STATE OF MICHIGAN
SUPREME COURT

Defendants-Appellants' appeal from the Michigan Court of Appeals
The Hon. Amy Ronayne Krause, Henry William Saad and Kurtis T. Wilder
Per Curiam

ANTHONY HENRY and KEITH WHITE, Plaintiffs-Appellees, - v - LABORERS' LOCAL 1191 d/b/a ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191 and MICHAEL AARON, Defendants-Appellants, and BRUCE RUEDISUELI, Defendant, **AND**	Supreme Court No. 145631 Court of Appeals No. 302373 Wayne County Circuit Court No. 10 000384 CD Wayne County Circuit Court Hon. Jeanne Stempien **DEFENDANTS-APPELLANTS' APPEAL BRIEF** **ORAL ARGUMENT REQUESTED**
MICHAEL RAMSEY and GLENN DOWDY, Plaintiffs-Appellees, - v - LABORERS' LOCAL 1191 d/b/a ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191 and MICHAEL AARON, Defendants-Appellants, and BRUCE RUEDISUELI, Defendant.	Supreme Court No. 145632 Court of Appeals No. 302710 Wayne County Circuit Court No. 10 004708 CD Wayne County Circuit Court Honorable Jeanine Stempien

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STATEMENT OF THE BASIS FOR JURISDICTION

The Michigan Court of Appeals issued its Opinion on July 3, 2012. On August 8, 2012, Defendants-Appellants filed a timely Application For Leave To Appeal this July 3, 2012 Opinion. MCR 7.302(C). On February 6, 2013, this Court granted Defendants-Appellants' Application For Leave To Appeal.

This Court has discretionary by-leave jurisdiction to ascertain Defendants-Appellants' appeal pursuant to MCR 7.301(A)(2) and 7.302. So, this appeal is properly before this Court.

LIST OF ABBREVIATIONS

CEPA	Conscientious Employee Protection Act, NJ Stat Ann 34:19-1 *et seq*
FAC	First Amended Complaint
E-BOARD	Laborers' Local 1191 – Member Executive Board
LIUNA IG	Laborers' International Union of North America Inspector General
LMRDA	Labor Management Reporting and Disclosure Act, 29 USC 401 *et seq*
LOCAL 1191	Laborers' Local 1191
MCOA	Michigan Court of Appeals
MDOL	Michigan Department of Labor
NLRA	National Labor Relations Act, 29 USC 1515 *et seq*
NLRB	National Labor Relations Board
TULC	Trade Union Leadership Council
USDOL	United States Department of Labor
WPA	Whistleblowers' Protection Act, MCL 15.361 *et seq*

STATEMENT OF QUESTIONS PRESENTED

1. Whether the MCOA erred when it failed to find that the NLRA preempts Plaintiffs-Appellees' (who were four employees acting in concert) WPA claims, which are specifically and explicitly based on (a) the absence of a union contract; (b) the failure to pay "union wages"; and (c) allegedly unsafe work conditions.

Trial Court presumably answers: ***No***

Court of Appeals answers: ***No***

Defendants-Appellants answer: ***Yes***

2. Whether the MCOA erred when it expanded WPA's application to traditionally preempted matters by disregarding long-standing (since 1959) U.S. Supreme Court case law and authoritative Michigan case law (*Calabrese*) that reads NLRA preemption expansively, and NLRA preemption exceptions narrowly.

Trial Court presumably answers: ***No***

Court of Appeals answers: ***No***

Defendants-Appellants answer: ***Yes***

3. Whether the MCOA erred in affirming a trial court's denial of Defendants-Appellants' MCR 2.116(C)(4) summary disposition motions, and rejecting the applicability of *Packowski v United Food and Commercial Workers Local 951,* 289 Mich App 132; 796 NW2d 94 (2010), thereby condoning an impermissible expansion of the WPA to discharge cases that arise under the LMRDA.

Trial Court presumably answers: ***No***

Court of Appeals answers: ***No***

Defendants-Appellants answer: ***Yes***

4. Whether, regardless of the public body to which an employee complains or reports, the NLRA or the LMRDA preempt the WPA if the challenged conduct actually or arguably falls within the jurisdiction of the NLRA or the LMRDA.

Trial Court presumably answers: ***No***

Court of Appeals answers: ***No***

Defendants-Appellants answer: ***Yes***

5. Whether a union employee's report to a public body of suspected illegal activity, *viz.,* absence of a Union contract, the failure to pay "Union wages", and allegedly unsafe work conditions or participation in a related investigation, is of only peripheral concern to the NLRA or the LMRDA and, therefore, the employee's WPA claims are not preempted by federal law.

Trial Court presumably answers: ***Yes***

Court of Appeals answers: ***Yes***

Defendants-Appellants answer: ***No***

6. 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.

Trial Court presumably answers: ***Yes***

Court of Appeals presumably answers: ***Yes***

Defendants-Appellants answer: ***No***

12. In September of 2009, Plaintiffs discovered what they suspected to be illegal conduct on the part of the employer.

13. Specifically, Plaintiffs discovered that union workers were performing work ... without union wages.

14. Various laborers worked without protective clothing as required by law and without pay ... in accordance with the appropriate pay rate/scale.

-- Plaintiffs-Appellees' FAC Complaint Alleging a WPA Claim

▪ ▪ ▪

Q. And is that what you claim that the people who worked out on that job site should have been paid pursuant to a collective bargaining agreement?

A. Yes.

-- Testimony of Plaintiff-Appellee White

INTRODUCTION

This matter involves two WPA lawsuits, brought by four employees, against their common employer.[1]

All four employees, who admittedly acted in concert, claim they were fired in retaliation for jointly reporting to the USDOL their suspicions of employer-involved "illegal conduct" -- which *they* specifically define in their separate, but virtually verbatim, complaints as the absence of a union contract and "union wages," and the presence of unsafe work conditions.

The Defendants moved to dismiss (via MCR 2.116(C)(4) motions) on the threshold issue of jurisdiction, *i.e.*, preemption under federal labor law. The trial court denied Defendants' motions. On July 3, 2012, the MCOA found no preemption under either the NLRA or the LMRDA.

[1] These separate lawsuits, filed approximately three months apart, were consolidated for appeal purposes on March 11, 2012 by the MCOA.

The July 3, 2012 MCOA decision improperly and improvidently expands WPA into traditionally NLRA-regulated labor disputes. The MCOA decision is glaringly erroneous and causes material injustice. It impermissibly expands WPA's application to NLRA "protected, concerted activity" that is, and has been for over 50 years, within the exclusive province of the NLRB.

The MCOA decision clearly conflicts with and disregards long-standing federal case law (*e.g., San Diego Bldg Trades Council, et al v Garmon*, 359 US 236; 79 S Ct 773; 3 L Ed 2d 755 (1959)), and standard-setting Michigan case law (*Calabrese v Tendercare of Mich, Inc,* 262 Mich App 256; 685 NW2d 313 (2004)) that reads NLRA preemption expansively, and has pointedly interpreted NLRA preemption exceptions narrowly (*Pierson v Ahern,* 2005 WL 1685103 (Mich Ct App)).

Even more to the point, the MCOA decision conflicts with federal and state case law that has explicitly found NLRA preemption in the context of the WPA. (*Flores v Midwest Waterblasting Co*, 1994 WL 16189543 (ED Mich); *Furie v Milford Fabricating,* 2001 WL 761977 (Mich Ct App).

While giving lip-service to *Calabrese, a case that found NLRA preemption even though the Plaintiff did* ***not*** *complain to the NLRB*, the MCOA first noted that Plaintiffs-Appellees did not go "to the NLRB." The MCOA then completely disregarded *Calabrese's* expansive NLRA preemption test, *viz.,* whether the controversy is "arguably" subject to the NLRA.

Instead, with no explanation, the MCOA summarily concluded that Plaintiffs' reports to the USDOL about "union wages," a union contact, and unsafe work conditions

are only of "peripheral concern to the NLRA's purpose" and therefore an exception to the expensive sweep of NLRA preemption.

The MCOA did not support its generous and contrarian read of what constitutes a "peripheral concern" to the NLRA. Nor did it explain its disregard for authoritative federal and state preemption analysis. The MCOA decision relied, instead, on a 2003 Maine Federal District Court decision (*Roussel v St Joseph Hosp,* 257 F Supp 2d 280 (D Me, 2003)) that ***predates*** *Calabrese,* involves a single employee acting solely on behalf of herself (she filed a workers' compensation claim), and did not involve NLRA protected, concerted activity.

Notably, this MCOA decision did not reject, or even address, Defendants-Appellants' argument that Plaintiffs-Appellees were actually engaged in NLRA preemption-triggering "protected, concerted activity," and that Plaintiffs-Appellees' claims are "arguably" covered under the NLRA. Even more striking, the MCOA never addressed the undeniable fact that Plaintiffs-Appellees could have presented their controversy to the NLRB – the very test *Calabrese* describes as a "critical inquiry" in preemption analysis.

The MCOA decision re-writes the WPA. It extends the WPA's application to labor disputes that have traditionally been regulated exclusively under the NLRA. As such, the MCOA decision creates a *new* WPA cause of action.

The significance of this is clear and chilling: it invites employees to sue under the WPA for an allegedly retaliatory discharge that was, but for this new MCOA decision, within the exclusive province of the NLRB.

Stated even more starkly, under this MCOA decision, discharged employees *acting in concert* may now sue under the WPA when they report to a "public body" their suspicions of an employer's failure to pay union wages, the absence of a union contract, and the presence of allegedly unsafe work conditions.

Employers, now *faced with an employee's retaliatory discharge claim linked to wages, hours, and terms and conditions of employment*, must face a jury and the WPA's statutorily-created damage claims (mental/emotional distress, loss of reputation and esteem, and the "ordinary pleasures of life") that are unavailable at the NLRB.

This Court should summarily reverse the MCOA's July 3, 2012 decision and grant summary disposition for Defendants-Appellants for the reasons set forth in this brief.

STATEMENT OF FACTS

I. LOCAL 1191'S CONSTITUTION AUTHORIZES THE ELECTED BUSINESS MANAGER TO DISCHARGE LOCAL 1191 BUSINESS AGENTS

A. Local 1191: Labor Union And Employer

Local 1191 is a Detroit local labor union that represents over 4,000 construction industry employees. Local 1191 members perform laborers' work related to underground, highway (both state and interstate), and general construction. (1025a).

As an *employer*, Local 1191 employs Business Agents and administrative staff to perform its representative duties and serve the membership's needs.

B. The Local 1191 Business Manager's Authority Over Local Business Agents

The Local 1191 Business Manager is a *membership-elected* position. It is the highest office within Local 1191. (1034a; 1036a – 1037a)

As the Local's constitutionally-recognized representative, the Business Manager is charged with broad duties and authority, including extensive authority over Local 1191 Business Agents[2]:

> The Business Manager shall be in charge of, direct and supervise the activities of Field Representatives and Organizers. *The Business Manager shall have the authority to discharge Field Representatives and Organizers.*

(1036a, emphasis added)

C. Plaintiffs Were Appointed Business Agents

Business Agents are *appointed,* not elected, positions. (1037a-1038a). All four Plaintiffs were appointed Local 1191 Business Agents.

Plaintiff Ramsey was also the Recording Secretary of the Local 1191 Executive Board (E Board) and Plaintiff Dowdy was the Local 1191 E Board Vice President. (161a, 163a)

II. THE PERTINENT EVENTS PRECEDING PLAINTIFFS' LAWSUITS

A. Business Manager Michael Aaron

In May 2009, Defendant Michael Aaron became the Business Manager of Local 1191. He filled the remaining term (it expired in June 2010) of the retiring predecessor Business Manager.

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[2] Business Agents are Local 1191's "Field Representatives," as described in the Union's Constitution.

B. Plaintiffs Affirmed Their At-Will Status

Plaintiffs and all other Local 1191 Business Agents, who Defendant Aaron retained when he became the Local's Business Manager, signed May 2009 resignation letters. (1058a-1061a) By their identical letters, all four Plaintiffs specifically reaffirmed that they served at the pleasure and will of Aaron. (*Id.*) The identical letters read:

> Mike Aaron, Business Manager
> Laborer's Local 1191
> 2161 West Grand Blvd.
> Detroit, Michigan 48208
>
> Dear Mr. Aaron:
>
> This letter constitutes my resignation from employment by Laborer's Local 1191. This resignation is effective on _____. I authorize you [Mr. Aaron] to fill the blank date in at your pleasure.
>
> Sincerely,

(*Id.*)

C. Local 1191's "Rolling Lay-Offs" Of Business Agents

Prior to May 2009, when Defendant Aaron became the Local's Business Manager, Local 1191 began experiencing significant financial problems. In January 2009, the prior Business Manager laid off the Local's Business Agents for four weeks.

In November 2009, Defendant Aaron implemented additional cost-saving measures to reduce Local 1191's expenses. Among other things, he established a continuous "rolling layoff" of all appointed Business Agents. (251a) Under this "rolling layoff" system, Local 1191 Business Agents had a rotating schedule of three weeks of

active employment followed by a three week layoff. All four Plaintiffs were part of this "rolling layoff" system. (134a)

D. Plaintiffs And Others Meet Secretly To Plot Against Business Manager Aaron

Shortly after signing their resignation letters, Plaintiffs held secret "political" meetings with three other appointed Local 1191 Business Agents and the Local's former Business Manager. (1019a-1022a) Four Local 1191 E Board members attended these secret "political" meetings, including Plaintiffs Ramsey and Dowdy. (1017a, 1020a, 1021a)

At these "political" meetings, Plaintiffs and the other attendees discussed assembling a slate of candidates to run against Defendant Aaron in Local 1191's June 2010 election. (1019a-1022a) Plaintiffs Henry, Dowdy, and Ramsey specifically expressed their desire to succeed Aaron and become the Local's Business Manager. (1047a, 1050a)

E. The Trade Union Leadership Council (TULC) Volunteer Work, The Expense Stipend, And Plaintiff Henry's Videotape

In early September 2009, Defendant Aaron asked Plaintiff White to assemble several laborers with scaffolding skills for brief volunteer work at the TULC. (1027a) White was working as Local 1191's job dispatcher. (1024a-1025a) The TULC is a community-focused, non-profit entity that provides, among other things, training for laid-off employees and holiday food/gifts for needy children and the elderly. (1064a-1065a)

The work consisted of removing brick facings from the TULC building because they presented a safety hazard.

Such volunteer work was not unusual. Prior to Aaron becoming the Local's Business Manager, members of Local 1191 had performed similar community-focused volunteer work.

Aaron told White that these individuals would be paid a per-diem expense stipend by Local 1191. (1029a) White alone selected eight unemployed Local 1191 members to perform the volunteer work at the TULC. (1027a) White informed his selectees about the per-diem stipend. (1029a)

Defendant Aaron did *not* select any of the laborers who performed the TULC work. (1027a) No laborer was required to perform this work. (1026a-1027a). The work lasted a total of two or three days, beginning on September 15, 2009. (1029a; 1066a-1076a)

On his own initiative, and before any Local 1191 member was reimbursed for his per-diem expenses, Plaintiff Henry videotaped this TULC volunteer work although he was actually on his "rolling layoff" at the time. (1044a). While filming, Henry did not approach Joe Wright, the on-site person in charge of the TULC work and someone Henry knew, with any concerns about the worksite's working conditions. Henry had never before videotaped laborers working and the TULC was located outside his assigned geographic area. (1056a-1057a)

Later, Local 1191 reimbursed the volunteers $30 per day. (1065a; 1069a-1076a) According to Plaintiffs, this $30 per day rate is the same daily rate Local 1191 used to reimburse members for picket line duty and it is the same per diem stipend used by the Laborers' Apprenticeship School to reimburse certain apprentices' expenses. (1028a-1029a)

The total amount paid to all the laborers who worked at the TULC was $480. (8 checks x $60 per check = $480) These stipend checks contained the following notation: "Memo: Picket Line 2 Days." (1069a-1076a) None of these volunteers, however, performed any picket line duty for their expense reimbursement. (1028a; 1065a)

F. Plaintiffs And Others Meet After The TULC Volunteer Work And Compose And Review An Anonymous, Accusatory Letter

After the TULC work was performed, Plaintiffs met several times with the other earlier meetings-attendees. (1023a; 1048a-1052a; 1057a) (1023a; 1032a; 1045a-1052a; 1057a) At these post-TULC meetings, Plaintiffs and the others discussed, among other things, the "political advantages" of writing an accusatory, TULC-focused letter. The letter was designed to serve as a basis for the Local's E Board to immediately and unilaterally oust Defendant Aaron from his Business Manager position and "disqualify" him as a candidate in the June 2010 Local election. (1023a). With others, Plaintiffs again discussed assembling a political slate to challenge Aaron in the Local's 1191's June 2010 election. (1046a-1050a)

Plaintiffs and the other meetings-attendees specifically reviewed and discussed the proposed letter, initially drafted by Plaintiff Henry. (1024a; 1049a-1050a) The proposed letter was read aloud at these meetings. (*Id.*) Plaintiffs and the other meetings-attendees approved it for substance as well as "grammar." (*Id.*)

The four Plaintiffs and the other meetings-attendees, including the other attending E Board members, then sent the letter anonymously to Local 1191's E Board (in effect, the attendant E Board members sent an anonymous letter to themselves) along with the TULC video tape taken by Plaintiff Henry. (1051a, 1052a; 1090a-1095a)

They copied the anonymous letter, which included an attached section of the LMRDA and Henry's video tape, to LIUNA's International President, the LIUNA IG, the Michigan Laborers' Training School, the *Detroit News*, the *Detroit Free Press*, and Detroit's three major TV stations: WXYZ (Channel 7), WDIV (Channel 4) and Fox 2 News. (1090a-1095a).

G. The Anonymous Letter

Shortly after September 25, 2009, the E Board received the anonymous letter. Signed only as "a very Concerned Member," the letter addressed the volunteer TULC work and suggested that "kickbacks," conflicts of interest, and inappropriate "wages," were involved, referenced LIUNA's "Ethics and Disciplinary Procedure," and threatened the Local's E Board. (*Id.*) The "Concerned Member" specifically warned the Local's E Board that he/she might sue the E Board under the LMRDA. (*Id.*)

H. The E Board Considers The Anonymous Letter And It Is Read Aloud At The Local's Membership Meeting

1. The October 2, 2009 E Board Meeting

At the E Board's October 2, 2009 meeting - - the first E Board meeting after its receipt of the anonymous letter - - the Local 1191 E Board reviewed the September 25, 2009 anonymous letter. Defendant Aaron specifically addressed its allegations. (1097a)

At this meeting, no E Board member took "ownership" of the letter or revealed that they had participated in drafting it or had, in fact, reviewed and approved the anonymous letter *before* it was sent.

2. The October 2, 2009 Local Membership Meeting

The anonymous letter was then read aloud at the October 2, 2009 Local 1191 membership meeting -- the first membership meeting after Local 1191 received the accusatory letter. (1032a; 1054a)

During this Local 1191 membership meeting, which all four Plaintiffs attended, no Plaintiff, nor any E Board member, nor any Business Agent who participated in the preparation and review of the letter disclosed their extensive role in its composition and distribution. (*Id.*) At the meeting, none of these individuals announced their so-called concerns about the alleged "illegal" working conditions and "wages" at TULC or anything else. (*Id.*)

I. Plaintiffs Collectively Meet With The USDOL And Report "[T]heir [S]uspicions Of [I]llegal [A]ctivity"

In October 2009 -- shortly after the October 2, 2009 Local Membership Meeting -- Plaintiffs Henry, White, and Ramsey collectively met with the USDOL. (1053a) At these USDOL meetings, Plaintiffs Henry, White, and Ramsey "reported their suspicions of illegal activity," which they "specifically" define as including unsafe work conditions (fall protection), the absence of "protective clothing" and the failure to pay "union wages" for those who worked at the TULC. (15a; 26a-27a; 464a) Later, in December 2009 or January 2010, the USDOL also interviewed Plaintiff Dowdy.

J. The Indefinite Layoff Of White And Henry, And Henry's Post-Layoff Meeting With The USDOL

Defendant Aaron indefinitely laid-off Plaintiffs White and Henry from their at-will Business Agent positions on November 11, 2009. Aaron informed White and Henry of

their indefinite layoffs by identical November 11, 2009 letters. (1062a-1063a) Aaron's letter explained that the layoffs were primarily economic-driven. (*Id.*)

After his layoff, Henry met with and gave the USDOL a copy of his termination letter. (119a)

K. LIUNA IG Investigates The Union Corruption Claims, Finds Nothing To Support Them, And Closes The Matter

The LIUNA IG investigated the allegations contained in the anonymous member's September 25, 2010 letter that was drafted and distributed by Plaintiffs. (1098a)

LIUNA's IG rejected Plaintiffs' claims of ethical misconduct. The LIUNA IG closed the matter on November 13, 2009. (*Id.*)

L. The USDOL Investigates And Takes No Action

As part of its LMRDA investigation, the USDOL interviewed Defendant Aaron. (1099a-1100a) In early 2010, Aaron appeared alone -- without counsel -- during his USDOL interview. (300a)

On February 8, 2010, the USDOL "declined" to take *any* action on *any* of Plaintiffs' accusations or claims. The USDOL closed its LMRDA investigation. (1099a-1100a)

III. PLAINTIFFS' LAWSUITS

A. Plaintiffs Henry/White's Lawsuit

In January 2010, Henry and White sued. (3a-8a) In their initial complaint, Plaintiffs claimed only that they contacted the MDOL about their suspicions of "illegal activity." (5a-6a)

On June 21, 2010, Henry and White filed their First Amended Complaint (FAC). (25a-32a) In their FAC, Plaintiffs deleted their earlier MDOL references and substituted those references with the USDOL. Plaintiffs Henry and White claim that their report to the USDOL about wages and terms and conditions of employment and their participation in the USDOL's later investigation, prompted their retaliatory discharge. (27a-29a)

Plaintiffs Henry and White do *not* claim that they were fired in retaliation for their refusal to commit or aid/participate in a crime. (25a-32a)

In March 2010 -- *before* Plaintiff Ramsey's and Plaintiff Dowdy's termination -- both Plaintiffs Henry and White testified about the "political" meetings held *before and after* the September 2009 TULC voluntary work day and the topics discussed. (1-19a-1024a; 1052a-1057a) They specifically identified Ramsey and Dowdy as attending and participating in these meetings. (1031a; 1051a)

B. Plaintiffs Ramsey/Dowdy's Lawsuit

Based on Plaintiff Henry's and Plaintiff White's deposition disclosures, Defendant Aaron fired Ramsey and Dowdy in April 2010 -- approximately six months after Ramsey met, along with Henry and White, with the USDOL and approximately four months after Dowdy met with the USDOL. Defendant Aaron dismissed Ramsey and Dowdy primarily for their disloyalty.

On April 22, 2010, Plaintiffs Ramsey and Dowdy also sued under the WPA. Although ostensibly represented by separate counsel, Plaintiffs Ramsey and Dowdy made identical -- virtually *verbatim* -- WPA allegations to those of Plaintiffs Henry and White. (13a-20a)

Plaintiffs Ramsey and Dowdy claim that they were fired in retaliation for their protected activities of reporting to the USDOL alleged union corruption and "illegal activity" that they define as unsafe work conditions (fall protection), the absence of "protective clothing," and the failure to pay "union wages." (15a) Like Plaintiffs Henry and White, Plaintiffs Ramsey and Dowdy also claim that they were fired for cooperating with the USDOL.[3]

Plaintiffs Ramsey and Dowdy do *not* assert, as part of their WPA claims, that they were fired in retaliation for their refusal to commit or aid/participate in a crime. (13a-20a)[4]

IV. TRIAL COURT PROCEEDINGS

A. Defendants' MCR 2.116(C)(4) Motions

On November 1 and 2, 2010, Defendants Local 1191 and Michael Aaron moved for summary disposition of all four of Plaintiffs' WPA claims based on the principle of federal preemption. (Defendant Ruedisueli concurred in the motion). Defendants argued that Plaintiffs' WPA claims were preempted under the LMRDA. Among other cases, Defendants specifically cited the MCOA's July 8, 2010 opinion in *Packowski.*

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[3] In April 2010, Plaintiffs Henry and Dowdy formally became candidates for the position of Local 1191 Business Manager. Plaintiff White ran for the positions of Local 1191 delegate and E Board member.

In the June 2010 Local 1191 election, Defendant Aaron defeated Plaintiffs Henry and Dowdy. Plaintiff White lost to a candidate from Defendant Aaron's slate.

Plaintiffs Henry, White and Dowdy each challenged the Local 1191 election results with LIUNA, as required under the LIUNA Constitution and federal law. LIUNA dismissed these election challenges.

On November 18, 2010, Plaintiffs Henry, White and Dowdy filed an LMRDA complaint with the USDOL. They challenged Local 1191's June 10, 2010 election results and LIUNA's earlier rejection of their election complaints. On April 15, 2011, the USDOL rejected all of Plaintiffs Henry, White and Dowdy's election challenges.

[4] Plaintiff Ramsey alone claims a public policy violation independent of the WPA. Defendants did *not* seek summary disposition of Ramsey's public policy claim. It is not part of the consolidated appeal.

B. The Trial Court Opinions

On January 13, 2011, the trial court ruled from the bench. The trial court rejected Defendants' LMRDA preemption arguments and found *Packowski v United Food and Commercial Workers Local 951*, 289 Mich App 167; 796 NW2d 94 (2010) inapplicable. (589a-593a) The trial court's oral explanation indicates that it:

1) limited *Packowski's* LMRDA preemption holding to only "just cause" termination cases;

2) disregarded *Packowski's* review of other LMRDA-preemption cases, including those that addressed public policy retaliatory dismissals, as well as *Packowski's* pointed, *sua sponte* discussion of plaintiff Packowski's LMRDA rights to sue for retaliatory discharge in federal court;

3) found no preemption because the WPA was consistent with "the purposes of federal law"; and

4) relied on the LMRDA's "savings clause" to deny a preemption finding.

The trial court entered identical Orders denying Plaintiffs' MCR 2.116(C)(4) motions on January 13, 2011 (*Henry/White*) (602a-603a) and on February 3, 2011 (*Ramsey/Dowdy*) (604a-605a). Each Order states that the motion was denied for the reasons stated on the record. (602a-603a; 604a-605a)

V. MCOA PROCEEDINGS

A. Defendants' Applications for Leave to Appeal

On February 3, 2011, Defendants filed a timely Application For Leave To Appeal in the *Henry/White* case. In the *Ramsey/Dowdy* case, Defendants-Appellants filed a timely Application For Leave To Appeal on February 24, 2011.

In both cases, Defendants requested leave to appeal whether the trial court had committed legal error in denying Defendants' MRC 2.116(C)(4) motions for summary disposition (subject matter jurisdiction) on the basis of federal preemption. On March 30, 2011, the MCOA granted Defendants' Applications for Leave to Appeal and, on its own motion, consolidated the cases. (742a)

On appeal, Defendants argued that Plaintiffs' WPA claims were preempted by the NLRA and LMRDA.[5]

B. The MCOA Opinion

In its July 3, 2012 decision, the MOCA affirmed the trial court. (886a-891a) The MCOA found no NLRA preemption. It held that a retaliatory discharge claim arising from a report of "suspected illegal activity" -- which the Plaintiffs-Appellees specifically defined in their complaint and testimony as involving the absence of a union contract and union wages, and the presence of "unsafe work conditions" -- is of "only peripheral concern" to the NLRA's purpose of protecting the rights of employees to engage in protected concerted activity.

The MCOA distinguished *Flores,* a Detroit federal district court decision that found NLRA preemption in the specific context of a WPA claim, by noting that plaintiffs there reported to the NRLB. The MCOA also relied on a federal district court decision which held that plaintiff's WPA claim under Maine law, which alleged a retaliatory discharge for filing a worker's compensation claim, was not preempted by the NLRA. *Roussel v St Joseph Hosp*, 257 F Supp 2d 280 (D Me, 2003).

[5] The MCOA denied Plaintiffs' Motion to strike Defendants' brief to the extent that it claimed NLRA preemption. (App. 1)

The MCOA also found no LMRDA preemption. The MCOA reasoned that the LMRDA governs rights afforded to individuals by virtue of their status as union members and because Plaintiffs were pursuing rights arising from their status as employees, there was no LMRDA preemption. The MCOA held that *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132 (2010), which found LMRDA preemption of a union business agent's claim alleging that he was improperly discharged without just cause, did not apply to WPA claims.

ARGUMENT

I. THE LEGAL STANDARD FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(4)

Summary disposition is mandated where the trial court "lacks jurisdiction of the subject matter." MCR 2.116(C)(4). Under MCR 2.116(C)(4), the trial court "must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate that the court lacks subject matter jurisdiction." *CC Mid West, Inc v McDougall,* 470 Mich 878, 878; 683 NW2d 142 (2004), MCR 2.116(G)(5). When the trial court lacks subject matter jurisdiction, any action other than dismissal of the case is "absolutely void." *Fox v Univ of Michigan Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965).

The trial court's denial of a MCR 2.116(C)(4)-based motion for summary disposition is a question of law that must be reviewed *de novo*. *Travelers Ins Co v Detroit Edison Co,* 465 Mich 185, 205; 631 NW2d 733 (2001). So, this Court must review the entire record. *Township of Homer v Billboards by Johnson, Inc*, 268 Mich App 500, 502; 708 NW2d 737 (2005) (citing *Maiden v Rozwood*, 461 Mich 109, 118;

597 NW2d 817 (1999)). Existence of subject matter jurisdiction and a determination of preemption are likewise reviewed *de novo*. *Konynenbelt v Flagstar Bank*, 242 Mich App 21, 27; 617 NW2d 706 (2000).

The trial court's lack of subject matter jurisdiction can be raised at any time, even if challenged for the first time on appeal. *Lehman v Lehman,* 312 Mich 102, 105-06; 19 NW2d 502 (1945). In fact, courts have a duty to "take notice of the limits of their authority" and "a court ... should, on its own motion, ... recognize its lack of jurisdiction," and dismiss or otherwise dispose of the action, at any stage of the proceeding, even if the question of subject matter jurisdiction is not raised by the pleadings or by counsel. *In re Fraser's Estate,* 288 Mich 392, 394; 285 NW 1 (1939).

II. FEDERAL PREEMPTION

A. Federal Preemption Principles

The Supremacy Clause of the United States Constitution underpins the doctrine of federal preemption. It states in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

US Const, art VI, cl 2.

Under the Supremacy Clause, state courts are bound by federal statutes, despite any state law to the contrary. *Packowski*, 289 Mich App at 139. And, state courts must "find preemption when it exists, because federal law is the supreme law of the land." *Id.* (citing *Detroit v Ambassador Bridge Co*, 481 Mich 29, 36; 748 NW2d 221 (2008)).

Whether a federal law preempts a Michigan law claim is a question of federal law. *Packowski,* 289 Mich App at 139 (citing *Allis-Chalmers Corp v Lueck*, 471 US 202, 214; 105 S Ct 1904; 85 L Ed 2d 206 (1985)). Where such questions of federal law are involved, courts must "follow the prevailing opinion of the United States Supreme Court." *Packowski*, 289 Mich App at 139 (citing *Beatty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994)). When federal preemption exists, the Michigan courts are deprived of subject matter jurisdiction. *Packowski*, 289 Mich App at 139-40.

There are three types of federal preemption: *express, conflict,* and *field preemption. X v Peterson,* 240 Mich App 287, 289; 611 NW2d 566 (2000).

Express preemption exists where the federal statutory language clearly preempts state law or such preemption is clearly implied in the statute's structure and purpose. *People v Kanaan,* 278 Mich App 594, 607; 751 NW2d 57 (2008).

Field preemption exists where the federal law so thoroughly occupies a legislative field that it is reasonable to infer that Congress did not intend for states to supplement it. *Cipollone v Liggett Group, Inc,* 505 US 504, 516; 112 S Ct 2608; 120 L Ed 2d 407 (1992).

Conflict preemption exists where there is a conflict between state and federal law that makes compliance with both impossible or where state law obstructs the accomplishment and execution of Congress's full purposes and objectives. *People v Hegedus,* 432 Mich 598, 620-21; 443 NW2d 127 (1989) (citing *Hillsborough County v Automated Medical Labs, Inc,* 471 US 707, 713; 105 S Ct 2371; 85 L Ed 2d 714 (1985) (internal citations omitted)).

B. Plaintiffs' Claims Are Preempted Under The NLRA And The LMRDA

Plaintiffs' WPA claims are conflict and expressly preempted under the NLRA because their claims allege concerted conduct that is *actually or arguably* protected by the NLRA and within the exclusive purview of the NLRB. Similarly, the alleged retaliatory discharge is *actually or arguably* prohibited by the NLRA. *San Diego Building Trades Council v Garmon*, 359 US 236, 245 (1959); *see also Flores*, 1994 WL 16189543 at *9 n4 (specifically holding a Michigan WPA claim preempted under § 7 of the NLRA and pointedly noting that, regardless of the public body involved, the NLRA would preempt Michigan's WPA if the plaintiff's conduct was actually or arguably protected under the NLRA).

Plaintiffs' WPA claims are also conflict preempted by the LMRDA because their attempted use of the WPA to adjudicate claims arising out of their union employment obstructs Congress's clear purposes and objectives under the LMRDA -- to protect "democratic processes in union leadership." *Packowski,* 289 Mich App at 149; *See also Finnegan v Leu,* 456 US 431, 441; 102 S Ct 1867; 72 L Ed 2d 239 (1982).

Plaintiffs' claims are also field preempted under both the NLRA and the LMRDA. As more fully explained below, the NLRA so thoroughly occupies the field of labor relations, and has done so for nearly 80 years, that it is undisputable that Congress did not intend for the states to supplement the NLRA.

Similarly, LMRDA Section 102 (29 USC 412) provides a federal cause of action for retaliatory discharge claims by union employees. *Ardingo v Potter*, 445 F Supp 2d 792, 798 (WD Mich, 2006). Plaintiffs' WPA claims impermissibly encroach on matters

governed exclusively by the LMRDA and litigated in federal court. *Safe Workers' Org, Chapter 2 v Ballinger,* 389 F Supp 903, 910 (SD Ohio, 1974).

III. NLRA PREEMPTION

A. NLRA Protected Concerted Activity

The NLRA protects, *inter alia*, the exercise by employees of full freedom of association for their mutual aid or protection. 29 USC 151.

Specifically, NLRA § 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities* for the purpose of collective bargaining *or other mutual aid or protection.*

29 USC 157 (emphasis added). And, it is an "unfair labor practice" for an employer to:

> ...interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 157 of this title.

29 USC 158(a)(1).

NLRA § 7 protects concerted employee activities where such activities can reasonably be seen as affecting the terms or conditions of employment. *NLRB v Main Street Terrace Care Ctr,* 218 F 3d 531, 540 (CA 6, 2000) (internal citations omitted) (discharged employee's repeated efforts to remedy the wage-related problem for other employees was protected concerted activity). And, the activity is "concerted" if it relates to group action for the mutual aid or protection of other employees. *NLRB v Lloyd A. Fry Roofing Co,* 651 F 2d 442, 445 (CA 6, 1981) (employee's repeated complaints about unsafe conditions of the employer's trucks was protected concerted activity for

the mutual aid and protection of employees "aimed at achieving employer compliance with governmental regulations affecting working conditions.")

The relevant question is whether the employee acted with the purpose of furthering group goals. *Compuware Corp v NLRB*, 134 F 3d 1285, 1288 (CA 6, 1998) (employee's threat to report work-related concerns to State representative was protected concerted activity even if he was not the authorized representative of other employees where his actions were on behalf of the group); *Flores*, 1994 WL 16189543 at *9, (finding preemption under NLRA § 7 in a Michigan WPA case).

B. The NLRA Preempts Plaintiffs' Claims Because Their Conduct Actually or Arguably Constitutes Protected Concerted Activity

The US Supreme Court has long recognized that an actual conflict between the NLRA and state law leads to preemption of the state law. *See, e.g., Weber v Anheuser-Busch, Inc,* 348 US 468, 480; 75 S Ct 480; 99 L Ed 546 (1955). But, in *Garmon,* a 1959 decision, the U.S. Supreme Court announced an expansive test for preemption. Since that time, the U.S. Court has applied this expansive *Garmon* preemption doctrine no fewer than 14 times.[6] The number of U.S. Circuit Courts of Appeals and federal district courts that have applied this expansive *Garmon* doctrine are, literally too long to list.

The *Garmon* Court found that the NLRA preempts states from regulating conduct that is *arguably* either protected or prohibited by the NLRA. *Garmon,* 359 US at 245. The "arguably protected or prohibited" test broadly excludes state law claims without regard to the substance of the state regulation. So, the NLRA preempts state regulations even where the substantive terms of a state law are wholly consistent with

[6] Between *Journeymen v. Borden*, 373 US 690, 698 (1963) and *Marquez v. Screen Actors Guild*, 525 US 33, 50-51 (1998), the U.S. Supreme Court has unfailingly reaffirmed *Garmon's* broad NLRA preemption doctrine.

that of the NLRA. *See, e.g., Wisconsin Dep't of Industry, Labor and Human Relations v Gould Inc,* 475 US 282, 286; 106 S Ct 1057; 89 L Ed 2d 223 (1986). (Overlooking this important point, the trial court rejected Defendants' preemption claim because, the trial court said, the WPA was "consistent" with federal law.)

In *Garmon*, the Supreme Court announced that when "an activity is *arguably* subject to §7 or §8 of the [NLRA], the states as well as the federal courts must defer to the exclusive competence of the [NLRB]." *Garmon,* 359 US at 245 (emphasis added). State jurisdiction must yield if the state law claims involve actions that can fairly be assumed as protected concerted activity under § 7 or constituting an unfair labor practice under § 8. *Id.* at 244. To permit state jurisdiction in these areas "would create potential frustration of national purposes." *Id.*

For the NLRA to preempt state jurisdiction, a plaintiff's state law claims need not consist of *actual* protected concerted activity or an *actual* unfair labor practice. Where state law claims *arguably* consist of actions covered by §§ 7 or 8, the NLRB must be given the first adjudicative authority to make the determination concerning possible NLRA violations. *Id.* at 244-45.

Stated another way, preemption is not dependent on a *finding* that the NLRA has been violated but instead is contingent upon allegations in the complaint that are *arguably* cognizable under the NLRA. *Local Union No 25 v New York, New Haven and Hartford Railroad Co,* 350 US 155, 160; 76 S Ct 227; 100 L Ed 166 (1956). In *Weber*, the U.S. Supreme Court explained the broad preemptive reach of the NLRA:

> ... where the facts ***reasonably*** bring the controversy within the sections prohibiting these practices, and ***where the conduct***, if not prohibited by the federal Act, ***may*** **be** ***reasonably deemed to come within the protection***

> ***afforded by that Act, the state court must decline jurisdiction*** in deference to the tribunal which Congress has selected for determining such issues in the first instance.

Weber, 348 US at 481 (emphasis added).

Because preemption is designed to avoid conflicting regulation of *conduct*, the focus of preemption analysis is the conduct being regulated, not the formal description of governing legal standards. *Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees of America v Lockridge*, 403 US 274, 292; 91 S Ct 1909; 29 L Ed 2d 473 (1971). So, this Court must focus on Plaintiffs' underlying conduct that constitutes their causes of action to decide the issue of NLRA preemption. *Id.*

Plaintiffs' claims are based on conduct that is arguably protected concerted activity under the NLRA and their alleged retaliatory discharges are, at a minimum, arguably unfair labor practices. Plaintiffs claim that they were punished for their protected concerted activity, *viz.,* their coordinated reporting to the USDOL about "illegal," unsafe work conditions and the absence of "union wages." (15a; 26a-27a) Plaintiffs specifically define the suspected "illegal" activities as involving the failure to pay "union wages" and union members' exposure to purportedly unsafe working conditions. *Id.*

So, the issues Plaintiffs brought to the USDOL, which Plaintiffs specifically cite in their complaints and testimony, are based on their fellow members' working conditions and wages. Plaintiffs' complaints allege that they acted in concert for the purpose of furthering such group wage and working condition goals. *Id.* Both as a matter of pleading and substance, Plaintiffs' conduct is clearly protected activity under NLRA. *Eastex, Inc*, 437 US at 564; 29 USC 152(3).

1. Michigan and Federal Courts Have Recognized NLRA Preemption of State Discharge Claims Where the Alleged Conduct is Actually or Arguably Covered by the NLRA

Michigan Courts have recognized *Garmon* and preempted state retaliatory-discharge claims - - including discharge claims based on alleged *public policy* violations - - that were arguably protected or prohibited under §§ 7 or 8 of the NLRA.

In 2004, the MCOA relied on NLRB preemption to dismiss a supervisor's public-policy based state claim for wrongful termination. *Calabrese v Tendercare of Michigan, Inc*, 262 Mich App 256 (2004). Citing *Garmon*, the *Calabrese* Court held that state causes of action are NLRA preempted "when they concern an activity that is actually or arguably protected or prohibited by the NLRA." *Id.* at 260.[7]

The *Calabrese* Court also articulated an indispensable component aspect of any NLRA preemption review. The critical inquiry, the *Calabrese* Court held, is "whether the controversy presented to the state court is identical to...that which could have been, but was not, presented to the Labor Board." *Id.* at 261.

The *Calabrese* Court concluded that "[t]he primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." *Id.* (citing *Sears, Roebuck & Co v San Diego Co Dist Council of Carpenters*, 436 US 180, 197, 202; 98 S Ct 1745; 56 L Ed 2d 209 (1978)). That is, a Plaintiff's state law claims are preempted if they could have been brought before the NLRB as an unfair labor practice. *Id.* at 262-63. *See also Pierson v Ahern,* 2005 WL 1685103 (Mich Ct App) (unpublished) (holding that defendant's counterclaim for abuse of process, conspiracy to abuse process and

[7] *Calabrese* was also before this Court on an interlocutory appeal of the trial court's denial of defendants' MCR 2.116(C)(4) motion for summary disposition based on, *inter alia,* preemption.

discharge in violation of public policy were preempted); *Radzikowski v BASF Corp*, 2004 WL 2881814 (Mich Ct App) (unpublished) (holding that plaintiff's claim that he was terminated for discussing unions was preempted; "plaintiff's claim concerns alleged activity by defendant that is at least arguably prohibited by the NLRA and, thus, could have been presented to the NLRB"); (*Coulter v Graphic Communications Int'l Union*, 2000 WL 33385378 (Mich Ct App) (unpublished) (finding NLRA preemption of plaintiffs' claim that they were not hired due to union statements that they would create problems in upcoming negotiations; alleged conduct would violate the NLRA and was within the exclusive jurisdiction of the NLRB).

In *Furie v Milford Fabricating Co*, 2001 WL 761977 (Mich Ct App) (unpublished), the MCOA Court found that Plaintiff's WPA claim was preempted. Significantly enough, the *Furie* Court recognized that the test was *not* whether Plaintiff's report was made to the NLRB. In an obvious gesture to *Calabrese*, the *Furie* Court noted that critical issue is whether Plaintiff *could* have brought his claim to the NLRB. The Court held:

> Here, Plaintiff's claims ***could*** have been brought before the NLRB. Accordingly, Plaintiff's claims [wrongful discharge and WPA claims based on refusal to Union bust] were preempted . . . and the trial court did not err in dismissing them under the doctrine of preemption (emphasis added; footnote 3 omitted).

Federal Courts have also preempted WPA claims under the NLRA. In *Flores v Midwest Waterblasting Co,* 1994 WL 16189543 (ED Mich), the federal district court specifically found NLRA preemption of Plaintiffs' WPA claim. The *Flores* plaintiffs alleged that they were discriminated against because they complained to the NLRB and other undisclosed public authorities. The *Flores* Court dismissed the WPA claim as preempted by the NLRA. In so doing, the *Flores* Court held:

> 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 activity under § 7 of the NLRA, and an employer commits an unfair 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*.

Id. at *9.

The *Flores* Court was unconcerned with the "public body" to which an employee makes a report. Instead, *Flores* focused on the "arguably prohibited or protected" standard. It noted that a WPA claim based on a report made to any other public body would avoid preemption provided "***it concern[ed] issues unrelated to the CBA and not arguably prohibited or protected by the NLRA.***" *Id.* at *9 n4. So, the *Flores* Court specifically applied the broad "arguably prohibited or protected" standard to employee reports made to agencies other than the NLRB.

Stated plainly, under *Flores*, and nearly 80 years of federal law, the public body to which an employee reports is not determinative of the employee's WPA claim in the context of preemption. So, for example, an employee cannot successfully assert, as a defense to a preemption claim, that he/she reported allegedly illegal conduct to the EPA. So long as the issues presented are arguably prohibited or protected by the NLRA, the matter is NLRA preempted.

Applying *Flores* to Plaintiffs' claims requires a finding of NLRA preemption because, while Plaintiffs' did not report to the NLRB, their claims constitute activity that is arguably prohibited or protected by the NLRA.

Other states have recognized the insignificance of the "public body" to which an employee reports and more importantly, have re-affirmed the "arguably protected/prohibited" standard.

In *Rodriguez v Yellow Cab Cooperative, Inc*, 206 Cal App 3d 668 (1988), Plaintiff sued his employer for retaliatory discharge based on Plaintiff's pro-union testimony, before California's Public Utility Commission, about job security and wages. *Id.* at 673. There was no collective bargaining agreement, and Plaintiff had *not* filed charges with the NLRB on issues that were before the *Rodriguez* Court. *Id.* at 680 and 672. The *Rodriquez* Court held that Plaintiff's testimony was arguably protected concerted activity under NLRA § 7 and preempted. *Id.* at 675 (noting that "Other federal courts that explore the scope of 'mutual aid and protection' have observed that lawsuits relating to labor matters are generally preempted.by § 7.").

Here, Plaintiffs' conduct is, at a minimum, arguably protected concerted activity under the NLRA and their alleged retaliatory discharges are, also at a minimum, arguably unfair labor practices. As such, these claims could have been brought before the NLRB.

Plaintiffs claim they were punished for their protected concerted activity, *viz.,* their coordinated reporting to the USDOL of "illegal", unsafe work conditions and the absence of "union wages." (Ex. D: ¶13, 15; Ex. O: ¶13, 15) Plaintiffs specifically defined the suspected "illegal" activities as involving the failure to pay "union wages" and union members' exposure to purportedly unsafe working conditions. (*Id.*)

So, the issues Plaintiffs brought to the USDOL, and which Plaintiffs specifically cite in their complaints, bear a direct relationship to their fellow members' working

conditions and wages. Plaintiffs' complaints allege that they acted in concert for the purpose of furthering these group wage and working condition goals. (*Id.*)

As such, the NLRB has exclusive jurisdiction of Plaintiffs' claims and all four Plaintiffs' WPA claims are preempted.

The fact that Plaintiffs made their report to the USDOL and not to the NLRB is irrelevant. Plaintiffs' claims could have been brought before the NLRB because their claims involve matters cognizable under NLRA § 7. *Calabrese*, 262 Mich App at 261. As such, Plaintiffs' claims are preempted by the NLRA.

C. Complaints About Wages And Working Conditions Are Not of Peripheral Concern to the NLRA, and Plaintiffs' Claims Do Not Involve A Deeply Rooted State Interest That Precludes Preemption

The *Garmon* Court, in addition to recognizing broad NLRA preemption, announced two narrow exceptions to the general rule.

The exceptions to the NLRA broad preemption occur when a Plaintiff's state law claim alleges conduct of *peripheral concern* to the NLRA, or where the state law claim "touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the court] could not infer that Congress ha[s] deprived the States of the power to act." *Northwestern Ohio Adm'rs, Inc v Walcher & Fox, Inc*, 270 F 3d 1018, 1027 (CA 6, 2001) (citing *Garmon*, 359 US at 243).

The U.S. Supreme Court has narrowly construed these exceptions to preemption to preserve the NLRB's broad jurisdiction. *Int'l Longshoremen's Ass'n v Davis*, 476 US 380, 391-393 (1986).

Michigan courts have also narrowly applied the NLRA preemption exceptions. Typically, the Michigan courts have found that only claims alleging or involving "state

laws regulating violence, defamation, intentional infliction of emotional distress, trespassory picketing, and obstruction of access to property" constitute concerns that are peripheral to the NLRA and involve deeply rooted state interests. *Pierson v Ahren*, 2005 WL 1685103 (Mich Ct App) (citing *Sears, Roebuck & Co. v San Diego Co Dist Council of Carpenters*, 436 US 180, 204, 207 (1978)).

In *Platt v. Jack Cooper Transport Co, Inc*, 959 F 2d 91 (CA 5, 1992), the Fifth Circuit found that Plaintiff's California WPA claim was NLRA preempted because the claim was not peripheral to the NLRA and could have been filed with the NLRB. Whatever interest the state may have had in the WPA claim, *Platt* reasoned, was preempted by the fact that the claim involved matters that were not merely peripheral to the NLRA. The *Platt* Court explained:

> If the challenged conduct occurs in the context of a labor dispute, so that an unfair labor practice charge could have been filed, but the deeply rooted local interest in regulating that conduct is strong, the critical inquiry for *Garmon* preemption purposes is "whether the controversy presented to the state court is identical to ... that which could have been, but was not, presented to the Labor Board." *Sears, Roebuck*, 436 U.S. at 197, 98 S.Ct. at 1757. That is precisely the situation here. Platt could have brought to the NLRB the specific claim asserted in this lawsuit-that he was fired for making job safety complaints. Moreover, from a remedial standpoint, Platt's lawsuit seeks reinstatement and back pay, so that the court is simply "an alternative forum for obtaining relief that the Board can provide." *Belknap, Inc. v Hale*, 463 U.S. 491, 510, 103 S.Ct. 3172, 3183, 77 L.Ed.2d 798 (1983). Thus, ***both the retaliatory misconduct alleged and the remedy sought are directly relevant to the Board's central function, unlike the cases in which a local interest exception has been recognized.*** See, e.g., *Linn*, 383 U.S. at 63-64, 86 S.Ct. at 663-64. (emphasis added)

Platt, 959 F 2d at 95; *See also, Rodriguez*, 206 Cal App at 675.

In *Sitek v Forest City Enterprises, Inc*, 587 F Supp 1381 (ED Mich, 1984), Plaintiff was a discharged supervisor. He alleged that he was wrongfully fired for not engaging in union busting. The *Sitek* Court first acknowledged that Plaintiff's alleged conduct was prohibited by NLRA § 8. Then the *Sitek* Court addressed whether the claim was peripheral to the NLRA or whether the claim involved deeply rooted state interests. *Id.* at 1384. The *Sitek* Court held that Plaintiff's claim was *not* peripheral to the NLRA and, therefore, subject to preemption.

Plaintiff's claim, the *Sitek* Court noted, was that his discharge contravened Michigan public policy in that it interfered with the guards' efforts to unionize. Because this is the very issue that would have been before the NLRB on an unfair labor practice charge, and the State's interest did not supersede the NLRA, the *Sitek* Court found it NLRA preempted.

In *MVM Inc v Rodriguez*, 568 F Supp 2d 158 (D Puerto Rico, 2008), Plaintiff MVM contracted with the United States Marshall Service (USMS) to provide court officers to federal courts within the First Circuit. MVM fired Defendant Rodriquez after he informed the USMS of labor disputes between MVM and its court officers. MVM sued Rodriguez for defamation and tortious interference with contract. Rodriguez brought a WPA counterclaim.

The *MVM* Court identified three independent grounds for finding NLRA preemption. Significantly, the MVM Court found that Defendant-Counter Plaintiff Rodriguez's claims of . . . federal labor laws violations were *"more than a "peripheral concern" to the NLRA; it constitutes concerted activity protected by the Act."* *Id.* at 178 (emphasis added).

Here, Plaintiffs' claims are hardly peripheral to the NLRA. Plaintiffs acted upon the absence of a union contract, union wages, and unsafe work conditions. Such conduct goes to the heart of NLRB jurisdiction. Plaintiffs' claims plainly allege conduct that is arguably subject NLRA §§ 7 and 8. As such, the underlying conduct being alleged is of central concern to the NLRA.

Plaintiffs' claims could have been brought before the NLRB as an unfair labor practice charge. So, under *Rodriguez*, *Platt*, *Sitek*, and *MVM*, the fact that the State may have an interest in protecting workers who assert claims such as the Plaintiffs' does not prevent NLRA preemption because Plaintiffs' claims could have been brought before the NLRB.

IV. LMRDA PREEMPTION

A. The LMRDA's Purposes And Objectives: To Promote Union Democracy

Congress enacted the LMRDA to curtail widespread abuse of power by union leadership. *Finnegan,* 456 US at 435; *see also* 29 USC 401(b) and (c) ("Declaration of Findings, Purposes, and Policy.") The LMRDA's overriding objective is to "...ensure that unions are democratically governed." *Finnegan,* 456 US at 441. And, the United States Supreme Court has specifically recognized that "the ability of an elected union president to select his own administrators" is an integral part of ensuring such union democracy and the purposes of the LMRDA. *Id.* at 414, 437, 441.

The LMRDA protects union members' freedom of expression and assembly without fear of retaliation by the union. *Id.* at 436; *see also* 29 USC 411 ("Title I - Bill of Rights of Members of Labor Organizations.") This protection generally does not extend

to union members in their capacity as union employees. In *Finnegan*, the Supreme Court held that a newly-elected local president could terminate the union business agents, who opposed him during the union election, without violating the employees' LMRDA membership rights. *Finnegan,* 456 US at 434.

Finnegan thus established the underlying preemption principle that, as a matter of federal labor law and policy, the LMRDA's union-democracy purposes are best served by ensuring that elected union officials be able to fire appointed union employees. So established, federal courts have regularly found that the LMRDA generally preempts state wrongful discharge claims brought by an appointed employer of the union. *See, e.g., Cehaich v UAW*, 710 F 2d 234 (CA 6, 1983); *Bloom v General Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F 2d 1356 (CA 9, 1986); *Vought v Wisconsin Teamsters Joint Council No 39*, 558 F 3d 617 (CA 7, 2009).

State courts, including the MCOA (*Packowski*), have similarly adhered to *Finnegan*'s mandate and dismissed union employees' state wrongful termination claims as preempted by the LMRDA. These state courts recognized a strong federal policy in governing union employment relationships and declared any state law claims that interfere with these relationships as obstacles to the achievement of the LMRDA's purposes and objectives.

B. In *Packowski*, the MCOA Found That A Union Employee/Member's State Wrongful Discharge Claim Was Preempted And, *Sua Sponte*, Addressed His Retaliatory Discharge Claim

In *Packowski,* the MCOA reviewed federal preemption in a case with remarkably similar facts to the cases *sub judice, viz.,* Plaintiff Packowski was a fired union employee/member who sued over his discharge. *Packowski*, 289 Mich App at 134-35.

In *Packowski*, the discharged former business agent (and union member) sued on two grounds:

> (1) retaliatory discharge in violation of Michigan public policy for assisting in a USDOL investigation of his local union, and
>
> (2) violation of employer-union's "just-cause" termination policy.

The trial court summarily dismissed both claims.

Plaintiff Packowski appealed only the summary dismissal of his just-cause termination claim. *Packowski*, 289 Mich App at 134. Citing *Finnegan*, the MCOA affirmed the trial court's summary dismissal and specifically found that the LMRDA preempted Plaintiff's state just-cause termination claim because it conflicted with one of the LMRDA's purposes, *i.e.,* to promote union democracy by granting union officials the right to choose -- hire/fire -- their union staff. *Packowski*, 289 Mich App at 148 (citing *Finnegan*, 456 US at 442). Specifically, the *Packowski* Court found:

> Conflict preemption applies to preclude plaintiff's state law action. The democratic purposes of the LMRDA would be contravened by allowing a demoted or discharged business agent or organizer to sue for wrongful discharge.

Packowski, 289 Mich App at 144.

As shown below, the *Packowski* holding was well-researched and based upon other state court analogous decisions, including decisions that involved public policy, WPA-like discharge cases.

1. Other Jurisdictions Overwhelmingly Support LMRDA Preemption

Packowski examined LMRDA preemption cases from other jurisdictions. *Id.* at 140 (citing *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221 n6; 761 NW2d 293 (2008)). Finding the LMRDA-preemption cases "more numerous, more analogous ... and more persuasive than the cases finding no preemption," *Packowski* specifically found LMRDA preemption in the context of a discharge of an appointed union business agent. *Packowski*, 289 Mich App at 148.

Of the cases the *Packowski* Court found persuasive, and whose "reasoning" *Packowski* "adopted" and "applied," two cases stand out -- *Dzwonar v McDevitt*, 348 NJ Super 164; 791 A2d 1020 (2002) and *Screen Extras Guild v Superior Court*, 51 Cal 3d 1017; 800 P2d 873 (1990). These cases are significant because *Packowski* reviewed them in detail and they involved more than mere "just cause" dismissal claims. Rather, they involved a WPA-like public policy discharge claim and a court's caution against artful pleading as a means of subverting LMRDA-preemption.

In 2002, the *Dzwonar* court addressed a union employee's retaliatory discharge claim under, *inter alia,* CEPA, an equivalent of Michigan's WPA.[8] The *Dzwonar* court noted that the LMRDA contained "no express limitation of the right of states to protect union employees from discharge in retaliation for conduct falling within ... CEPA," *i.e.,* a

[8] Among other things, CEPA prohibits an employer from firing an employee for disclosing to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of a law, rule or regulation. NJ Stat Ann 34:19-2, 3(a)(1). The Michigan WPA similarly prohibits such conduct. MCL 15.362.

whistle-blower statute. That said, the *Dzwonar* court concluded, the LMRDA preempted the New Jersey whistleblower claim because "such limitation may be inferred from the federal act's [LMRDA] scope." *Dzwonar*, 248 NJ Super at 170.

In *Screen Extras Guild,* the California court held that the LMRDA preempted a discharged union employee's wrongful termination claim based on California's covenant of good faith and fair dealing in an employment contract. The *Screen Extras* court reasoned that if such state claims were permitted to proceed, "creative lawyers" could subvert LMRDA preempted claims by masquerading them as state claims. *Screen Extras Guild*, 51 Cal 3d at 1028.

Packowski also reviewed other LMRDA preemption cases. *Vitullo v Int'l Brotherhood of Electrical Workers, Local 206*, 317 Mont 142; 75 P3d 1250 (2003) (LMRDA preempted discharged union business agent's state claim under the Montana Wrongful Discharge from Employment Act); *Tyra v Kearney*, 153 Cal App 3d 921, 923; 200 Cal Rptr 716 (1984) (LMRDA permits an elected union official to discharge business agents and "allowance of a claim under state law would interfere with the effective administration of national labor policy"); *Smith v Int'l Brotherhood of Electrical Workers,* 109 Cal App 4th 1637, 1648; 1 Cal Rptr 3d 374 (2003) (discharged union organizer sued employer union under a breach of contract claim and the court dismissed under LMRDA preemption.)

These decisions, which *Packowski* also found persuasive, held that union employees' state wrongful discharge claims are LMRDA-preempted because they encroach on federal labor policy and impede Congressional objectives as articulated in *Finnegan* and its progeny.

After preempting Plaintiff Packowski's just-cause termination claim, the *Packowski* Court explicitly addressed Plaintiff Packowski's *unappealed* public policy-based retaliatory discharge claim (related to the USDOL investigation). The *Packowski* court noted that Plaintiff Packowski had a federal claim, in federal court, under the LMRDA for his retaliatory discharge claim:

> We note that, *to the extent that plaintiff has a claim of being demoted or fired in retaliation for participating in a Department of Labor investigation, he has an action for such a claim in federal court.*

Packowski, 289 Mich App at 146 n3 (emphasis added).

C. The U.S. District Court Found LMRDA Preemption In A Union Employee/Member's Public Policy-Based Retaliatory Discharge Suit

This *Packowski* observation is consistent with the reasoning of *Ardingo v Potter,* 445 F Supp 792 (WD Mich, 2006) another case with facts remarkably similar to the case *sub judice*. In *Ardingo*, a union business agent was allegedly fired in violation of his employer union's just cause policy and in retaliation for assisting in a USDOL investigation of his local union's finances and testifying before the grand jury. Plaintiff Ardingo claimed, *inter alia*, violations of his LMRDA free speech rights *and* Michigan public policy. The US District Court for the Western District of Michigan (Hon. Richard Alan Enslen) summarily dismissed his Michigan public policy claim stating:

> LMRDA provides Plaintiff's ***exclusive*** remedy for ***any*** retaliation generated by his free speech.

Ardingo, 445 F Supp at 798 (emphasis added).

Federal district courts have exclusive jurisdiction over suits filed under 29 USC 412 for violation of LMRDA free speech rights. *Safe Workers' Org,* 389 F Supp at 910.

D. The Trial Court and MCOA Committed Error When They Found No Preemption

1. *Packowski*

Despite the striking similarities between these consolidated cases and *Packowski,* the trial court and the MCOA here found *Packowski inapplicable*. (589a-593a) *Packowski,* the trial court and MCOA said, was inapplicable to Plaintiffs' WPA claims because *Packowski* ruled "only ... on just cause termination" and Plaintiffs' claims here were public policy, retaliatory discharge claims. This reads *Packowski* too narrowly.

Packowski thoroughly reviewed the decisions of other jurisdictions, which included public policy retaliatory discharge claims, *e.g., Dzwonar* and New Jersey's whistleblowers statute, found these decisions "persuasive," and "adopted" and "applied" them in finding LMRDA preemption. *Packowski,* 289 Mich App at 144.

The trial court and MCOA also erred in not considering *Packowski's* analysis of the narrow exception to LMRDA preemption. *Packowski* noted the cases that found no LMRDA preemption were "easily distinguished" from the case before it. *Id.* at 145. Specifically, *Packowski* noted that the cases finding no LMRDA preemption pivot on retaliatory discharge claims in which Plaintiffs alleged that they were fired for refusing to commit and/or participate in a crime. *Id.* at 146.

The MCOA's restrictive reading of *Packowski* is contrary to *Packowski's* declared reliance upon the persuasive "reasoning" of other LMRDA preemption cases, in particular *Dzwonar,* and its specific reference to only a narrow exception to LMRDA preemption.

Moreover, *Packowski's* unprompted discussion of Plaintiff Packowski's right to sue in federal court for USDOL-related retaliatory discharge should not be ignored. This marginalization of *Packowski's* pointed and *sua sponte* note misses the bigger picture.

Set in the context of *Packowski's* review of these persuasive LMRDA-preemption cases, *Packowski's* observations made clear that *had* Plaintiff Packowski appealed his public-policy retaliatory discharge claim that too would have been LMRDA preempted, along with his just-cause termination claim.

Even if, *arguendo, Packowski's* observations about LMRDA retaliatory discharge rights were merely dicta, the remarks are entitled to "considerable deference." *People v Bonoite,* 112 Mich App 167, 171; 315 NW2d 884 (1982).

2. WPA Compatibility With Federal Law

Packowski recited the facts of *Dzwonar* at some length. It specifically noted that it was a retaliatory discharge claim brought under New Jersey's CEPA, a WPA-like statute. As such, CEPA is similarly consistent with any "federal law" prohibition against retaliatory discharge. Despite this consistency, *Dzwonar* found LMRDA preemption and *Packowski* cites it approvingly. So, under *Packowski,* a public-policy retaliatory discharge action brought under a WPA-like statute, even one with compatible goals as "federal law," does not exempt the claim from LMRDA preemption.

Contrary to the trial court's and MCOA's intimation, *Packowski* is instructive with regard to retaliatory discharge claims brought under state statutes that are compatible with federal law. *Packowski's* extensive discussion about discharge cases in the context of LMRDA, and its specific discussion of *Dzwonar* and *Smith,* which presents a narrow exception to LMRDA preemption, illustrates that *Packowski* considered such

public policy retaliatory discharge claims and nonetheless found them preempted by LMRDA.

3. The LMRDA "Savings Clause"

Though not fully developed in its bench opinion, the trial court references the LMRDA "savings clause," 29 USC 523(a), as exempting Plaintiffs' WPA from LMRDA preemption. (593a) This too is an error. The MCOA only ellipitically refers to the "savings clause".

The trial court overreads the LMRDA "savings clause." It fails to consider the proper interplay between the LMRDA's "savings clause" and the compelling rule of federal preemption. This reliance misses the point that state laws must, *despite the "savings clause,"* clear the LMRDA preemption analysis. *See Dzwonar, supra; Vitullo, supra.*

E. Plaintiffs' WPA Claims Are Not Subject To Public Policy Exception To LMRDA Preemption, As Recognized By *Packowski*

Packowski recognized a public policy exception to LMRDA preemption. *Packowski,* 289 Mich App at 146. Specifically, *Packowski* acknowledged an exception to LMRDA preemption to the extent the claim is "based on an employee's unwillingness to aid his superior in the violation of concealment of a violation of criminal statute." *Bloom*, 783 F 2d at 1361-62. *See also Montoya v Local Union III of the Int'l Brotherhood of Electrical Workers*, 755 P2d 1221, 1224 (Colo App, 1988).

This exception to LMRDA preemption is not available to Plaintiffs. None of Plaintiffs allege, under the WPA, that they were discharged because they refused to commit or participate in a crime.

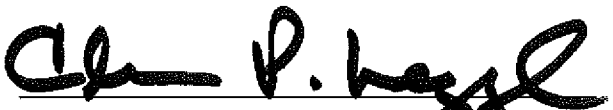
V. RELIEF SOUGHT

Defendants-Appellants ask this Court to enter an order reversing the Court of Appeals' decision and grant summary judgment for Defendants for the reasons set forth in Defendants-Appellants' brief.

Plaintiffs-Appellees' WPA claims are preempted under the NLRA for the reasons articulated in *Garmon* and by the Michigan Court of Appeals in *Calabrese.* Extending the WPA to this dispute inserts it into traditional employer/employee labor disputes regulated under the NLRA and the NLRB.

Plaintiffs-Appellees' stated WPA claims impede the federal labor policy, contravene the LMRDA's objectives as defined by the United States Supreme Court, and circumvent the LMRDA preemption principle as adopted and applied by this Court in *Packowski.*

Respectfully submitted,
LEGGHIO & ISRAEL, P.C.



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Dated: April 17, 2013

UNPUBLISED DECISIONS

Not Reported in N.W.2d, 2005 WL 1685103 (Mich.App.)
(Cite as: 2005 WL 1685103 (Mich.App.))

Court of Appeals of Michigan.
Bruce PIERSON and David Gaffka, Plaintiffs/Counterdefendants-Appellants/Cross-Appellees,
v.
Andre AHERN, Defendant/Counterplaintiff/Third-Party Plaintiff-Appellee/Cross-Appellant,
and
Tokio OGIHARA and Ogihara America Corporation, Third-Party Defendants-Cross-Appellees.

No. 260661.
July 19, 2005.

Before: FITZGERALD, P.J., and METER and OWENS, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Plaintiffs appeal as of right, and defendant cross appeals, from the trial court's order granting defendant summary disposition on plaintiffs' first amended complaint, and granting plaintiffs' motion for summary disposition of defendant's countercomplaint. We affirm.

Plaintiffs commenced this action for defamation after defendant allegedly sent a package of materials to third-party defendant Tokio Ogihara, president of third-party defendant Ogihara America, where plaintiffs and defendant were employed. The package consisted of a letter that allegedly disparaged plaintiff David Gaffka's work performance and photographs that allegedly showed examples of his poor workmanship. The return address label on the package listed plaintiff Bruce Pierson as the sender. The company investigated the incident, concluded that defendant was the actual sender of the package, and subsequently discharged him for violating the company's code of conduct. Defendant filed a countercomplaint and a third-party complaint alleging claims for contribution, [FN1] abuse of process, conspiracy to abuse process, and discharge in violation of public policy. The trial court dismissed plaintiffs' first amended complaint pursuant to MCR 2.116(C)(8) (failure to state a claim), and dismissed defendant's countercomplaint and third-party complaint pursuant to MCR 2.116(C)(4) (lack of subject-matter jurisdiction).

FN1. This claim is not at issue on appeal.

Plaintiffs first argue that the trial court erred in dismissing their defamation claims under MCR 2.116(C)(8). A trial court's decision regarding summary disposition is reviewed de novo. *Corley v. Detroit Bd of Ed*, 470 Mich. 274, 277; 681 NW2d 342 (2004). A motion under MCR 2.116(C)(8) challenges the legal sufficiency of the claim based on the pleadings alone. *Id.*

To establish a defamation claim, a plaintiff must show (1) a false and defamatory statement about the plaintiff, (2) an unprivileged publication to another party, (3) fault amounting at a minimum to negligence on the publisher's part, and (4) either actionability of the statement regardless of special harm or the existence of special harm as a result of the publication. *Kevorkian v. American Medical Ass'n*, 237 Mich.App 1, 8-9; 602 NW2d 233 (1999). The complained-of statements must be pleaded with specificity. *Royal Palace Homes, Inc v. Channel 7 of Detroit, Inc*, 197 Mich.App 48, 53-54, 56-57; 495 NW2d 392

(1992). In their first amended complaint, plaintiffs alleged that defendant sent a package of allegedly defamatory materials consisting of a letter and photographs to Ogihara, but plaintiffs did not attach copies of the letter or photographs, or describe their substance in their complaint. We agree with the trial court that plaintiffs failed to plead a claim of defamation with sufficient specificity regarding the allegedly defamatory statements. *Id.* Summary disposition was proper under MCR 2.116(C)(8).[FN2]

> FN2. Although plaintiffs assert that the trial court improperly looked beyond the pleadings, the trial court's reference to matters outside the pleadings was made only in the context of the court's independent ruling that if it were to consider plaintiffs' proposed second amended complaint, those claims would not be sustained because there was no genuine issue of material fact regarding whether plaintiffs were injured. There is no indication in the trial court's opinion that the court considered any documents beyond the pleadings when granting summary disposition of plaintiffs' first amended complaint under MCR 2.116(C)(8) for failure to state a cause of action.

Plaintiffs also argue that the trial court erred in denying their motion to amend their complaint. In its opinion, the trial court stated that even if it had allowed plaintiffs to file their proposed second amended complaint, it would have found that summary disposition was still proper because, with regard to plaintiffs' defamation claims, plaintiffs "failed to present sufficient evidence alleging a question of material fact of the defamatory nature of the letter and photographs." In essence, the trial court concluded that even if plaintiffs had filed their proposed second amended complaint, summary disposition was warranted under MCR 2.116(C)(10). Plaintiffs claim the court's decision was erroneous because it required plaintiffs to prove economic damages even though plaintiffs had pleaded defamation per se when they pleaded damage to their professional standing. We disagree.

***2** Defamation per se does not require proof of damages because injury is presumed. *Burden v Elias Bros Big Boy Restaurants*, 240 Mich.App 723, 728; 613 NW2d 378 (2000). Citing *Glazer v. Lamkin*, 201 Mich.App 432, 438; 506 NW2d 570 (1993), plaintiffs argue that defamation with respect to professional standing is slander per se. The Court in *Glazer, supra* stated, "Slander (libel) per se exists where the words spoken (written) are false and malicious and are injurious to a person in that person's profession or employment." *Id.*, citing *Swenson-Davis v. Martel*, 135 Mich.App 632, 635; 354 NW2d 288 (1984). Injurious is defined as "1. harmful, hurtful, or detrimental, as in effect ... 2. insulting; abusive; defamatory." *Random House Webster's Dictionary* (2001). The first definition indicates that there has to be a harmful effect; however, the second definition, which actually lists defamatory, does not necessarily indicate that there has to be a harmful result. The need to demonstrate a harmful result or effect does not appear to coincide with the per se concept of presumed injury.

Nevertheless, quoting MCL 600.2911(2)(a), the *Glazer* Panel also stated that a plaintiff " 'is entitled to recover only the actual damages he or she has suffered." ' *Glazer, supra* at 436. The statute provides that a plaintiff may only recover for actual damages suffered "in respect to his or her property, business, trade, profession, occupation, or feelings." MCL 600.2911(2)(a). The statute separately indicates that words imputing lack of chastity or commission of a criminal offense "are actionable in themselves." MCL 600.2911(1). Because the statute allows recovery only for actual damages for defamation regarding one's profession; the statute lists per se actions separately under a different subsection; and this Court in *Glazer, supra* indicated actual damages must be proven, plaintiffs here were required to show actual damages, and the instant court appropriately found that plaintiffs failed to do so.

On cross appeal, defendant argues that the trial court erred in determining that his claims for abuse of process, conspiracy to abuse process, and discharge in violation of public policy, were preempted by the National Labor Relations Act (NLRA), 29 USC 151 *et seq.* We review de novo whether a court has subject-matter jurisdiction. *Calabrese v Tendercare of Michigan, Inc.* 262 Mich.App 256, 259; 685 NW2d 313 (2004).

As this Court observed in *Calabrese, supra* at 260, under the United States Supreme Court's decision in *San Diego Building Trades Council v Garmon,* 346 U.S. 485; 74 S Ct 161; 98 L Ed 228 (1959), a state claim is preempted when it concerns

> "an activity that is actually or arguably protected or prohibited by the NLRA. The state claim may survive, however, if the conduct at issue 'is of only peripheral concern to the federal law or touches interests so deeply rooted in local feeling and responsibility....' The court balances the state's interest in regulating or promoting a remedy for the conduct against the intrusion in the NLRB's [National Labor Relations Board's] jurisdiction and the risk that the state's determination will be inconsistent with provisions of the NLRA. [Quoting *Bullock v Automobile Club of Michigan,* 432 Mich. 472, 493; 444 NW2d 114 (1989) (footnotes omitted).]

***3** If the controversy pertains to a matter identical to one that could be presented to the NLRB under the NLRA, state exercise of jurisdiction necessarily involves a risk of interference with the NLRB's jurisdiction and is precluded. *Calabrese, supra* at 261.

Section 157 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations...." 29 USC 157. Additionally, § 158 of the NLRA states, in pertinent part:

> (a) It shall be an unfair labor practice for an employer-
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it ...;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ...;
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter. [29 USC 158.]

Defendant's countercomplaint alleges that plaintiffs and third-party defendants conspired to abuse the judicial process by initiating this lawsuit for ulterior motives, namely, to retaliate against him for his union activity and for testimony he gave before the NLRB that was against his employer's interest, to intimidate him and others from engaging in union activities, and to discover the names of other union supporters in order to retaliate against them. Defendant further alleges that he was terminated because of his participation in unionizing activities. Looking at the gravamen of defendant's countercomplaint, the trial court correctly determined that defendant's claims fell within the purview of the NLRA by alleging unfair labor practices. The alleged actions by the third-party defendants are precisely the type of employer conduct that the NLRA seeks to prohibit under §§ 157 and 158 of the NLRA.

Defendant's argument that the trial court erred by

not performing the balancing test set forth in *Calabrese, supra,* is without merit. The balancing test is utilized only when the claim is of peripheral concern to the NLRA or affects interests deeply rooted in local feeling and responsibility. *Belknap, Inc v. Hale,* 463 U.S. 491, 498; 103 S Ct 3172; 77 L.Ed.2d 798 (1983). Here, the trial court properly concluded that it was unnecessary to engage in the balancing test because "the claims concern activities that are actually protected or prohibited by the NLRA."

We reject defendant's argument that his claims are "so deeply rooted in local feeling and responsibility" that they are actionable in state court. This exception to the *Garmon* preemption doctrine has been construed narrowly, in favor of the broad, exclusive jurisdiction of the NLRB. *Int'l Longshoremen's Ass'n v. Davis,* 476 U.S. 380, 391-393; 106 S Ct 1904; 90 L.Ed.2d 389 (1986). Claims that have been held to fall within the exception involve state laws regulating violence, defamation, intentional infliction of emotional distress, trespassory picketing, and obstruction of access to property. *Sears, Roebuck & Co v San Diego Co Dist Council of Carpenters,* 436 U.S. 180, 204, 207; 98 S Ct 1745; 56 L.Ed.2d 209 (1978). Regardless of defendant's characterization of his claims, at their core they involve his participation in unionizing activities, the very subject matter of the NLRA.

***4** Lastly, we find no merit to defendant's contention that his claim for discharge in violation of public policy is not preempted. In *Calabrese, supra,* the plaintiff alleged that she was wrongfully terminated because she would not fire employees for engaging in unionizing activities. She filed suit asserting claims for wrongful discharge and tortious interference with business relations. *Calabrese, supra* at 258-259. The plaintiff contended that she was terminated in violation of public policy. *Id.* at 259. This Court concluded that the plaintiff's claims constituted allegations of unfair labor practices under the NLRA and, thus, were preempted under the *Garmon* doctrine. *Id.* at 262-263. There are no distinguishing factors in this case that would compel a different result here. Accordingly, the trial court properly dismissed defendant's countercomplaint and third-party complaint for lack of subject-matter jurisdiction.

Affirmed.

Mich.App.,2005.
Pierson v. Ahern
Not Reported in N.W.2d, 2005 WL 1685103 (Mich.App.)

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Not Reported in N.W.2d, 2004 WL 2881814 (Mich.App.)
(Cite as: 2004 WL 2881814 (Mich.App.))

Court of Appeals of Michigan.
Gerald RADZIKOWSKI, Plaintiff-Appellant,
v.
BASF CORPORATION, Defendant-Appellee.

No. 250198.
Dec. 14, 2004.

Before: MURPHY, P.J., and WHITE and KELLY, JJ.

[UNPUBLISHED]
MURPHY, WHITE and KELLY, JJ.
MEMORANDUM.

*1 Plaintiff appeals as of right from the circuit court's order granting summary disposition in favor of defendant in this employment discrimination case. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Plaintiff argues that the relevant count of his complaint was not preempted by the National Labor Relations Act (NLRA). We disagree.

Whether a court has subject-matter jurisdiction is reviewed do novo. *Calabrese v Tendercare of Michigan, Inc*, 262 Mich.App 256, 259; 685 NW2d 313 (2004).

Under the preemption doctrine of *San Diego Building Trades Council v Garmon*, 359 U.S. 236, 245; 79 S Ct 773; 3 L.Ed.2d 775 (1959), a state claim is preempted when it concerns "an activity that is actually or arguably protected or prohibited by the NLRA." *Calabrese, supra* at 260, quoting *Bullock v Automobile Club of Michigan*, 432 Mich. 472, 492-493; 444 NW2d 114 (1989). The *Garmon* preemption doctrine "requires that when the same controversy may be presented to the state court or the NLRB [National Labor Relations Board], it must be presented to the Board." *Calabrese, supra* at 260-261, quoting *Sears, Roebuck, & Co v San Diego Co Dist Council of Carpenters*, 436 U.S. 180, 202; 98 S Ct 1745; 56 L.Ed.2d 209 (1978). The NLRA prohibits an employer from discriminating against an employee with regard to "tenure of employment" "to encourage or discourage membership in any labor organization." *Calabrese, supra* at 262, quoting 29 USC 158. The clear implication of plaintiff's allegation that defendant terminated him for discussing unions is that defendant took this action to discourage membership in a labor organization. It is immaterial whether there was evidence that *plaintiff* acted with an intent to further unionization or other concerted activity by employees. Defendant was prohibited by the NLRA from discriminating against plaintiff to discourage membership in a union regardless of plaintiff's intent. Accordingly, plaintiff's claim concerns alleged activity by defendant that is at least arguably prohibited by the NLRA and, thus, could have been presented to the NLRB. The circuit court properly granted defendant's motion for summary disposition with regard to plaintiff's claim because it was preempted by federal labor law.

In light of this conclusion, it is unnecessary to reach the parties' additional arguments regarding whether plaintiff presented adequate evidence that his discharge was related to his alleged union-related conversation.

Affirmed.

Mich.App.,2004.

Radzikowski v. BASF Corp.
Not Reported in N.W.2d, 2004 WL 2881814 (Mich.App.)

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