that the plaintiffs shall have ten (10) business days from the day that the Court rules on plaintiffs' Motion to Remand (Docket No. 6) in which to file their response to the defendants' Motion to Dismiss (Docket No. 10), if necessary.

ENTER:

23 May 2007


JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE