STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Hon. Amy Ronayne Krause, Henry William Saad and Kurtis T. Wilder
Per Curiam

ANTHONY HENRY AND KEITH WHITE,

Plaintiffs-Appellees,

v

LABORERS LOCAL UNION 1191 D/B/A ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191 AND MICHAEL AARON,

Defendants-Appellants,

and

BRUCE RUEDISUELI,

Defendant-Appellant,

AND

MICHAEL RAMSEY AND GLENN DOWDY,

Plaintiffs-Appellees,

v

LABORERS LOCAL UNION 1191 D/B/A ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191 AND MICHAEL AARON,

Defendants-Appellants,
and

BRUCE RUEDISUELI,

Defendant-Appellant.
_____/

Supreme Court Nos.
145631 consolidated with 145632

Court of Appeals Nos.
302373, 302710

Wayne Circuit Court Nos.
10-000384-CD, 10-004708-CD

BRIEF ON APPEAL OF ATTORNEY GENERAL BILL SCHUETTE AS AMICUS CURIAE

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The jurisdictional summary and standard of review stated in the parties' briefs are complete and correct.

INTRODUCTION

This case involves a question of great state interest—whether the Michigan Whistleblower Protection Act (WPA), MCL 15.361, *et seq.*, is preempted by either the Labor Management Reporting and Disclosure Act (LMRDA), 29 USC 401, *et seq.*, or the National Labor Relations Act (NLRA), 29 USC 151, *et seq.* (R 84.) Here the Plaintiff Union Employees were terminated from their positions as business agents for a labor union for reporting or participating in an investigation of allegedly illegal conduct by their employing union. The Defendant Union Employers contended that the Union Employees' claims satisfied both field and conflict preemption and thus, only the LMRDA and NLRA applied and not, the WPA. The Court of Appeals concluded that the claims under the WPA were not field or conflict preempted by either Federal Act. The Court of Appeals reasoned that because the Union Employees did not allege *any* infringement on their union membership rights, their claims were not preempted by either the LMRDA or the NLRA. (R 84.)

In its February 6, 2013 Order, this Court invited the Attorney General to file a brief amicus curiae and asked the parties to address the following three questions:

1. Whether regardless of the public body involved, the National Labor Relations Act (NLRA), 29 USC 151, *et seq.*, or the Labor Management Reporting and Disclosure Act (LMRDA), 29 USC 401, *et seq.*, preempt Michigan's Whistleblower Protection Act (WPA), MCL 15.361, *et seq.*, if the challenged conduct actually or arguably falls within the jurisdiction of the NLRA or the LMRDA;

2. Whether a union employees report to a public body of suspected illegal activity or participation in an investigation thereof is of only peripheral concern to the NLRA or the LMRDA so that the

employees claims under the WPA are not preempted by federal law; and

3. Whether the state's interest in enforcing the WPA is so deeply rooted that, in the absence of compelling congressional direction, courts cannot infer that Congress has deprived the state of the power to act.

Along with a general discussion on the strong presumption against preemption in cases like this, the focus of this amicus brief will be on the Court's third question. The Attorney General is the chief law enforcement officer for the State of Michigan and is charged with protecting the interests of the people of the State of Michigan in legal proceedings. MCL 14.01; MCL 14.28; *Fieger v Cox*, 274 Mich App 449, 451; 734 NW2d 602 (2007). Michigan has two principal interests at stake in these consolidated cases.

First, as an independent sovereign in our federal system, Michigan has a strong interest in this Court upholding state law and honoring the longstanding presumption against preemption absent clear Congressional intent. Second, Michigan has a deeply rooted public policy interest in the Court upholding, for all citizens of Michigan, the protections extended by the WPA. Finding preemption in this case would: (1) discourage employees of labor unions across the state from reporting corrupt or illegal activity, (2) deny such employees the ability to seek redress for retaliation suffered as a result of bringing to light corrupt or illegal activity, and (3) fundamentally undermine the State's ability to protect the health, safety, and welfare of its citizens. The State therefore supports a constrained application of any preemption, with the result that the Union Employees be allowed to go forward with their claims for a violation of the WPA.

COUNTER-STATEMENT OF FACTS

The Attorney General adopts the Union Employees' statement of facts.

ARGUMENT

I. Congress did not evince a clear and manifest intent that either the NLRA or the LMRDA preempts the WPA.

A. A strong presumption exists against preemption.

Our federal system is based on the concept of dual sovereignty. State governments and the federal government each retain and actively exercise the various powers and functions of government simultaneously. Historically, it is the several states which retain the powers related to the protection of the health, safety, and welfare of their citizens. *Hillsborough Co v Automated Med Labs, Inc.*, 471 US 707, 715 (1985). To safeguard our federal system and the historic police powers retained by the states, a clear statement of Congressional intent is required before the states can be stripped of those powers. *Garcia v San Antonio Metro Transit Auth*, 469 US 528, 552 (1985). Based on this principle, there is a strong and well established presumption against federal preemption of state law.

In applying the presumption against preemption, the United States Supreme Court has repeatedly said that a Congressional intent to displace state law must be "clear and manifest." *Wyeth v Levine*, 555 US 555, 565 (2009) (quoting *Medtronic, Inc. v Lohr*, 518 US 470, 485 (1996)). Overcoming the presumption imposes a "considerable burden" on the advocate of preemption. *De Buono v NYSA-ILA Med & Clinical Servs Fund*, 520 US 806, 814 (1997).

The Supreme Court has been particularly reluctant to find a "clear and manifest" congressional intent where the advocates of preemption, as here, invoke the doctrine of implied conflict preemption. Indeed, the Court's precedent establishes "that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of [a] federal Act." *Chamber of Commerce v Whiting*, 131 S Ct 1968, 1985 (2011) (quoting *Gade v National Solid Wastes Mgmt Ass'n*, 505 US 88, 110 (1992)). Invoking an implied Congressional intent lends itself to a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Gade*, 505 US at 111 (Kennedy, J., concurring in part, concurring in judgment); see also *Bates v Dow Agrosciences, LLC*, 544 US 431, 459; 125 S Ct 1788; 161 L Ed 2d 687 (2005) (Thomas, J, joined by Scalia, J, concurring in the judgment in part and dissenting in part) (approving "the Court's increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption"). Other Justices have suggested that the entire doctrine of implied conflict preemption is flawed and lends itself to judicial policymaking. E.g., *Geier v Am Honda Motor Co*, 529 US 861, 907-08 (2000) (Stevens, Souter, Thomas, Ginsburg, JJ, dissenting) (observing that "the presumption [against preemption] serves as a limiting principle that prevents federal judges form running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict preemption based on frustration of purposes.").

Accordingly, unless the Union Employers can show that the NLRA and LMRDA include a "clear and manifest" congressional intent to preclude state whistleblower claims based on retaliation for reporting criminal activity, the presumption against preemption applies, and this Court must find no preemption. As neither the LMRDA nor the NLRA contain an express preemption provision for a state whistleblower claim, the Court should constrain its analysis to avoid an untethered inquiry into *possible* federal objectives in passing these two Acts. Such an inquiry would undercut the principle that it is Congress, rather than the courts, that preempts state law.

B. Congress manifested no intent to preempt state whistleblower claims by employees of labor unions.

Neither the NLRA nor the LMRDA contain express preemption provisions for state law claims. *Chamber of Commerce v Brown*, 554 US 60, 65 (2008); *Brown v Hotel & Rest Employees and Bartenders*, 468 US 491, 505-506 (1984). On the contrary, the LMRDA contains a retention of rights clause for union members which provides that, "nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law *or law of any State*." 29 USC 523(a) (emphasis added). Nevertheless, the Union Employers argue that the WPA claims subject to this case are preempted by both Federal Acts. (Def/Appellant Ruedisuell's Br in Support of Appeal, R101, pp 1-2; Defs/Appellants' Appeal Br, R 102, pp 20-21.) The problem with this argument is that all evidence of Congress' purposes is to the contrary.

Congress enacted the NLRA in 1935 to "protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 USC 151. The LMRDA was enacted in 1959 to curb abuses of power by union leadership and provide certain protections to union members. 29 USC 401. Significantly, neither Act prohibits an employer from discharging an employee for reporting suspected criminal activity. To date, 18 states including Michigan have passed whistleblower protection laws that protect both public and private employees from retaliation based on the reporting of such activity.[1] If Congress thought that state whistleblower claims posed an obstacle to its objectives in either Act, it would have enacted an express preemption provision at some point during the 78-year history of the NLRA and the 54-year history of the LMRDA. It has not. As the Supreme Court held in *Wyeth*, Congress' silence on the issue is "powerful evidence" against finding preemption. 555 US at 575.

[1] States with general whistleblower statues that protect both private and public employees include: Arizona, California, Connecticut, Florida, Hawaii, Illinois, Louisiana, Maine, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Rhode Island, and Tennessee. US Legal Law Digest, United States Whistleblowers, http://lawdigest.uslegal.com/labor-law/whistleblowers/7289/.

II. The WPA is exempted from preemption under the NLRA because Michigan has a deeply rooted policy to protect its citizens from adverse employment actions for reporting violations of the law.

The state's interest to protect its citizens has been recognized by the federal and state courts so as to preclude preemption under the NLRA. Pertinent solely to the NLRA, the Supreme Court has crafted a guiding preemption principle known as "*Garmon* preemption." *San Diego Bldg Trades Council v Garmon*, 359 US 236 (1959). *Garmon* preemption forbids state regulation of activities protected by sections 7 or 8 of the NLRA, 29 USC 157, 158, *Garmon*, 359 US at 244. But where a state has regulated in an area that "touched interests [ ] deeply rooted in local feeling and responsibility," *Garmon* preemption does not apply unless Congress provided compelling direction to the contrary. *Garmon*, 359 US at 244; *Bullock*, 432 Mich at 493. That is precisely the situation here.

A. The parameters of the "deeply rooted" exception to preemption may extend to prohibiting employment-based discrimination.

Courts are tasked with determining whether sufficient dangers exist in allowing dual regulation so as to justify prohibiting a state from exercising its traditional powers. *Colorado Anti-Discrimination Comm v Continental Air Lines, Inc.*, 372 US 714, 719 (1963). The U.S. Supreme Court has described the inquiry as a "sensitive balancing" of the harm to Congress' regulatory scheme and the importance of the state claim in question to the state in protecting its citizens. *Local 926, Int'l Union of Operating Eng'rs, AFL-CIO v Jones*, 460 US 669, 676 (1983). The key question is "whether the controversy presented to the state court is identical to or different from that which could have been, but was not, presented to

the NLRB." *Sargent v Browning-Ferris Indus*, 167 Mich App 29, 34; 421 NW2d 563 (1988) (citing *Serrano v Jones & Laughlin Steel Co*, 790 F2d 1279 (CA 6, 1986)).

Historically, the U.S. Supreme Court has extended the "deeply rooted" exception to preemption to three areas of state concern: violence (*Youngdahl v Rainfair, Inc.*, 355 US 131 (1957)); libel (*Linn v United Plant Guard Workers*, 383 US 53 (1966)); and intentional infliction of mental distress (*Farmer v United Bhd of Carpenters & Joiners of Am, Local 25*, 430 US 290 (1977)). But more recently, federal courts have also embraced discrimination—specifically, the protection against it—as a strong state concern.

"[F]ew concepts are more 'deeply rooted' than the power of a State to protect the rights of its citizens." *Taggart v Weinacker's, Inc.*, 397 US 223, 228 (1977) (Burger, CJ concurring). That is why the Sixth Circuit has recognized Michigan's interest in regulating employment discrimination. For example, in *McCall v Chesapeake & Ohio R Co*, 844 F2d 294 (CA 6, 1988), a railroad employer determined that McCall was physically disqualified from performing certain tasks. 844 F2d at 296. The collective bargaining agreement in place at the time called for a three-member panel to review physical disqualification findings. *Id.* After the panel concluded that McCall could not perform the jobs at issues, McCall brought a state court action alleging a violation of Michigan's Handicappers' Civil Rights Act (now known as the "Persons with Disabilities Civil Rights Act"), MCL 37.1101, *et seq.* *Id.* at 297.

A jury returned a verdict in McCall's favor, and his employer appealed, arguing that the Michigan action was preempted by the Railway Labor Act, which provided McCall's exclusive remedy through the review board panel. *Id.* The court refused to "hold that Michigan's interest in eradicating employment discrimination must give way to the federal interest in regulating labor-management relations in the railway context merely because the rights protected under the state act relate to the collective bargaining agreement in some way." *McCall*, 844 F2d at 300. Instead, the court required a "stronger nexus" to support preemption of the Michigan statute. *Id.* In *McCall* there *was* such a nexus because the state action was based on facts that were "inextricably intertwined" with those in the grievance procedure spelled-out in the collective bargaining agreement and the Railway Labor Act. 844 F2d at 301 (citations omitted).

The U.S. Supreme Court has also recognized that a state has a strong, localized interest in keeping the hiring process free from discrimination. *Colorado Anti-Discrimination Comm*, 372 US at 721. Relying, in part, on *Colorado Anti-Discrimination Commission*, the United States District Court for the Eastern District of Michigan held that conduct regulated by Michigan's Elliott-Larsen Civil Rights Act "touches interests so deeply rooted in local feeling and responsibility that the court cannot infer that Congress intended to deprive the States of the power to act." *Simmons v Monsanto Chemical Co*, No 88-cv-71304, 1989 US Dist Lexis 18006, at *33-34 (ED Mich, Dec 14, 1989).

The plaintiff in *Simmons* alleged that he was harassed and discriminated against because of his race (African-American). *Simmons*, at *10-17. The defendant-employer asserted, among other things, that plaintiff's Elliott-Larsen claim was preempted because the actions complained of were governed by a collective bargaining agreement. *Id.* at *30. The court sought to avoid an "inflexible application" of preemption principles based on its recognition that not every state regulation concerning the interrelationship between employers, employees, and labor unions was preempted. *Id.* at *31 There, the Elliott-Larsen claim was not preempted because the state statute provided plaintiff with "non-negotiable state rights" that could be resolved without reference to the collective bargaining agreement, and because the conduct regulated by Elliott-Larsen touched on "interests deeply rooted in local feeling and responsibility." *Id.* at *33-34.

Prohibiting (and protecting against) employment-related discrimination *is* an interest deeply rooted in state feeling and responsibility. And if the hiring of an employee in a state is a localized matter, as in *Colorado Anti-Discrimination Commission*, then, logically, so is the firing of an employee. This is especially the case in the whistleblower context, when an employee alleges she was fired for reporting criminal activity or suspected criminal activity. Indeed, courts have held that the states' interest in protecting the ability of its citizens to report crimes free from fear of retaliation is paramount. E.g., *Bloom v Gen Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F2d 1356, 1360 (CA 9, 1986); *Montoya v Local Union III of the Int'l Bhd of Elec Workers*, 755 P.2d 1221, 1223 (Colo App, 1998).

The *Bloom* court opined that the state's interest in the case was strong because state law prohibited embezzlement, and plaintiff claimed he was fired for not covering up unapproved expenditure of union funds by union officers. *Bloom*, 783 F2d at 1360-1361. Thus, California had a strong interest in preventing the crime, "and consequently in seeing that employees are not coerced by threat of discharge into committing or abetting the crime." *Id.* at 1361. So a state claim of wrongful discharge for refusing to succumb to that coercion is "a necessary deterrent to both to coercion and the crime itself." *Id.* Continuing, the court stated that if federal law does preempt such state claims or actions, then the deterrent effect is lost and nothing can stop "unscrupulous employers" from making employees choose between committing crimes or losing their jobs. *Id.*

B. The WPA is designed to protect Michigan's citizens from discrimination for reporting illegal activity.

Michigan's interest in enforcing the WPA is strong. It was the first state to grant statutory protection to employees who reported an employer's illegal activity. *Dudewicz v Norris-Schmid, Inc.*, 443 Mich 68, 82; 503 NW2d 645, 651 (1993) (Boyle J, dissenting). Michigan enacted the WPA in 1980, and designed it to "encourage employees to assist in law enforcement and to protect those employees who engage in whistleblowing activities." *Id.* at 83. Thus, the WPA's underlying purpose is public protection, and it does so with an eye toward promoting public health and safety. The WPA meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or

suspected violations of the law. Without employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses.

The legislative analysis of the WPA described the problem the act aimed to address, as follows:

> Violations of the law by corporations or by governments and by the men and women who have the power to manage them are among the *greatest threats to the public welfare.* ... Because these institutions are large and impersonal, and because they are regulated by complex and, to most people, unfamiliar statutes and rules, specific violations of the law by them often go unnoticed by the public *which is the victim.* The people best placed to observe and report violations are the employees of government and business, but employees are naturally reluctant to inform on an employer or a colleague. . . . A person ought to be able to do his or her civic duty without fear of reprisals from an employer. [House Legislative Analysis, HB 5088, 5089 (February 5, 1981) (emphasis added).]

Michigan has a vital interest in enforcing a statute that was enacted pursuant to the State's sovereign police power to cure one of the greatest threats to the public welfare. This is especially the case where employees may have no other means to remedy discrimination against them for reporting suspicions of illegal activity.

C. The NLRA's objectives center on the right to form and join labor unions for purposes of collective bargaining, not on the reporting of criminal activity.

The Union Employees assert they reported their suspicions of the misappropriation of union funds furthering a kickback scheme, which they assert are felonies under federal and state law. (Pls/Appellees Henry and White's Appeal Brief, R 106, pp 4-6; Pls/Appellee Ramsey and Dowdy's Appeal Brief, R 109, pp 5-7.)

Michigan has a strong interest in preventing crimes of this nature, and in seeing that union employees are not coerced by threat of discharge into committing or abetting the crime. A state cause of action under the WPA based on reporting of such illegal activity is a necessary deterrent to the crimes themselves. It would be obnoxious to Michigan's interests—and contrary to public policy and sound morality—to allow the union as an employer to discharge any union employee on the grounds that the employees reported such alleged illegal activity, and to then leave said employee with no state cause of action to seek redress for such wrongs.

A key consideration as to whether a state claim is so deeply rooted in an area of local concern and responsibility, so as to escape preemption, is whether the set of facts giving rise to the state claim could also give rise to a claim under the federal statute. *Sargent*, 167 Mich App at 34. Michigan's interest in enforcing the WPA is therefore strengthened if the WPA is the Union Employees' only remedy for challenging their termination. And here, neither the NLRA nor the LMRDA provide protection for union employees who report their employer's criminal activity.

The NLRA's declared policy is, in part, to "protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 USC 151. These rights are secured in § 7 of the NLRA, which grants employees the right to "self-organization, to form, to join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other activities for the purpose of

collective bargaining or other mutual aid or protection." 29 USC 157. Employees also have the right to refrain from those activities. *Id.* The NLRA makes it an unfair labor practice for an employer to, among other things, "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ." 29 USC 158(a)(1). So the question becomes whether the reporting to a public body of suspected illegal activity or the participation in an investigation by one or more *employees* of the union, falls within the rights the NLRA protects.

The NLRA's reach extends only to claims that could be filed with the NLRB, not to every scenario where an employee is subject to an adverse employment action. In *Calabrese*, the Michigan Court of Appeals considered a wrongful-termination claim by a woman who claimed she was fired for refusing to fire other employees for engaging in unionizing activity. 262 Mich App at 257. Because the plaintiff alleged that she was terminated for refusing to discourage unionizing activities (an unfair labor practice under 29 USC 158), her claims could have been brought before the NLRB. *Id.* at 262-263. As such, her allegations actually or arguably fell within the NLRB's jurisdiction and her claims were preempted under *Garmon*. *Id.* at 264. The exact opposite is true here.

The parties brought to this Court's attention an unpublished opinion holding the NLRA preempts the WPA. *Flores v Midwest Waterblasting Co*, unpublished memorandum opinion of the United States District Court Eastern District of Michigan, issued September 26, 1994 (Docket No 93-72586) (attached as Exhibit 1). There, the plaintiffs filed a WPA claim and alleged they were "subject to

discriminatory conduct at work including a reduction in work hours" after they reported the defendant's failure to provide compensation *to the NLRB* and other public authorities. *Flores*, *5-8, 24. The court held that the WPA claim was preempted under *Garmon* because the NLRA made it an unfair labor practice for an employer to discharge or otherwise discriminate against an employee for filing charges or giving testimony *under the NLRA*; for giving sworn statements to an NLRB field examiner; or for filing a claim with a state labor commission that the employer has not properly paid them. *Id.* at *25. Because plaintiffs alleged they were discriminated against for making misconduct reports to the NLRB and other public authorities, and because such reports are protected by § 7 of the NLRA (and § 8(a)(4)), the discrimination claimed of in the whistleblower claim was preempted. *Id.* at *25-26. Significantly, the court clarified that § 8(a)(4) does *not* apply to filing charges or testifying under legislation *other than the NLRA*. *Flores*, at *26 n 4. Thus, if the plaintiffs were discriminated for making reports to bodies other than the NLRB (regarding issues unrelated to a collective bargaining agreement and not arguably prohibited/protected by the NLRA) their WPA claim would *not* be preempted. *Id.* A key consideration, then, is whether the state claims here rely on "conduct which supports an unfair labor practice claim." *Id.* at *28. They do not. As a result, there is no preemption or even a suggestion that Congress intended to use the NLRA to enact state whistleblower claims involving alleged criminal activity.

III. LMRDA does not preempt the WPA either.

As noted, the LMRDA evinces clear intent not to interfere with or detract from state rights afforded to employees represented by unions. 29 USC 523(a). In fact, the LMRDA *saves* state criminal actions and state-imposed responsibilities of union officers from preemption. *Bloom*, 783 F2d at 1361 (citing 29 USC 524 and 29 USC 523(a)). The LMRDA recognizes the importance of maintaining such state actions, and logic dictates that the ability and methods of enforcing them must also be maintained. *Id.* So, while the savings clauses themselves do not save a state wrongful discharge claim, by addressing criminal actions and union officers' duties, they imply that such a state claim can be maintained. *Id.* This strong implication cuts against any argument that Congress in the LMRDA clearly deprived states of the power to act in such circumstances.

A. The LMRDA's objectives center on the rights of members in the democratic governing of labor unions, not on the reporting of criminal activity.

The LMRDA resulted from Congressional concern over "widespread abuses of power by union leadership." *Finnegan v Leu*, 456 US 431, 435 (1982). LMRDA's primary objective is to "ensur[e] that unions would be democratically governed and responsive to the wills of their memberships." *Id.* at 436 (citations omitted). The LMRDA grants members of a labor organization the right to "express any views, arguments, or opinions." 29 USC 411(a)(2). And this language protects rank-and file union members, not union officers or employees. *Finnegan*, 456 US at 436-437.

The LMRDA prohibits unions, including their officers, agents or representatives, from fining, suspending, expelling, or otherwise disciplining union members "for exercising any right to which he is entitled under the provisions of [the LMDRA]." 29 USC 529. The U.S. Supreme Court has held that this prohibition on discipline "refers only to retaliatory actions that affect a union member's rights or status as a *member* of the union." *Finnegan,* 456 US at 437. The termination of a union employee, on the other hand, "does not impinge upon the incidents of union membership, and affects union members only to the extent that they also happen to be union employees." *Id.* at 438 (citation omitted). In other words, Title I does not protect the union-official or union-employee relationship and a removed official or employee would have no rights under the LMRDA. *Schonfeld v Penza,* 471 F2d 899, 904 (CA 2 1973). Thus, the *Finnegan* Court concluded that Congress did not intend to establish any system of job security or tenure for employees of unions when it passed the LMRDA. *Finnegan,* 456 US at 438.

Further, the LMRDA permits a person whose rights under Title I of the Act have been infringed to file a civil action in federal court. 29 USC 412. The relevant question is whether the union, as an employer, infringed on an employee's rights, which were secured by Title I of the LMRDA. The Court in *Finnegan* did not reach the question of whether "the retaliatory discharge of a union member from union office" could give rise to a civil action under 29 USC 412. Rather, the Court held that Title I of the LMRDA did not "restrict the freedom of an elected union leader to choose staff whose views are compatible with his own." *Finnegan,* 456 US at 441.

Driving the point home, the Court stated that "the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election." *Id.* The Court explicitly left open the question of whether a union leader enjoys unfettered freedom to discharge "nonpolicymaking and nonconfidential employees." *Id.* n 11. The Court also did not address whether a discharged employee of a union has a cause of action under 29 USC 412 if they are terminated for nonpolitical activity, such as reporting suspected illegal activity or participation in an investigation of such activity. Thus, *Finnegan* did not address whether the LMRDA applied to a retaliatory discharge for reporting criminal activity.

But the LMRDA prohibits the fining, suspending, expelling, or other disciplining of a union member "without enumerated procedural protections." 29 USC 411(a)(5). Citing comments in the legislative history of the LMRDA, the U.S. Supreme Court concluded that this section also referred to "punitive actions diminishing membership rights, and not to termination of a member's status as an appointed union employee." *Finnegan*, 456 US at 438. Thus, the Court held that removing an appointed union employee from their appointed position falls outside the scope on the prohibitions placed on unions in 29 USC 529. *Id.* at 439. So while the LMRDA protects the rights of union members by ensuring their labor unions carry out the wills of the membership, the courts have not extended those protections to union employees.

In *Bloom*, the Ninth Circuit held that although business agents have "significant policymaking responsibility," a "union *employee* who is discharged in a way that does not affect his rights as a union *member* has no cause of action under section 412 [of LMRDA]." 783 F2d 1356, 1357, 1359 (CA 9 1986) (emphasis in original). Bloom alleged that he was not fired for political reasons but, rather, because he would not falsify union minutes. *Id.* at 1360. The court concluded Bloom's discharge, alone, did not affect his membership rights, as he retained all rights and privileges of such membership after his discharge. *Id.* at 1359. The court held that an indirect burden on one's membership rights (i.e. forced choice between expressing their opinion and losing their job) is not sufficient to state a LMRDA claim. *Id.* There must be some infringement on one's rights as a union member to state a claim under §§ 411 and 412. *Id.*

Where an employee, like Bloom, alleges that they are fired for refusing to act illegally, the state interest is strong. *Bloom*, 783 F2d at 1362. Such a discharge is not the kind sanctioned by the LMRDA or the cases interpreting it. *Id.*; R 84, pp 4-5. Preemption "does nothing to serve union democracy of the rights of union members; it serves only to encourage and conceal such criminal acts and coercion by union leaders." *Id.* Thus, the subject of such a state claim is "merely peripheral to the concerns of the Act." *Id.* (citation omitted). Such a state claim furthers the purposes of the LMRDA because Title V prohibits embezzlement and imposes fiduciary duties addressed by state law. *Id.* (citing 29 USC 501).

The LMRDA has no mechanism to prevent coercive terminations for reporting such provisions. *Id.* A state claim for wrongful-discharge "for refusing to violate those provisions is therefore a useful adjunct to federal as well as state law." *Id.* In sum, the *Bloom* court held that "where a union employee bases a wrongful discharge action on allegations that he was fired for refusing to violate state law, that cause of action is not preempted by the federal labor policies reflected in the LMRDA or *Finnegan v Leu*." *Id.*

Even when considering similar claims by union employees, the Michigan Court of Appeals has recognized the important distinction under the LMRDA between union employees who are fired for political or loyalty reasons, and those employees who are fired for reporting criminal activity. Employee claims based on the former category are preempted; claims based on the latter category are not. See *Packowski v United Food and Commercial Workers Local 951*, 289 Mich App 132, 145-146; 796 NW2d 94 (2010) versus *Bloom*, 783 F2d at 1362.

B. *Packowski* does not apply.

Appellants rely heavily on *Packowski* in support of their assertion that the LMRDA preempts state law whistleblower claims brought by employees like the Union Employees in this case. (R 101, pp 36-44; R 102, 33-39.) In *Packowski*, the Court of Appeals *did* determine that the LMRDA preempted a union employee's state law claim of termination without just cause, but based such a holding on facts substantially different than those presented here. The *Packowski* panel was *not* presented with a scenario where a union employee was fired for refusing to commit

a crime or aid in the committing of a crime. In fact, the court distinguished cases finding no preemption because those cases "involved discharges for the plaintiffs' alleged refusal to commit or aid in committing a crime," whereas the plaintiff in *Packowski* was fired for failing to follow legitimate policies. *Packowski,* 289 Mich App at 145-146. This was a key distinction the Court of Appeals noted here in distinguishing *Packowski.* The Court of Appeals noted that *Packowski* did not involve an employee who claimed they were wrongfully discharged for refusing to commit or aid in committing a crime. (R 84, p 3.) Because the Union Employees allege they were terminated for reporting their suspicions of criminal activity—thus, refusing to aid in the committing of that crime—*Packowski* does not control.

In sum, the case law interpreting the NLRA and the LMRDA establishes that the State has a strong interest in preventing terminations based on the reporting of illegal activity, and in protecting citizens from having to choose between reporting such activity and keeping their jobs (and in that way aiding and abetting the commissions of the crimes themselves). Michigan led the nation in offering statutory protections for employees in just such circumstances. Thus, Michigan has a strong, deeply rooted interest in continuing its legacy as a trailblazing state in the area of whistleblower protection. More important, Michigan has an even stronger, deeply rooted interest in protecting its citizens from this type of discrimination, *especially* those who have no other remedies available to them to seek redress from such actions by their employers.

CONCLUSION AND RELIEF REQUESTED

Employees like those here are often the only ones in a position to report illegal criminal activity. They are often understandably reluctant to make such reports out of fear of retaliation. This was the situation the legislature recognized in 1980 when it passed the WPA, and it was the situation facing the Union Employees in this case. They made the courageous choice to report such conduct, and they have the right to seek protection for that choice from the WPA.

The United States Supreme Court has instructed courts to find clear Congressional intent before determining that a state law is preempted. That intent is lacking here. Further, Michigan has a strong, deeply rooted interest in ensuring that the WPA remains a functioning sword and shield, protecting Michigan's citizens from termination for reporting suspicions of illegal criminal activity.

Accordingly, the Attorney General respectfully urges the Court to affirm the Court of Appeals, hold that neither the NLRA nor the LMRDA preempts the WPA, and allow the matter to return to the Wayne County Circuit Court so that the Union Employees may pursue their WPA claims.

Respectfully submitted,

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Dated: July 18, 2013

VICTOR A. FLORES, GLENN HEIMBACH, JAMES L. BAUGHEY, Jr., ROBERT BAUGHEY, RICHARD A. DE LA CRUZ, and ROBERT H. PHILLIPS, Plaintiff, v. MIDWEST WATERBLASTING COMPANY, a Michigan Corporation; INDUSTRIAL SERVICES, Inc., a Michigan Corporation; INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, DETROIT DISTRICT COUNCIL NO. 22 OF PAINTERS; ALAN L. SCHAFER, an individual; RANDALL B. MARTOLOCK, an individual; and ROBERT KENNEDY, an individual; jointly and severally, Defendants.

No. 93-72586

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

1994 U.S. Dist. LEXIS 17704

September 26, 1994, Decided

JUDGES: [*1] Nancy G. Edmunds, U.S. District Judge

OPINION BY: Nancy G. Edmunds

OPINION

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter has come before the Court upon Defendants' motion for summary judgment. Plaintiffs Victor Flores and other current and former employees of Industrial Services, Inc., filed a complaint in state court alleging that Defendant employers and their representatives failed to comply with the terms of a collective bargaining agreement and failed to disclose the existence of the collective bargaining agreement, and that the Defendant Union and its agent breached its duty of air representation by taking no action to enforce the terms of the labor agreement. Defendants removed the action to federal court. Plaintiffs filed a motion to remand to state court, but in September, 1993, this court denied Plaintiffs' motion, finding it had jurisdiction of at least one of Plaintiffs' claims. All Defendants on February 3, 1994, filed this motion for summary judgment, contending that Plaintiffs' state law claims are preempted by § 301, that Plaintiffs' breach of contract claim should be dismissed because of the Plaintiffs' failure to exhaust their remedies in [*2] the collective bargaining agreement, and that Plaintiffs breach of the duty of fair representation claim is foreclosed by the principles of majority rule and exclusive representation. For the reasons stated below, Defendants' motion for summary judgment is granted.

I. Facts

Plaintiff employees of Defendant Industrial Services, Inc., ("Defendant employer") contend that in September, 1992, they became interested in joining a labor organization. To that end, they contacted a representative of the United Steelworkers of America ("Steelworkers") to pursue organizational efforts on their behalf. Much to the surprise of Plaintiffs, the Steelworkers representative

discovered that the employees were already covered by a collective bargaining agreement ("CBA") executed between Industrial Services and Defendant International Brotherhood of Painters and Allied Trades, Detroit District Council No. 22 ("Painters Union"). This CBA covered the employees from January, 1990 to December, 1992. It was preceded by another CBA, which covered the employees from 1988 through December, 1989. [1]

1 The first CBA was executed between the Painters Union and Defendant Midwest Waterblasting Co. Midwest Waterblasting employed most of the Plaintiffs before they became employees of Industrial Services. At the time this suit was brought, Midwest Waterblasting typically entered into contracts to conduct waterblasting for customers, such as automobile plants, and then subcontracted with Industrial Services for performance. Defendant Alan Schafer is the sole shareholder of Midwest Waterblasting. Defendant Randall Martolock is the sole shareholder of Industrial Services.

[*3] It was further discovered that the employers had compensated their employees at a rate less than provided in the CBA, that the employers had provided employees with an employee handbook containing a grievance procedure contradicting the procedures contained in the CBA, and that the employers had paid to the Painters Union, through its officer Defendant Robert Kennedy, the equivalent of union dues and had made contributions to union pension funds. At no time prior to the Steelworkers' discovery did the Painters Union contact the employees or provide any assistance to the employees that a collective bargaining agent normally provides.

Most of the employers' customers own "union shops." Therefore, the employers regularly provided its employees with union cards to carry to customer sites. Once the employees were on site, the employers collected the union cards from the employees. The employees claim that the employers told them that the union cards were merely a formality and that the employees were not in fact members of a union.

Plaintiffs further claim that once they learned of the existence of the CBAs, the employers harassed and threatened to discharge the employees if they pursued [*4] the matter and subsequently reduced the number of hours the complaining employees could work.

The Painters Union convened a meeting October 3, 1992, once it learned that the Steelworkers had discovered the existence of the CBA. At that meeting the Painters Union distributed copies of the CBA and reviewed it with the employees. In December, 1992, the Painters Union filed a representation petition with the National Labor Relations Board ("NLRB") seeking to be designated as the majority representative of the affected employees. The NLRB held the election in January, 1993. The Painters Union won the election by a vote of S-7. The NLRB certified the Painters Union as the collective bargaining representative of the affected employees, including Plaintiffs, on February 10, 1993. No challenge to the conduct of the election was filed with the NLRB.

Simultaneously, Industrial Services and the Painters Union met to negotiate the terms of a new CBA and to settle the issue of Industrial Services' failure to comply with the terms of the prior CBAs. An agreement was concluded and submitted to a vote of the employees on February 4, 1993. A 9-8 majority of the employees voted to ratify the new CBA [*5] and the settlement proposal. As a result, Industrial Services issued these employees checks which were thereafter cashed.

Article XX of the 1990-92 CBA provides for the arbitration of any "complaint or request of an employee which involves the interpretation or application of or compliance with the provisions of" the CBA. At no time after being informed in October, 1992, of the existence and contents of the CBA did any Plaintiff file a grievance pursuant to the CBA.

Plaintiffs' claims consist of the following nine counts: misrepresentation fraud, breach of the duty of fair representation, breach of fiduciary duty, breach of third party contract, unjust enrichment, civil conspiracy, intentional infliction of emotional distress, violation of the Michigan Whistleblowers' Protection Act, and constructive retaliatory discharge.

II. Standard for Summary Judgment

In considering a motion for summary judgment, the Court may grant the motion only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. As the Supreme Court ruled in *Celotex, "Rule 56(c)* mandates the entry of summary judgment, after [*6] adequate time for discovery and upon motion,

against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).*

The court must view the allegations of the complaint in the light most favorable to the non-moving party. *Windsor v. The Tennessean, 719 F.2d 155, 155 (6th Cir. 1983).* "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).*

However, the mere existence of a scintilla of evidence in support of the non-movant is not sufficient; there must be sufficient evidence upon which a jury could reasonably find for the non-movant. *Liberty Lobby, 477 U.S. at 252.*

"The movant has the burden of showing that there is no genuine [*7] issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." *Id. at 256.* "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue' for trial." *Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989)* (citing *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).*

III. Analysis

A. Introduction

Plaintiffs' claims can be grouped into the following four categories: (i) that Defendant employers breached the CBA between the employers and the Painters Union; (ii) that the employers fraudulently misrepresented to Plaintiffs the non-existence of the CBA; (iii) that the employers retaliated against Plaintiffs for pursuing their claims; and (iv) that the Painters Union breached the duty of fair representation and a fiduciary duty to Plaintiffs. The first two categories of Plaintiffs' claims are in essence [*8] a breach of a collective bargaining agreement claim that is preempted by § 301 and is dismissed for failure to exhaust contractual remedies. The third category of Plaintiffs' claims are preempted under the Court's *Garmon* principle. *San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959).* The final category of Plaintiffs' claims are preempted by § 301 and are dismissed because the Union's settlement of The dispute was not wholly irrational or arbitrary. Even if the Union did breach the duty of fair representation, union official Robert Kennedy is immune from suit.

B. Preemption

Plaintiff's state law claims are all preempted. Most of their claims are preempted by § 301. The others are preempted under the *Garmon* principle.

1. Section 301 preemption

All of Plaintiffs' claims that Defendant employers breached the CBA between the employers and the Painters Union and that the employers fraudulently misrepresented to Plaintiffs the nonexistence of the CBA are preempted by § 301.

> Under § 301 of the tabor Management Relations Act,
>
> Suits for violation of contracts between [*9] an employer and a labor organization representing employees in an industry affecting commerce. . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

185 U.S.C. § 185(a). In a series of cases since 1962, the Supreme Court has made clear that § 301 preempts any state law claim arising from a breach of a collective bargaining agreement. *Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 100 L. Ed. 2d 410, 108 S. Ct. 1877 (1988); Caterpillar, Inc. v. Williams, 482 U.S. 386, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 85 L. Ed. 2d 206, 105 S. Ct. 1904 (1985); Teamsters v. Lucas Flour Co., 369 U.S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571 (1962).*

Two federal labor law policies underlie the Court's preemption doctrine: the need [*10] for uniformity in the interpretation of collective agreements and the importance of arbitration to the resolution of labor

disputes. The Supreme Court has held that labor Contracts must be interpreted according to a uniform federal law because "(the possibility that individual contract terms night have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Lucas Flour, 369 U.S. at 103-04.* The negotiation of labor agreements, and any disputes arising under them, would be prolonged if labor and management had to consider the meaning of collective agreement terms under competing legal systems. *Id.* Therefore, "the meaning given to terms in collective bargaining agreements must be determined by federal law." 11 *Lueck,* 471 U.S. at 210.

Further, the Court's preemption doctrine preserves the effectiveness of arbitration as a means to resolve labor disputes. *Lueck, 471 U.S. at 219.* "A rule that permitted an individual to sidestep available grievance procedures [*11] would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Id., 471 U.S. at 220.*

But "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301 or other provisions of the federal labor law." *Id., 471 U.S. at 211.*

> Even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 preemption purposes.

Lingle, 486 U.S. at 409-10. Thus, state courts may evaluate state law claims "involving labor-management relations only if such claims do not require construing [*12] collective-bargaining agreements." *Id.*

The Sixth Circuit has developed a two-step approach for determining whether § 301 preemption applies. *DeCoe v. General Motors Corp.,* F.3d , No. 93-1225, slip op. at 6 (6th Cir. July 24, 1994), 1994 WL 282466.

> First, the district court must examine whether proof of the state law claim requires interpretation of collective bargaining agreement terms. Second, the court must ascertain whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state law. If the right is borne of state law and does not invoke contract interpretation, then there is no preemption. However, if neither or only one criterion is satisfied, section 301 preemption is Warranted.

Id.; see also Caterpillar, 482 U.S. at 394 ("Section 301 governs claims founded directly on rights created by the collective bargaining agreement, and also claims substantially dependent on analysis of a collective bargaining agreement."); *Tisdale v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 704, 25 F.3d 1308, 1310-11 (6th Cir. 1994).* [*13]

a. Breach of contract

Plaintiffs' complaint appears to assert three varieties of a breach of contract claim. Plaintiffs allege that (i) Defendants breached a third party contract of which Plaintiffs were the intended beneficiaries, that (ii) they are entitled to further relief under a theory of unjust enrichment, and (iii) that Defendants committed a civil conspiracy. All three of these breach of contract claims are preempted by § 301 because the claims depend upon the existence of collective bargaining agreements.

(1) Breach of third party contract

Plaintiffs allege that they were the intended beneficiaries of CBAs between the employers and the Painters Union. Plaintiffs further allege that Defendant employers breached the CBAs in two ways: first, by failing to compensate and provide benefits consistent with the terms of the CBAs; and, second, by failing to advise Plaintiffs of the existence of the CBAs and failing to pursue Plaintiffs' rights arising under the CBAs.

Section 301 preempts all breach of contract claims where the allegedly breached contract is a CBA or was created pursuant to a CBA. *Jones v. General Motors, 939*

F.2d 380, 383 (6th Cir. 1991); [*14] *Ulrich v. Goodyear Tire & Rubber Corp., 884 F.2d 936, 938 (6th Cir. 1989)*. In *Jones*, the plaintiff claimed that his employer, by refusing to reinstate him, breached a settlement agreement arrived at by virtue of a CBA-established grievance procedure. The court held that § 301 preempted plaintiff's breach of contract claim because both the right claimed by plaintiff and the relationship between the Parties embodied in the settlement agreement existed because of the CBA. *Jones, 939 F.2d at 382-83*.

Here, Plaintiffs' breach of third party contract claim depends upon the existence of the 1988-90 and 1990-92 CBAs. But for those CBAs, Plaintiffs could not claim that they are the intended beneficiaries of a contract and thus entitled to damages for its breach. Thus, Plaintiffs' breach of third party contract claim is created by the CBA. Plaintiffs' claim is therefore preempted by § 301 under *DeCoe* and *Jones*.

(2) Unjust enrichment

Plaintiffs further allege that they are entitled to relief under a theory of unjust enrichment. Specifically, Plaintiffs claim that all Defendants received benefits from Plaintiffs' labor, [*15] and that "it would be inequitable for Defendants to retain fully these benefits since Plaintiffs were not compensated for their labor, as called for by the collective bargaining agreement." Complaint, para. 61-63.

The elements of a claim to impose a quasi-contract to prevent unjust enrichment are: "(i) receipt of a benefit by the defendant from the plaintiff and, (ii) which benefit it is inequitable that the defendant retain." *Dumas v. Auto Club Ins. Ass'n, 437 Mich. 521, 546, 473 N.W.2d 652, 663 (1991)*. Plaintiffs' unjust enrichment claim is preempted because in order to determine whether it is inequitable for Defendants to retain the benefits of Plaintiffs' labor, the court must look to the CBA to see what benefits Defendants specifically were entitled to retain.

(3) Civil Conspiracy

Plaintiffs further allege that all Defendants "acted to deprive Plaintiffs of the compensation and benefits to which they were entitled, and that "Defendants' concerted action had the unlawful purpose of defrauding Plaintiffs of compensation and benefits to which they were entitled, and otherwise achieving purposes that are contrary to contract, labor, [*16] and other laws. Complaint, para. 65-66.

A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. *Admiral Ins. Co. v. Columbia Cas. Ins. Co., 194 Mich. App. 300, 486 N.W.2d 351, 358 (1992)*. To the extent that Plaintiff's civil conspiracy claim is derivative of their breach of contract claim, it is preempted by § 301. *Jones, 929 F.2d at 383*. As discussed above, the claim that Defendants accomplished the purpose of breaching CBAs depends on the existence of those CBAs, and thus the right claimed by Plaintiffs is created by the CBAs. [2]

2 Because breach of contract is not "criminal," or "unlawful," it is possible that Defendants are entitled to summary judgment on this claim on grounds other than preemption. But because the Court holds that Plaintiffs' civil conspiracy claim is preempted, the Court does not reach this question.

[*17] **(4) Breach of fiduciary duty**

According to Plaintiffs' complaint, Defendants breached fiduciary duties to Plaintiffs by "failing to act in the interests of Plaintiffs with respect to their employment, failing to disclose material facts) known to Defendants, and acting only in their self-interest." Complaint, para. 52.

An employer owes no fiduciary duty to its employees at common law. *See Bradley v. Gleason Works, 175 Mich. App. 459, 438 N.W. 2d 330, 332 (1989)*. Therefore, Defendants are entitled to summary judgment to the extent that Plaintiffs' claim against their employer is based on a common law fiduciary duty. To the extent that Plaintiffs' claim is based on a contractual fiduciary duty, Plaintiffs' claim is preempted by § 301 because any contractual fiduciary duty arising between the employers and the employees could arise only from a CBA provision.

Further, to the extent that Plaintiffs' breach of fiduciary duty claim is directed against the Painters Union, Plaintiffs' claim is preempted by § 301. Any fiduciary duty of the Painters Union arises from its status as the exclusive bargaining representative of the affected employees. [*18] Therefore, Plaintiffs' state law breach

of fiduciary claim must be resolved by reference to uniform federal labor law concerning the breach of the duty of fair representation. *See United Steelworkers of America v. Rawson,* U.S. , *110 S. Ct. 1904, 1909-11 (1990). Cf. Airline Pilots Ass'n Intern. v. O'Neill,* U.S. , *111 S. Ct. 1127, 1134 (1991)* ("The duty of fair representation is. . . akin to the duty owed by other fiduciaries to their beneficiaries. . ."

b. Misrepresentation/Fraud

Plaintiffs allege that through actual and silent misrepresentations, Defendant employers deprived Plaintiffs or compensation and benefits as well as union assistance, guidance, and representation. Specifically, Plaintiffs allege that when Defendant employers issued union cards to its employees prior to the time they were to enter union shops to perform water blasting services, Defendants told their employees that the union cards were a formality and that the employees were not in fact represented by a union. Two CBAs, however, had been executed between the employers and the Painters Union. Complaint, Ex. A. Plaintiffs [*19] further allege that the employers and the Painters Union committed a silent misrepresentation because they had a legal and/or equitable duty to disclose the existence of the CBAs and that Plaintiffs were union members. Complaint, para. 38-41.

To prove misrepresentation or fraud, a plaintiff must prove that the defendant made a material misrepresentation, that the misrepresentation was false, that the defendant knew it was false or made it recklessly without any knowledge of its truth, that the defendant made it with the intention that it would be acted upon by the plaintiff, that the plaintiff acted in reliance upon it, and that the plaintiff thereby suffered injury. *Price v. Long Realty, Inc., 199 Mich. App. 461, 470, 502 N.W.2d 337, 341-42 (1993).*

The Sixth Circuit has held that fraud and misrepresentation actions stemming from CBAs are preempted. In *Terwilliger v. Greyhound Lines Inc., 882 F.2d 1033, 1037 (6th Cir. 1989), cert. denied, 495 U.S. 946, 109 L. Ed. 2d 531, 110 S. Ct. 2204 (1990),* a medically-disqualified employee had been denied [*20] reinstatement under a CBA-established reinstatement procedure. The plaintiff contended that the employer had committed fraud by withholding a prior medical report from an examining physician. The court held that the plaintiff essentially alleged that the employer, acting in bad faith, violated the medical examination provisions of the CBA, and that such a claim was preempted because it arose from rights created by the CBA and because the court had to interpret terms of the CBA in order to determine whether, in fact, the employer complied with them in carrying out the process of examining a reinstatement request. *Id. at 1027-38.* The court would not permit such "artful pleading" to avoid preemption under § 301. *Id.*

In *Martin v. Associated Truck Lines, Inc., 801 F.2d 246 (6th Cir. 1986),* the plaintiffs alleged that their employer made a misrepresentation when it notified them that their jobs would be eliminated and that they would be transferred or redomiciled. The employer told the plaintiffs that if they did not choose to redomicile they would be considered "voluntary quits" and would lose unemployment benefits and seniority. The plaintiffs each [*21] redomiciled to new areas in order to retain their seniority. They later discovered that according to the CBA, employees who refused to redomicile would be considered "laid off" rather than "voluntary quits" and would have been recalled based on senority. The court held that the plaintiffs' misrepresentation claim was preempted by § 301 because the resolution of the plaintiffs' claims depended upon the plaintiffs' true recall rights, which depended upon the CBA provisions. *Id. at 249.*

Here, Plaintiffs' fraud/misrepresentation claim depends on the existence of the CBA and the bargaining relationship it creates. Plaintiffs allege that Defendants committed fraud by representing that Plaintiffs were not union members and by failuring to disclose the existence of the CBA. This is merely "artful pleading." *Terwilliger, 882 F.2d at 1028.* The essence of Plaintiffs' allegation is that Defendants completely ignored and failed to comply with the CBA. But for the existence of the CBA, Defendants would have made no false misrepresentation, an essential element in proving fraudulent misrepresentation under Michigan law. *Price,* 461, *502 N.W.2d at 241-42.* [*22] As with Plaintiffs' breach of contract Claims, this fraud/misrepresentation claim depends on the existence of the CBA. Therefore, it is preempted. [3]

3 To the extent that Plaintiffs' civil conspiracy claim is derivative of the misrepresentation/fraud claim, it is also preempted.

2. *Garmon* preemption

Plaintiffs' claims that Defendants violated the Michigan whistleblowers' Protection Act, committed the tort of intentional infliction of emotional distress, and constructively discharged Plaintiffs in retaliation for exercising their rights under state and federal labor laws are all preempted under the *Garmon* rule. The *Garmon* preemption doctrine, which protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA is distinct from § 201 preemption. *San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959).* Under *Garmon,* [*23] matters involving conduct arguably prohibited or protected by the NLRA are preempted. In *Garmon,* the Supreme Court held that:

> when it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that the state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

Id., 359 U.S. at 244. Nevertheless, a state may regulate conduct that is of only "peripheral concern" to the NLRA or that is "so deeply rooted in local law" that the courts should not assume that congress intended to preempt the application of state law. *Id., 259 U.S. at 242.* The critical inquiry is whether the controversy presented to the state court is identical to that which could be presented to the NLRB. *Belknap v. Hale, 463 U.S. 491, 510, 3183, 77 L. Ed. 2d 798, 103 S. Ct. 3172 (1983);*, [*24] *Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1978).*

a. Violation of the Whistleblowers' Protection Act

According to Plaintiffs' complaint, Plaintiffs reported misconduct of Defendant employers to public authorities including, but not limited to, the National Labor Relations Board ("NLRB"), and subsequently Plaintiffs were subjected to discriminatory conduct at work including a reduction in work hours. Complaint, para. 74-76. Plaintiffs allege that Defendant employers' conduct violated the Michigan Whistleblowers' Protection Act.

The Michigan Whistleblowers' Protection Act provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, condition, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to a law of this state, a political subdivision of this state, or the United States to a public body. . . [*25]

Mich. Comp. Laws Ann. § 12.362 (West 1994).

Plaintiffs' Whistleblower's claim is preempted under *Garmon.* Section 8(a) (4) of the National Labor Relations Act ("NLRA") provides that "it shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony" under the Act. *29 U.S.C. § 158(a)(4).* An employer is also prohibited by the NLRB from discriminating against an employee for giving sworn statements to an NLRB field examiner, even though the employee had neither "filed charges" nor "given testimony" at a hearing, *NLRB v. Scrivener, 405 U.S. 117, 31 L. Ed. 2d 79, 92 S. Ct. 798 (1972),* or for filing a claim with a state labor commission that his employer failed to pay him according to the CBA. *NLRB v. Searle Auto Glass, Inc., 762 F.2d 769, 774 n.6 (9th Cir. 1985).*

Here, Plaintiffs claim they were discriminated against because they made' reports about Defendant employers' "misconduct" to the NLRB and other undisclosed public authorities. Such reports are protected [*26] activity under § 7 of the NLRA, and an employer commits an unfair labor practice if it discriminates against the exercise of such protected activity. *29 U.S.C. § 158(a)(4).* Therefore, the discrimination claimed of in Plaintiffs' whistleblowers' claim is preempted under *Garmon.* [4]

4 Section 8(a) (4) does not apply to filing charges or testifying under legislation other than the NLRA. *See B & M Excavating, 155 NLRB 1152 (1965), enf'd, 368 F.2d 624 (9th Cir. 1966).* To the extent that Defendants discriminated against Plaintiffs for making reports to public bodies other than the NLRB Concerning issues unrelated to the CBA and not arguably prohibited or protected by the NLRA, Plaintiffs Whistleblowers' claim would not be preempted. Plaintiffs, however, did not specify any public bodies other than the NLRB. Complaint, para. 74-76. Therefore, Plaintiffs allegations fail to state a claim other than the NLRB, claim discussed above.

[*27] **b. Intentional Infliction of Emotional Distress**

Plaintiffs further allege that Defendants engaged in extreme conduct in the employment setting, including threatening or actually terminating Plaintiffs' employment and subsequently rescinding the termination, verbally abusing Plaintiffs, and ostracizing Plaintiffs, thereby causing severe emotional distress. According to Plaintiffs' complaint, this conduct occurred "subsequent to the time that the issues raised in this Complaint were brought to the attention of the Defendant Employers. . . " Complaint, para. 68.

In *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 51 L. Ed. 2d 338, 97 S. Ct. 1056 (1977)*, a union member claimed that he had been denied job referrals and subjected to a campaign of abuse and harassment by the union. The Court held that the NLRA did not preempt a state action for intentionally inflicting emotional distress, even though a major part of the cause of action consisted of conduct that was arguably an unfair labor practice.

But not all claims of intentional infliction of emotional distress escape preemption. [*28] For an intentional infliction of emotional distress claim to escape preemption, "it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." *Id. 430 U.S at 205.* An employee's tort claim is preempted if his claim relies on conduct which supports an unfair labor practice claim. *Carter v. Sheet Metal Workers' Ass'n, 724 F.2d 1472, 1476 (11th Cir.), cert. denied, 469 U.S. 831, 105 S. Ct. 119, 83 L. Ed. 2d 61 (1984).*

Here, Plaintiffs' claim of intentional infliction of emotional distress centers around conduct which took place after Plaintiffs' raised the issue of the employers' lack of compliance with CBA, and allegedly occurred "with the ultimate goal of encouraging Plaintiffs to abandon the claims raised in this Complaint." Complaint, para. 70. As discussed above, this conduct also supports an unfair labor practice charge under § 8(a)(4) and any emotional distress [*29] suffered by Plaintiffs is a "function of. . . (employment) discrimination itself." *Farmer, 430 U.S. at 205.* Plaintiffs' intentional infliction of emotional distress claim is therefore Preempted.

c. Constructive retaliatory discharge

Plaintiffs further allege that Defendant employers constructively discharged Plaintiffs by reducing the amount of hours worked by each Plaintiff in retaliation for Plaintiffs' refusal to forego their claims. As discussed above, such retaliatory conduct also supports an unfair labor practice charge under § 8(a)(4) and is thus preempted.

C. Failure to exhaust contractual remedies

Plaintiffs' breach of third party contract claim, which was preempted by § 201, should have been first resolved through the grievance procedures established by the collective bargaining agreement. "As a general rule in cases to which federal labor law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by the employer and union as the mode of redress." *Republic Steel Corp. v. Maddox, 379 U.S. 650, 652, 13 L. Ed. 2d 580, 85 S. Ct. 614 (1965).* [*30] "An employee (can not sidestep the grievance machinery provided in the contract and. . . unless he attemptes) to utilize the contractual procedures for settling his dispute with his employer, his independent suit against the employer in the District Court will be dismissed." *Hines v. Anchor Motor Freight, 424 U.S. 554, 563, 47 L. Ed. 2d 231, 96 S. Ct. 1048 (1976).* This insistence on the arbitration of contract disputes is the same policy underlying § 301 preemption. *Lueck, 471 U.S. at 220* ("It is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.")

It is undisputed that the painters Union held an employee meeting October 3, 1992 at which it distributed to each employee a Copy of the 1990-92 CBA. Article XX of that agreement contains a grievance procedure. Section 1 describes a grievance as a dispute over the interpretation or application or compliance with the provisions of the agreement. Section 2 provides that if the parties are unable to resolve the grievance, they may then proceed to final and binding [*31] arbitration. Nevertheless, none of the Plaintiffs filed a grievance or requested that the Painters Union proceed to final and binding arbitration on the Defendant employers' alleged breach of the CBA.

Nor are Plaintiffs' excused from exhausting their contractual remedies by either of the two exceptions to the exhaustion requirement. *Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967).* One such exception occurs "where the effort to proceed formally with contractual or administrative remedies would be wholly futile." *Glover v. St. Louis-San Francisco Railway, 393 U.S. 324, 329-30, 21 L. Ed. 2d 519, 89 S. Ct. 548 (1969).* Exhaustion may also be excused "when the conduct of the employer amounts to a repudiation of the contractual procedures." *Vaca, 386 U.S. at 185.* Such repudiation must be of the grievance procedures themselves. *Terwilliger, 882 F.2d at 1039.*

Plaintiffs cannot avail themselves of either exception. The Painters Union's lack of representation for [*32] almost four years may have rendered resort to grievance arbitration futile for that period, but the Painters Union disseminated copies of the CBA to all employees October 3, 1992, and no Plaintiff filed a grievance thereafter. Similarly, the employer's concealment of the existence of the CBA may have amounted to a repudiation of the CBA for the term of the concealment, but Plaintiffs have produced no evidence that the employers conduct amounted to a repudiation of the CBAs' grievance procedures subsequent to Plaintiffs receipt of copy of the CBA in October, 1992. Therefore, Plaintiffs' breach of contract claim is dismissed for failure to exhaust available contractual remedies.

D. Breach of the duty of fair representation

Plaintiffs' remaining contention is that the Union breached its duty of fair representation by acting fraudulently, dishonestly, and in bad faith in purporting to undertake representation of the employees and purporting to negotiate a resolution of the issue of the non-compliance with the CBA. As the exclusive bargaining representative of the employees, a union has a "statutory duty fairly to represent all of those employees, both in its collective bargaining. [*33] . . and in its enforcement of the resulting collective bargaining agreement." *Vaca, 386 U.S. at 177.* "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests Of all members without hostility or discrimination toward any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* A federal court must review a union's contract negotiation and resolution of labor disputes deferentially. As the Supreme Court recently stated:

> Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain reached by the union. Rather, Congress envisioned the relationship between the courts and labor union as similar to that between the courts and the legislature. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities.

Air Line Pilots Ass'n Intern. v. O'Neill, U.S. , *111 S. Ct. 1127, 1135 (1991).* [*34] Therefore, the product of union negotiation constitutes a breach of the duty of fair representation only if it can be fairly characterized as "so far outside 'a wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.'" *Id. at 1136.*

It must be remembered here that Plaintiffs do not claim that the Painters Union breached its duty of fair representation in failing to represent Plaintiffs and enforce the CBAs from 1988 to October, 1992. Rather, Plaintiffs claim that the Painters Union breached its duty of fair representation in its negotiation of the settlement regarding Defendant employers' failure to comply with the 1988-90 and 1990-92 CBAs. This settlement provided to all current employees a 50 cent per hour raise and 50 cents per hour back pay for hours worked in the past six months. By a vote of 9-8, a majority of the employees voted in favor of the new contract and the

settlement proposal. Such a settlement cannot be fairly characterized as "so far outside 'a wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.'" *O'Neill, 111 S. Ct. at 1136.* Therefore, Defendant Painters Union [*35] has not breached its duty of fair representation. [5]

5 Defendants argue that Plaintiffs' breach of the duty of fair representation claim is foreclosed by the principle of majority rule and by Plaintiff's failure to exhaust their contractual remedies. Because this court grants the Defendants' motion for summary judgment on the grounds that the Union's conduct in reaching a settlement of this issue was not wholly irrational or arbitrary, it need not reach these arguments.

F. Union officer as Defendant

Even if the Painters Union had breached its duty of fair representation to Plaintiffs, Defendant Painters Union officer Robert Kennedy is immune from liability for breach of the duty of fair representation as well as state tort actions. Section 301(b) of the Labor Management Relations Act, *29 U.S.C. § 185(b)*, as interpreted by the courts, provides that individual union officers and members are immune from liability for breach of the duty of fair representation, *Complete Auto Transit, Inc. v. REIS, 451 U.S. 401, 68 L. Ed. 2d 248, 101 S. Ct. 1836 (1981),* [*36] as well as state tort actions, *Evangelista v. Inland boatmen's Union of the Pac., 777 F.2d 1390, 1400 (9th Cir. 1985).*

IV. Conclusion

Thus, summary judgment is hereby GRANTED in favor of Defendants, and Plaintiffs' claims are hereby dismissed.

Nancy G. Edmunds

U.S. District Judge

Dated: *SEP 26, 1994*