

A woman sued her former employer in state court, asserting age and sex discrimination claims under both state and federal law. The woman's attorney had recently been embarrassed in court by the judge to whom the case was assigned. Wishing to avoid difficulties with the judge, the woman's attorney promptly removed the case to federal court on the basis of federal-question jurisdiction. The employer's attorney has timely moved to remand.

How is the federal court likely to proceed?

- A. Remand the entire case.
- B. Remand the state claims but keep the federal claims.
- C. Retain the case, because it was timely removed and the woman alleges federal claims.
- D. Retain the case to avoid the risk of bias and impropriety in having it proceed before a judge who has shown clear hostility toward the woman's attorney.

Explanation:

Remand based on improper removal

Basis	Example	Result
No subject-matter jurisdiction	<ul style="list-style-type: none">• No subject-matter jurisdiction over <i>any</i> claim	<ul style="list-style-type: none">• Remand entire case
	<ul style="list-style-type: none">• No subject-matter jurisdiction over <i>some</i> claims	<ul style="list-style-type: none">• Retain removable claims• Sever & remand nonremovable claims
Procedural error	<ul style="list-style-type: none">• Defendant filed notice of removal more than 30 days after receiving complaint• Not all defendants consented to removal• Case removed by plaintiff (not defendant)• Notice not delivered to parties or state court• Removal violates forum-defendant rule	<ul style="list-style-type: none">• Remand entire case

A **defendant** can **remove a case** originally filed in state court **to federal court** if:

- the federal court has **subject-matter jurisdiction** over the plaintiff's claims—eg, when a claim arises under the U.S. Constitution, a treaty, or federal law
- all defendants consent to removal
- the defendant files a notice of removal within 30 days of receiving the plaintiff's initial complaint or service of the summons (whichever period is shorter) *and*
- a copy of the notice of removal is delivered to the state court and the other parties.

A party can challenge removal by filing a motion to remand (ie, return) the case to state court. This motion must generally be filed in federal court within 30 days after the notice of removal is filed, but a motion based on lack of subject-matter jurisdiction can be filed at any time. The burden is then on the party seeking removal to prove by a preponderance of the evidence that removal is proper. If there was a **procedural error** in the removal, the federal court should **remand the entire case** to state court.*

Here, the woman sued her former employer in state court, and her attorney promptly removed the case to federal court. However, there was a *procedural error* in that removal since the woman is the plaintiff—not the defendant. Therefore, the federal court will likely remand the entire case.

*The federal court clerk must mail a certified copy of the remand order to the state court clerk. The order may require payment of costs, including attorney's fees. But if a remand is based on procedural error (as in this case), attorney's fees can only be awarded if there was no objectively reasonable basis for removal.

(Choice B) Had the federal court lacked subject-matter jurisdiction over some of the woman's claims (eg, her state claims), it would have remanded those claims but kept the removable claims (eg, her federal claims).

(Choice C) Although the case may have been timely removed and the woman alleges federal claims, removal is improper because she is the plaintiff.

(Choice D) A plaintiff cannot remove a case, even if there is a risk of bias and impropriety in having the case proceed before a hostile state-court judge.

Educational objective:

If a procedural error occurs in the removal of a case from state to federal court (eg, removal by the plaintiff), the federal court should remand the entire case.

References

- 28 U.S.C. §§ 1441, 1446 (removal of civil actions).

Copyright © 2019 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.