March 09, 2022

FEATURE

To Remove or Not to Remove: A Look at the Federal Officer Removal Statute

Patricia A. Rauh

Share:

ftwitty/E+ via Getty Images Plus

When determining whether a defendant is acting under color of federal office, the defendant's conduct must amount to more than simply following orders or directives of a federal agency.

Imagine this scenario. A group of plaintiffs who all reside in State X bring an action in X state court against a corporate defendant, ABC Corp., which is incorporated in State X with its principal place of business also in State X. The plaintiffs allege multiple causes of action, including negligence, trespass, and public nuisance. The lawsuit alleges that ABC Corp. negligently caused toxic waste to escape into the air and soil while it was attempting to clean up the waste pursuant to a contract Corp. had entered into with the federal government. The plaintiffs claim that they have each

suffered various injuries as a result of being exposed to these chemicals. Upon being served with the complaint, counsel for ABC Corp. promptly removes the case to its local federal district court.

One may wonder why or how the defendant could remove this case to federal court when only violations of state law are being alleged. In other words, how does a federal court even have jurisdiction over a lawsuit alleging negligence, public nuisance, and trespass, which all arise out of state law? We already know that there is no diversity jurisdiction between the parties as both the plaintiffs and the defendant reside in the same state, i.e., State X. However, the defendant's counsel argues that removal to federal court is proper because of a rather less often used ground: federal officer jurisdiction.

This hypothetical is actually reflective of hundreds, if not thousands, of cases currently pending in federal courts across the nation, where defendants argue that federal officer jurisdiction applies, regardless of the fact that the causes of action all sound in violations of state statutory law or state common law. This article will explain what the federal officer removal statute entails, what a defendant needs to show in order to remove a case on this basis, and the different types of cases in which this ground for removal can be invoked.

History of Removal to Federal Court Based on Federal Officer Status

During the War of 1812, New England states were opposed to the national trade embargo against England, and some people tried to prevent the embargo's enforcement by commencing lawsuits against customs officers in state court.[1] In 1815, Congress granted to officers seeking to enforce the U.S. customs laws a "right of removal" to federal court. That law expired after that war ended. In 1833, South Carolina disputed and sought to "nullify" the federal tariffs of 1928 and 1932. Congress enacted the Force Bill, which authorized the president to utilize the military to collect disputed tariffs. As part of that bill, Congress granted to any federal officer sued or prosecuted in state court in the course of enforcing the tariffs the right to remove the action to federal court.[2] During the Civil War, Congress passed a new group of removal statutes that applied mainly to cases growing out of enforcement of the revenue laws.[3] In 1948, as discussed below, the federal officer removal statute was included in the revision of the Judicial Code. It was extended to apply to all federal officers, not just revenue enforcement officers.

Historically, the federal officer removal statute was used as a way to protect those who worked for the federal government, whether directly or indirectly, in the event that they were sued or

prosecuted for conduct performed while working in their capacity as a federal officer or working under the direct control and supervision of a federal officer. Congress believed that allowing these types of cases to be heard in a federal forum would prevent potential prejudice against federal officer defendants from local and state prosecutors.[4] In other words, the purpose of the federal officer removal statute is to prevent states from interfering with federal operations, which could occur if states were permitted to prosecute state officials in cases involving their official federal duties.

Today's Federal Officer Removal Statute

The present federal officer removal statute, found in 28 U.S.C. § 1442(a)(1), was passed in 1948 as part of the revision of the Judicial Code. In short, the federal officer removal statute now permits the removal of cases commenced in state court against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof . . . for or relating to any act under color of such office."[5]

Where the defendant is a federal employee, the statute is fairly straightforward. However, where the defendant is not a federal employee, then the parties and the court must consider who qualifies as a "person" or a "person acting under that officer." What types of suits qualify as "for or relating to any act under such color of office"? Does a "person" have to be a human, or may a corporation qualify? What evidence is necessary to show that the person was acting under an officer? Is a government contract sufficient, or does the government officer have to maintain some control over the conduct? And what type of activities qualify as "under color of such office"?

Not surprisingly, this language has engendered significant litigation relating to who can use the statute and what types of cases qualify under the statute. In response, federal courts have come up with a variety of different tests and methods to determine whether a case can be removed to federal court on the basis of federal officer removal.

The U.S. Court of Appeals for the Second Circuit recently held that private contractors may avail themselves of federal officer removal if they can prove the following: (1) they are "persons" who acted under a federal officer; (2) they assisted, were supervised by, or received delegated authority from a federal officer; (3) the challenged act occurred while the defendants were performing their official duties; and (4) the defendants have raised a colorable federal defense.[6] The Second Circuit [illegible]d that courts have imposed few limitations on what qualifies as a colorable federal defense.

The U.S. Court of Appeals for the Fifth Circuit, meanwhile, established its own test in *Latiolais v. Huntington Ingalls, Inc.*,[7] in which it overruled a slightly different variation of the test in a previous case, *Bartel v. Alcoa Steamship Co.* In *Latiolais*, the court stated that in order to remove a state court action under the federal officer removal statute, a defendant must show that (1) it has asserted a colorable federal defense, (2) it is a "person" pursuant to the statute, (3) it has acted pursuant to a federal officer's directions, and (4) the charged conduct is connected or associated with an act pursuant to the federal officer's directions.[8]

Finally, the U.S. Court of Appeals for the Eighth Circuit established a slightly different version of the test to determine whether a case is removable on federal officer grounds. This test requires four elements: (1) the defendant has acted under the direction of a federal officer, (2) there was a causal connection between the defendant's actions and the official authority, (3) the defendant has a colorable federal defense to the plaintiff's claims, and (4) the defendant is a "person" within the meaning of the statute.[9]

Although all of the above tests are relatively similar, they still fall short of describing what some of the key statutory phrases really mean. What is a colorable federal defense? What does it mean to act under color of federal office? These questions must be answered before a defendant can determine with certainty that the federal officer statute applies.

Analyzing the Federal Officer Removal Statute

Who is a "person" under the statute? A party's analysis of this statute should begin with the seemingly simple question of whether the party is considered a person under the statute. Certainly, any natural person or group of natural persons would qualify, but what about entities such as corporations?

Today, the courts have generally established that a corporation is considered a person for purposes of this statute.[10] Yet, this was not always the case. In 1988, a federal district court in the First Circuit found that the American Red Cross, the defendant in a wrongful death claim, was not a person under the federal officer removal statute; it ruled that the statute only refers to natural persons and does not encompass a federal agency or corporation.[11] Other courts throughout the United States have taken this position as well. However, the federal officer removal statute was amended in 1966 to expressly include federal agencies in the list of those that are entitled to

remove, which made this first step of the analysis much more straightforward, at least as to federal agencies.

What does it mean to "act under color of federal office"? Once a defendant can successfully demonstrate that it is a person under the federal officer statute, the next hurdle, and often one of the most challenging, is to prove that it was acting under an agency or officer of the United States.

In general, a person acting under a federal officer must demonstrate that the conduct or acts that form the basis of a state lawsuit were performed pursuant to a federal officer's direct orders or detailed regulations. In other words, there should be a "causal nexus" between the defendant's actions and a federal officer's directions.[12] On the one hand, if a defendant can establish only that it was generally acting under direct orders of a federal agency, then it is not entitled to federal officer removal.[13] For instance, a defendant whose work or conduct is simply bound by federal regulations or directives would probably not be able to establish that it was acting under a federal officer. On the other hand, if a defendant has a detailed and comprehensive contract with a government agency that sets forth the precise work that is to be completed, and the government agency directly oversees and supervises that work, then that could form the basis for showing a person acting under a federal officer or agency.

Acting under color of a federal officer also can depend heavily on the type of case at issue. As explained in greater detail later in this article, the courts have employed different tests depending on whether the case involves a military contractor, a products liability issue, or even an environmental/pollution issue.

The U.S. Supreme Court did interpret the "color of office" requirement in *Willingham v. Morgan*, which involved a suit brought in state court by a federal prisoner against the warden and the chief medical officer of the prison where the plaintiff was confined.[14] The plaintiff alleged that he had been assaulted, beaten, and tortured by the defendants. The Supreme Court ruled that the defendants were indeed entitled to remove this case under § 1442(a)(1). Further, the Court held that in order to secure removal, the defendants need not admit that they actually committed the charged offenses. Instead, the Court stated that it was "sufficient for petitioners to have shown that their relationship to respondent derived solely from their official duties."[15] In other words, for purposes of federal removal, defendants can establish that they were acting under color of federal office by simply stating that their alleged conduct or acts, though negligent or wrongful, were committed while they were in the performance of their official duties.

Conversely, in a case out of the U.S. District Court for the Eastern District of Pennsylvania, the court found that a navy contractor that manufactured turbine generators, which allegedly emitted asbestos, failed to satisfy its burden of showing that it had acted under a federal officer. While the defendant contractor asserted that it was acting under the control and directive of the U.S. Navy, the evidence demonstrated that the navy was involved only in the design and manufacture of the turbines and did not supervise, direct, or control the manufacturing process.[16]

Now consider a case out of the U.S. District Court for the Eastern District of New York, *In re "Agent Orange" Product Liability Litigation*, where the court found that the defendants, various companies that manufactured the herbicide Agent Orange, could remove the case to federal court pursuant to the federal officer removal statute.[17] In the *Agent Orange* case, the court reiterated that a "substantial degree of direct and detailed federal control over the defendant's work is required."[18] The court found that this was established here because the U.S. government had direct involvement in the design of Agent Orange, and it directly controlled and supervised the production—formal military specifications and requirements for Agent Orange were prepared and promulgated by the government.

One of the best examples of direct and detailed orders from a federal agency that would be sufficient to demonstrate that a defendant was acting under that officer or agency is a First Circuit case from 1989, *Camacho v. Autoridad de Telefonos*.[19] In this case, targets of federal wiretapping brought suit against telephone companies and government officials who participated in wiretapping on behalf of federal officers. The court found that removal was proper in this case because the telephone companies' "involvement in the electronic surveillance was strictly and solely at federal behest."[20] In other words, these telephone company defendants would have no reason to participate in wiretapping unless they were engaged in official government business. In fact, in this particular case, federal agents were actually wiretapping telephone calls, and the defendants were merely offering technical assistance or helping to facilitate the wiretapping. The *Camacho* court found that it was very clear that the defendants were acting under a federal officer, thereby justifying removal on the basis of the federal officer removal statute.

What is a "colorable federal defense"? Generally speaking, a colorable federal defense is one that is defensive, is based in federal law, and arises out of the removing party's compliance with the demands of a federal officer.[21] A federal defense does not need to be proven meritorious for removal under the statute; rather, the claim to the defense must only be "colorable"—or possibly meritorious. Further, it is not required that a court first determines that a defense will be

successful before removal.[22] For instance, if a defendant commits the challenged conduct of his or her own free will, in conjunction with the performance of a general duty required by a federal employer, the defendant will have no federal defense and no right of removal under the federal officer removal statute.

The Supreme Court discussed this important distinction in *Mesa v. California* in 1989.[23] The *Mesa* case involved two U.S. Postal Service employees who were each charged in state court for traffic violations arising out of incidents that occurred while they were operating their mail trucks. The U.S. attorney filed petitions for removal of the complaints on the basis that the defendants were federal employees at the time of the incidents and the charges arose from accidents that occurred while they were on duty and acting in the course and scope of their employment. While the district court granted the petitions for removal, the court of appeals found that federal postal workers could not remove state criminal prosecutions to federal court when they raised no colorable claim of federal immunity or other federal defense.

The Supreme Court in *Mesa* found that the postal workers were indeed persons acting under an officer of the United States or agency thereof but still did not permit removal because the postal workers had not been acting under color of office during the alleged traffic incidents. The Court reasoned that § 1442 allows removal only when the defendant's act was ordered or demanded by federal authority, which would then give rise to a colorable federal defense. In other words, even though the postal workers may have been acting under an officer or agency of the United States because the traffic incidents occurred while they were in the course and scope of their employment, there was no federal defense that they could raise for the conduct and acts committed. The Court declined to follow a broader interpretation, which would have allowed removal in cases whenever a federal officer is prosecuted for the manner in which the officer has performed his or her federal duties.

Certain Defendants and the Applicability of Section 1442(a)(1)

When determining whether a defendant meets the requirements to remove a case pursuant to § 1442(a)(1), the type of defendant in the case may slightly alter the analysis. These different types of defendants include government military or defense contractors, certain private corporate defendants, and, interestingly, certain types of environmental contractors or defendants.

Government military/defense contractors. Many corporations throughout the United States work as contractors for the federal government or the U.S. military. There have been many instances where one or more of these military/defense contractors were sued, typically in products liability actions, and the defendants have attempted to remove the cases to federal court under § 1442. Determining whether these government contractors acted under a federal officer or agency can be a very fact-specific analysis, and the way that the courts decide the legitimacy of a removal on this basis can vary slightly from other types of cases.

For example, in order for a government/military contractor defendant to successfully remove a state-law claim to federal court under § 1442, the defendant must show (1) that it acted under the direction of an officer of the United States in the performance of its contract and duties, and (2) that it has a colorable basis to satisfy the three elements of the federal contractor "defense" standard prescribed by the Supreme Court in *Boyle v. United Technologies Corp.*[24]

The *Boyle* case involved a wrongful death action that was brought against an independent contractor that had supplied a military helicopter that subsequently crashed into the ocean, resulting in the drowning death of a marine who was piloting the helicopter. The lawsuit alleged that the manufacturer had defectively designed the emergency escape hatch on the helicopter, which caused the marine to become trapped and eventually drown. The Supreme Court established the "military contractor defense" and ruled that if a defendant met the requirements under that test, then the case could be removed to federal court under the federal officer removal statute. The military contractor defense consists of the following requirements: (1) the United States approved reasonably precise specifications, (2) the equipment conformed to those specifications, and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

In another case involving military contractor defendants, the U.S. District Court for the Northern District of Ohio held that for purposes of federal officer removal of a products liability action alleging exposure to asbestos, a federal military contractor acted "under color of office" when it manufactured and supplied asbestos-encased evaporators for navy ships pursuant to navy specifications.[25]

Other corporate defendants. There have also been many cases in which other corporate defendants tried to remove a case on the basis of the federal officer removal statute.

The seminal case from the Supreme Court addressing this scenario is *Watson v. Philip Morris Co.*, which was decided in 2007.[26] This case involved a class action lawsuit against the tobacco company Philip Morris, alleging that it had violated Arkansas law by misrepresenting the amount of tar and nicotine in cigarettes marketed and sold as "light." The defendant invoked § 1442(a)(1) in an attempt to remove the litigation to federal court. Philip Morris claimed that it was acting under the direct control of regulations set forth by the Federal Trade Commission (FTC), so federal officer removal applied. In a unanimous decision, the Supreme Court ruled that Philip Morris could not remove the case to federal court because it was not "acting under a federal officer" in the sense of the statute. Simply put, the fact that Philip Morris operated its business in an industry that was so heavily regulated by the federal government did not mean that it was acting under an officer or agency of the U.S. government. The Court reasoned that "acting under" would suggest a type of relationship where a subordinate performs acts that assist the subordinate's superior. Clearly, that was not the case because Philip Morris had no actual or direct relationship with any federal officer or agency.

In 2021, the Second Circuit held in *Agyin v. Razmzan* that a private party is "acting under" color of federal office if its conduct involves "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior."[27] Further, the court ruled that a defendant acts under a federal officer if it performs a job that, in the absence of a contract with a private firm, the government itself would have had to perform.

Environmental contractors. In recent years, our society has become much more concerned about issues such as pollution and the environment. It is certainly not uncommon for the Environmental Protection Agency (EPA) to determine that a certain geographical site in the United States has been polluted to the point that federal intervention is needed. In most of these cases, however, it is not employees of the EPA or some other federal agency who actually perform the remediation work. Rather, the EPA and state environmental agencies will set forth plans for cleaning up the polluted area, often referred to as a "Superfund" site, and then contract the work out to local companies that specialize in cleaning up and remediating these toxic sites pursuant to the protocols put in place by the federal government.

Does this mean that the local companies that are cleaning up a polluted site pursuant to the EPA's directives are "acting under" a federal officer or agency of the United States? The answer to this [illegible]tion can vary depending on the jurisdiction in which the defendants find themselves, as well [illegible]e exact extent of the EPA's involvement.

In a recent case from the U.S. District Court for the District of New Mexico, the State of New Mexico brought an action in state court against a manufacturer of polychlorinated biphenyls (PCBs), alleging that New Mexico's natural resources were contaminated with these toxins.[28] The plaintiff asserted claims for public nuisance, design defect, failure to warn, and negligence, among other local and state-based tort claims. The defendant removed the case to federal court on the basis of federal officer removal, and the plaintiff moved to remand. The court ruled that the defendant had no basis for removing the case under § 1442(a). First, the defendant manufacturer did not act under a federal officer as it did not produce PCBs pursuant to any government contract and the vast majority of the PCB sales were to other government contractors rather than to the government itself. Further, the government did not supervise the production of PCBs, nor did the government compel production of them.

In contrast, consider a 2000 case out of the U.S. Court of Appeals for the Tenth Circuit, where the plaintiff alleged that the defendants had violated the Rocky Mountain Low-Level Radioactive Waste Compact by implementing a remedy for cleanup at the Unit 8 Denver Radium Site, a remedy that the EPA had ordered pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[29] The court held that the requirements of federal officer removal had been met there because the defendants had implemented a remedy selected by the EPA (a federal agency) pursuant to CERCLA. Further, the defendants would have been subject to civil penalties had they not complied with that federal directive.

Another CERCLA-related case in the U.S. Court of Appeals for the Ninth Circuit also addressed federal officer removal. In *California v. H & H Ship Service Co.*, the defendant challenged its conviction under the California Fish and Game Code, which prohibits the release of substances deleterious to fish, plants, or birds in state waters.[30] In assessing whether the district court had properly asserted jurisdiction under the federal officer removal statute, the court considered the criteria that needed to be met: (1) whether the defendant was a person acting under a federal officer, (2) whether the defendant was acting under color of that officer's authority, and (3) whether the defendant raised a colorable federal defense. In support of the petition for removal, the defendant asserted that it was acting under a federal officer because its actions were taken as part of a removal action supervised by the U.S. Coast Guard and authorized under CERCLA. The court found that the defendant was indeed acting under color of federal office because the actions that formed the basis of its prosecution were taken during the course of a [illegible]up/removal that was under the direction and control of the Coast Guard, acting pursuant to [illegible]thority under CERCLA. Finally, the court found that the defendant had a colorable federal

defense because the actions for which it was prosecuted were taken pursuant to federal directives, thereby creating a federal defense.

It should be noted, however, that federal officer removal is not always applicable just because the EPA is involved. Take, for example, the U.S. Court of Appeals for the Sixth Circuit case of *Mays v. City of Flint, Michigan*, which was decided in 2017.[31] In that case, residents of Flint, Michigan, brought a putative class action against city officials and employees of the Michigan Department of Environmental Quality (MDEQ). The plaintiffs alleged that the defendants allowed the City of Flint to switch its water supply without using an anticorrosive agent, despite having knowledge that the water was highly corrosive and unsafe. The plaintiffs asserted state-law tort claims for gross negligence, fraud, assault and battery, and intentional infliction of emotional distress. The defendants removed the case to federal court, but the district court judge granted the plaintiffs' motion to remand.

According to the defendants, removal was appropriate because they were being sued for actions that they took while acting under the express direction of the EPA. They claimed that the EPA delegated primary enforcement authority to the MDEQ to implement the federal Safe Drinking Water Act (SDWA) in Michigan. The defendants further claimed that they were required to submit quarterly and annual reports to the EPA detailing the MDEQ's compliance with the EPA's Lead and Copper Rule. Most notably, the defendants claimed that they were acting under the authority of the EPA because the EPA issued an emergency order in 2016 stating that the MDEQ and the City of Flint had failed to adequately respond to the drinking water crisis, and the EPA then directed the MDEQ to take certain actions that it deemed necessary.

Taking all of this into the account, the Sixth Circuit nevertheless agreed with the district court that federal officer removal did not apply here. The court stated that even though the defendants claimed that they were acting under the authority of the EPA, there was no contract between the defendants and the EPA, no employer-employee relationship, and no other indication of an agency relationship. The fact that the MDEQ received funding from the EPA was also insufficient to invoke federal officer removal. With regard to the defendants' contention that they were under the control of the EPA as they were required to submit periodic reports, the court turned to the reasoning in *Watson*, where that court stated that compliance reporting, even if detailed, is simply insufficient to invoke and sustain federal officer removal.

Conclusion

The cases contained in this article are just a few among thousands of cases that deal with the federal officer removal statute. The key takeaway is that it should be something that is considered by any party in a litigation. The federal officer removal statute can be a powerful tool for government contractors, or even private individuals or corporations, that would prefer to litigate in federal court when the claims arise out of conduct or acts that they performed at the direction of a federal officer or agency.

Notes

1. Elizabeth M. Johnson, Note, *Removal of Suits against Federal Officers: Does the Malfeasant Mailman Merit a Federal Forum?*, 88 COLUM. L. REV. 1098, 1099 (1988).

2. Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632. This crisis, the "Nullification Crisis," was resolved by the "Great Compromise," which reduced the tariffs over time; shortly after that, South Carolina rescinded its Ordinance of Nullification, so the Force Bill did not need to be invoked.

3. Willingham v. Morgan, 395 U.S. 402, 405–06 (1969).

4. *See, e.g.*, Maryland v. Soper, 270 U.S. 9 (1926).

5. 28 U.S.C. § 1442(a)(1).

6. Badilla v. Midwest Air Traffic Control Serv., Inc., 8 F.4th 105, 120 (2d Cir. 2021).

7. 951 F.3d 286 (5th Cir. 2020), *overruling* Bartel v. Alcoa S.S. Co., 805 F.3d 169 (5th Cir. 2015).

8. *Id.* at 296.

9. *See* West v. A&S Helicopters, 751 F. Supp. 2d 1104, 1109 (W.D. Mo. 2010) (citing Dahl v. R.J. Reynolds Tobacco Co., 478 F.3d 965, 967 n.2 (8th Cir. 2007)).

10. *In re* "Agent Orange" Prod. Liab. Litig., 304 F. Supp. 2d 442 (E.D.N.Y. 2004).

11. *See* Roche v. Am. Red Cross, 680 F. Supp. 449 (D. Mass. 1988).

ood v. Armstrong World Indus., Inc., 914 F. Supp. 1125, 1126, 1127 (E.D. Pa. 1996).

13. *See id.* at 1128.

14. 395 U.S. 402 (1969).

15. *Id.* at 409.

16. *Good*, 914 F. Supp. 1125.

17. 304 F. Supp. 2d 442, 446 (E.D.N.Y. 2004).

18. *Id.* at 447.

19. 868 F.2d 482 (1st Cir. 1989).

20. *Id.* at 486.

21. *See* Mesa v. California, 489 U.S. 121 (1989).

22. United States v. Todd, 245 F.3d 691 (8th Cir. 2001).

23. 489 U.S. 121.

24. 487 U.S. 500 (1988).

25. Ferguson v. Lorillard Tobacco Co., 475 F. Supp. 2d 725 (N.D. Ohio 2007).

26. 551 U.S. 142 (2007).

27. 986 F.3d 168, 175 (2d Cir. 2021).

28. New Mexico *ex rel.* Balderas v. Monsanto Co., 454 F. Supp. 3d 1132 (D.N.M. 2020).

29. Greene v. Citigroup, Inc., 215 F.3d 1336, 2000 WL 647190 (10th Cir. 2000) (table decision).

30. 68 F.3d 481, 1995 WL 619293, at *2 (9th Cir. 1995) (table decision).

[redacted]1 F.3d 437 (6th Cir. 2017).

ENTITY:

TORT TRIAL AND INSURANCE PRACTICE SECTION

TOPIC:

TORTS, LITIGATION & TRIALS

Authors