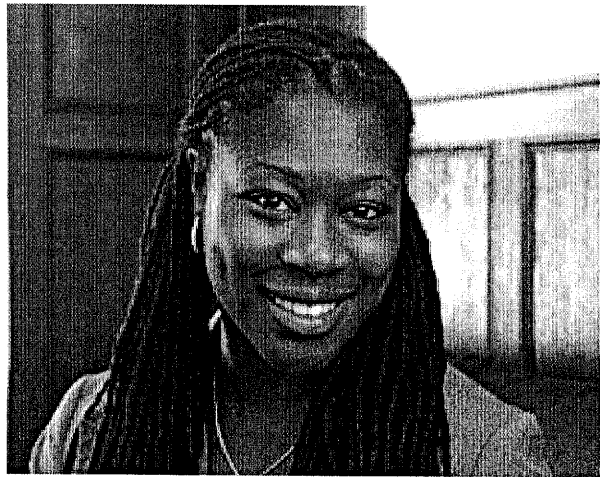


## Pretextual Removal of State Claim Gets Xerox Sanctioned

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LaToya Barrett

A U.S. judge in Camden has sanctioned Xerox Corp. for improperly removing a racial bias and hostile work environment suit to federal court when no federal cause of action was asserted.

Xerox sales manager Angela Carrington sued under the state Law Against Discrimination, seeking compensatory damages that include lost salary and benefits during her involuntary placement on disability leave.

Xerox asserted that the claims were pre-empted by the Employee Retirement Income Security Act's enforcement provision. But District Judge Joseph Irenas, applying the well-pleaded-complaint rule, found that pre-emption — a defense — is insufficient cause for removal.

Irenas remanded the case, *Carrington v. Xerox Corp.*, 11-cv-4698, to state court and ordered Xerox to pay the plaintiff \$5,062 for the time her lawyers, LaToya Barrett and Andrew Dwyer of Newark, spent defeating the removal attempt.

Carrington, who is black, sued Xerox, claimed her boss Vincent Scire II treated black employees more harshly than whites, assigned Carrington to supervise underperforming sales representatives, reassigned valuable client accounts to others and gave her more work assignments than whites who held the same title were given.

Carrington also claimed that she was paid less than white employees holding comparable jobs and that Scire placed her on a three-month, unpaid disability leave in retaliation for her complaint about him to the personnel manager.

Carrington sued on July 1 in Camden County Superior Court. In an Aug. 15 notice of removal, Xerox's counsel cited her demand for "compensatory damages, including but not limited to back pay, front pay, bonuses, commissions, incentive pay, and all other benefits to which plaintiff is entitled, including insurance, pension and other benefits.

"By virtue of demanding insurance, pension and other benefits and because plaintiff received these benefits through ERISA-regulated plans, plaintiff's complaint sets forth an action to recover benefits due under her ERISA-regulated benefits plans, and as such Plaintiff's complaint is completely pre-empted by the civil enforcement provision of ERISA," Xerox added.

In an Aug. 30 order to show cause why the case should not be remanded, Irenas said that the complaint does not assert a federal cause of action and the "defendant's assertion that ERISA pre-emption is a defense to the claim asserted does not convert the state law claim into a federal cause of action."

Xerox, replying to the order to show cause on Sept. 13, said Carrington's claim "necessarily implicates ERISA because she seeks to recover, under state law, benefits allegedly due to her under ERISA employee benefit plans."

On Sept. 20, Barrett and Dwyer filed a brief in support of remanding the case and seeking sanctions. Under the well-pleaded complaint rule, they said, a cause of action arises under federal law only if a federal question is presented on the face of the complaint. They cited four cases in which district courts rejected arguments similar to Xerox's.

Xerox is represented by Laura Martin Scales and Kristen DiMaria of Ogletree, Deakins, Nash, Smoak & Stewart in Philadelphia. Scales referred a reporter to DiMaria, who did not return a call.

Barrett, who argued for remand at the Oct. 6 hearing, says she learned from researching the case and speaking with colleagues in the National Employment Lawyers' Association that defendants in employment discrimination cases frequently seek removal to federal court under similar circumstances. Plaintiffs' lawyers then get the cases remanded.

In another case brought by Barrett and Dwyer, an Essex County jury awarded \$804,000 last April to another black manager at Xerox, Hope Bailey-Rhodeman, who raised claims similar to Carrington's.