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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 CHARLES G. WRIGHT,

8 Plaintiff,

9 v.

10 JOHN MERK and JANE DOE MERK,
husband and wife and their marital
community, if any, and
11 INTERNATIONAL ASSOCIATION
OF SHEET METAL, AIR, RAIL,
12 AND TRANSPORTATION
WORKERS, LOCAL 55 (SMART),
13

14 Defendants.

NO: 4:14-CV-5090-RMP

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION TO AMEND
COMPLAINT

15 BEFORE THE COURT is Defendants' Motion for Summary Judgment,
16 **ECF No. 15**, and Plaintiff's Motion to Amend Complaint, **ECF No. 23**. The Court
17 heard oral argument on the motions on July 23, 2015, in Richland, WA. Attorney
18 Scott M. Kinshella appeared on behalf of Plaintiff Charles G. Wright, and attorney
19 Jacob H. Black appeared on behalf of Defendants John and Jane Doe Merk, and
20 International Association of Sheet Metal, Air, Rail, and Transportation Works,

GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT ~ 1

1 Local 55. The Court has reviewed the motions, considered the parties' arguments,
2 and is fully informed.

3 **BACKGROUND**

4 Plaintiff Charles Wright¹ was and is a member of International Association
5 of Sheet Metal, Air, Rail, and Transportation Workers Local #55 ("SMART Local
6 #55"), a labor union operating in Washington and Idaho. ECF No. 19 at 1.

7 Beginning in March 2010, through July 3, 2014, Mr. Wright served as a Union
8 Organizer for SMART Local #55. Wright Dep., ECF No. 17-1 at 21-22. Mr.

9 Wright's position as a Union Organizer was subsidized by the International
10 Association of Sheet Metal, Air, Rail, and Transportation Workers

11 ("International"): SMART Local #55 paid half of his salary, and International paid
12 the other half. Wright Dep., ECF No. 31-1 at 13; ECF No. 17-1 at 14; Merk. Decl.,
13 ECF No. 18 at 3-4.

14 Mr. Wright was an at-will employee who served a one-year, renewable term
15 of employment. Wright Decl., ECF No. 19 at 2; Merk Dep., ECF No. 21-1 at 60.

16 International's constitution states that a local organizer "serve[s] at the discretion
17 of the business manager." ECF No. 18-1, Ex. A at 71. Mr. Wright's term was

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19 ¹ Co-Plaintiff Tracey Henderson was dismissed upon the parties' stipulation on
20 January 29, 2015. ECF No. 14.

1 renewed five successive years. Wright Decl., ECF No. 19 at 2. Mr. Wright states
2 that, when he was hired, the applicable pay structure was explained to him “in a
3 way that made it clear that [he] was under a one year contract which could be
4 renewed for other one year terms with an increase in pay.” Wright Decl., ECF No.
5 19 at 2. He understood this term structure to mean “that each March [his]
6 employment would be renewed for another year term assuming [he] was doing
7 [his] job.” Wright Decl., ECF No. 19 at 2.

8 Mr. Wright alleges that when he was appointed one of the International
9 Organizers, Sean Mahoney, gave him a copy of the 2009 Policy for the Local
10 Union Subsidized Organizers Program and “pointed out the application of its
11 provisions to local organizers and to Local 55.” Wright Decl., ECF No. 19 at 3-4;
12 EC However, Defendant John Merk contends that “Local 55 did not create the
13 policy, did not distribute the policy to its employees, and did not inform its
14 employees that the policy applied to them.” Merk. Decl., ECF No. 18 at 6-7. The
15 policy states:

16 The Local Union and the International Association, over time, will
17 *invest large sums* of money training, educating, and outfitting the
18 subsidized local union organizer. The knowledge and skills gained by
19 the organizer over a period of years is invaluable to our organization.
20 This is not an investment to be taken lightly. Obviously, when a local
union Subsidized Organizer is not doing the assigned duties, the
Business Manager may take disciplinary action, up to and including
termination.

1 ECF No. 18-1, Ex. D at 13 (emphasis in original). Additionally, the policy states
2 that “[t]he selection of the organizer by the local union is a critical step in the
3 success of an organizing program and should be undertaken without personal or
4 political motivation.” ECF No. 18-1, Ex. D at 9.

5 As a Union Organizer, Mr. Wright engaged in picketing and handbilling,
6 promoting SMART Local #55. Wright Dep., ECF No. 17-1 at 54-64. He worked
7 to incorporate new targets, or labor forces, into the Union, sometimes engaging
8 directly with nonorganized employees, and sometimes engaging upper
9 management regarding recognizing the Union. Wright Dep., ECF No. 17-1 at 54-
10 64. He states that all of his decisions regarding who to target, where to picket or
11 handbill, and the content of the handbills, had to be approved by either the
12 International Organizer Sean Mahoney or SMART Local #55’s Business Manager
13 / Financial Secretary, John Merk. Wright Decl., ECF No. 19 at 7 (“I had no
14 control over the decision-making process.”); Wright Dep., ECF No. 17-1 at 54-64.²
15 Mr. Merk states that Mr. Wright “played a significant role in developing and
16 implementing Local 55’s organizing strategy. . . . In accomplishing these tasks,
17 Wright often consulted with both [Merk] and the International’s organizer for our

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19 ² The Business Manager / Financial Secretary is the “top executive position” in
20 SMART Local #55. Merk Decl., ECF No. 18 at 2.

1 region, Sean Mahoney.” Merk Decl., ECF No. 18 at 4. However, Mr. Merk
2 described Mr. Wright’s position as a Union Organizer as being “in a policy-
3 implementing level,” as opposed to a “policy-making” position. Merk Dep., ECF
4 No. 21-1 at 75.

5 In May 2014, Mr. Wright decided to run for the position of Business
6 Manager / Financial Secretary. Wright Decl., ECF No. 19 at 6. Mr. Wright ran
7 against the incumbent, John Merk. Wright Decl., ECF No. 19 at 5-6; Merk Decl.,
8 ECF No. 18 at 4. In so doing, Mr. Wright campaigned under the slogan “New
9 People with New Ideas,” on a slate with two other candidates: Mark Born, who
10 successfully ran for Tri-Cities Business Agent, and Tracey Henderson, who
11 unsuccessfully ran for Boise Business Agent. ECF 17, Ex. D.

12 While campaigning, Mr. Wright was openly critical of Mr. Merk’s
13 performance as the incumbent Business Manager. Wright Dep., ECF No. 17, Ex.
14 A at 84, 91-92. He stated that Mr. Merk didn’t “have a future in this union,” that
15 he “talks down” about the members, and that he was “weakening [the] organizing
16 program.” Wright Dep., ECF No. 17, Ex. A at 84. He spoke critically of Mr.
17 Merk’s budget decisions, his decision to reduce organizing costs, and the fact that
18 the telephones at the union hall often went unanswered. Wright Dep., ECF No. 17,
19 Ex. A at 91-92. He promised, if he was elected, to hire more Union Organizers, to
20 require the Business Representatives to spend more time in the field, to hire a

1 secretary to answer the phones, to have quarterly staff meetings, and to hire two
2 additional employees. Wright Dep., ECF No. 17, Ex. A at 91-92.

3 Mr. Merk narrowly defeated Mr. Wright in the election on June 24, 2014.
4 Wright Decl., ECF No. 19 at 6. On July 3, 2014, Mr. Merk terminated Mr.
5 Wright's employment as a Union Organizer. Wright Decl., ECF No. 19 at 7; Merk
6 Decl., ECF No. 18 at 5. According to Mr. Wright, Mr. Merk told him that he was
7 terminating Mr. Wright because he ran against him in the election. Wright Decl.,
8 ECF No. 19 at 7. Defendants do not contend that Mr. Wright was performing his
9 duties unsatisfactorily. Instead, Mr. Merk admits:

10 In my opinion, to lead Local 55 effectively, I need a professional staff
11 that supports my policies. I felt that by running against me that
12 Wright had exhibited that he was disloyal to me and to my leadership.
13 The members voted for me rather than Wright. I took this as a
14 mandate to implement my policies and plans for Local 55. Since
15 Wright had campaigned against me and my policies, I did not have
16 confidence that he could work cooperatively with me to achieve my
17 goals for Local 55. In light of Wright's statements during the
18 election, I no longer believed that Wright was capable of working
19 with me in my administration and carrying out the membership's
20 mandate.

16 Merk Decl., ECF No. 18 at 5-6.

17 Mr. Wright contends that he was never informed by anyone at SMART
18 Local #55 or International that his employment might be terminated if he ran
19 against Mr. Merk and lost. Wright Decl., ECF No. 19 at 5-6. Mr. Merk admits

1 that he never told Mr. Wright that if his campaign was unsuccessful, he would be
2 terminated. Merk Dep., ECF No. 21-1 at 48.

3 Mr. Wright filed a complaint in Franklin County Superior Court on August
4 21, 2014. ECF No. 2-1.³ The complaint alleges three causes of action based on
5 Mr. Wright's termination: (1) wrongful termination / retaliatory discharge in
6 violation of public policy; (2) breach of implied contract; and (3) discriminatory
7 discharge in violation of RCW 42.17A.495. ECF No. 2-1. All three causes of
8 action are based on Washington state law. ECF No. 2-1.

9 Defendants move for summary judgment on all three causes of action as
10 preempted by federal labor law. ECF No. 15. Mr. Wright concedes that his first
11 and third causes of action are preempted and withdraws them. ECF No. 20 at 3.
12 Mr. Wright contends that his second cause of action claiming a breach of implied
13 contract is not preempted. ECF No. 20 at 4. He moves to amend his complaint to
14 include two additional federal causes of action based on §§ 101-102 of the Labor-
15 Management Reporting and Disclosure Act ("LMRDA") and § 301 of the Labor
16 Management Relations Act ("LMRA"). ECF No. 23.

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19 ³ Mr. Wright chose not to file a charge with the National Labor Relations Board,
20 but his former co-plaintiff did. Wright Dep., ECF No. 17, Ex. A at 43; Ex. E.

1 **DISCUSSION**

2 **A. Motion for Summary Judgment**

3 Summary judgment is appropriate when the moving party establishes that
4 there are no genuine issues of material fact and that the movant is entitled to
5 judgment as a matter of law. Fed. R. Civ. P. 56(a). If the moving party
6 demonstrates the absence of a genuine issue of material fact, the burden then shifts
7 to the non-moving party to set out specific facts showing a genuine issue for trial.
8 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). A genuine issue of material
9 fact exists if sufficient evidence supports the claimed factual dispute, requiring “a
10 jury or judge to resolve the parties’ differing versions of the truth at trial.” *T.W.*
11 *Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

12 The evidence presented by both the moving and non-moving parties must be
13 admissible. Fed. R. Civ. P. 56(e). Evidence that may be relied upon at the
14 summary judgment stage includes “depositions, documents, electronically stored
15 information, affidavits or declarations, stipulations . . . admissions, [and]
16 interrogatory answers . . .” Fed. R. Civ. P. 56(c)(1)(A). The court will not
17 presume missing facts, and non-specific facts in affidavits are not sufficient to
18 support or undermine a claim. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89
19 (1990).

1 In evaluating a motion for summary judgment, the Court must draw all
2 reasonable inferences in favor of the nonmoving party. *Dzung Chu v. Oracle*
3 *Corp. (In re Oracle Corp. Secs. Litig.)*, 627 F.3d 376, 387 (9th Cir. 2010) (citing
4 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). However, “when
5 opposing parties tell two different stories, one of which is blatantly contradicted by
6 the record, so that no reasonable jury could believe it, a court should not adopt that
7 version of that facts” *Scott v. Harris*, 550 U.S. 372, 380 (2007).

8 *i. First and Third Causes of Action*

9 In his first cause of action, Mr. Wright claimed that his termination violated
10 two Washington statutes: the Little Norris-LaGuardia Act, codified at RCW
11 49.32.020, which protects workers’ freedom to associate and organize; and RCW
12 42.17A.495(2), which prohibits an employer from discriminating against an
13 employee “in the terms or conditions of employment” for political activism. ECF
14 No. 2-1 at 7-8. In his third cause of action, Mr. Wright claimed that his
15 termination constituted a discriminatory discharge in violation of RCW
16 42.17A.495.

17 Defendants argued that all of Mr. Wright’s claims, including the second
18 cause of action, are preempted by federal labor law. ECF No. 15. Specifically,
19 Defendants contend that any claims that Mr. Wright was terminated for engaging
20 in union activity are preempted by the NLRA under *San Diego Bldg. Trades*

1 *Council v. Garmon*, 359 U.S. 236 (1963). Defendants also argue that Mr. Wright's
2 claims fall within an area of the law that Congress intended to be left unregulated,
3 and thus are preempted under *Machinists Lodge 76 v. Wis. Emp't Relations*
4 *Comm'n*, 427 U.S. 132, 149-51 (1976) and *Finnegan v. Leu*, 456 U.S. 431, 435-36
5 (1982).

6 Mr. Wright acknowledges that his first and third causes of action are
7 preempted under federal labor law. ECF No. 20 at 3. Therefore, Mr. Wright
8 withdraws those claims. ECF No. 20 at 3.

9 *ii. Second Cause of Action*

10 In his second cause of action, Mr. Wright claims that his termination
11 breached an implied contract of continued employment created between him and
12 SMART Local #55 by the organization's adoption of International's Constitution
13 and Policy for the Local Union Subsidized Organizers Program. ECF No. 2-1 at 9.
14 Mr. Wright argues that the constitution and Subsidized Organizers Policy gave him
15 the expectation that his employment term would be renewed each year if he
16 performed the job satisfactorily and that he could not be terminated without good
17 cause or based on political motivations. He argues that SMART Local #55
18 adopted those policies by communicating their contents to Mr. Wright, thereby
19 creating an implied contract of continued employment. Mr. Wright also argues
20 that he was never informed that he would be terminated if he ran against Mr. Merk

1 in the election, and that he detrimentally relied on this implied contract and lack of
2 information regarding the likelihood of his termination when he chose to accept the
3 nomination for Business Manager. Mr. Wright’s claim is based on Washington
4 state common law.

5 Defendants argue that Mr. Wright’s second cause of action is preempted by
6 § 301 of the LMRA because it requires interpretation of two labor contracts: the
7 constitution and the Subsidized Organizers Policy. ECF No. 15 at 10. Mr. Wright
8 disagrees, arguing that his breach of contract claim does not seek to enforce the
9 constitution or the Subsidized Organizers Policy as a contract, but rather, alleges
10 that an implied contract existed between SMART Local #55 and him which
11 “incorporated some of the language present in the contract between Local 55 and
12 the international.” ECF No. 20 at 5. According to Mr. Wright, “[a]ny language
13 from [the constitution and policy] need only be interpreted indirectly, to the extent
14 that it has been incorporated into the implied contract between Wright and Local
15 55.” ECF No. 20 at 5.

16 Section 301 establishes the proper venue for suits by and against labor
17 organizations, permitting those suits to be brought “in any district court of the
18 United States having jurisdiction of the parties” 29 U.S.C. § 185(a). The
19 Supreme Court has held that courts must apply federal law to suits brought under §
20 301. *Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448, 456

1 (1957). Additionally, § 301 has a preemptive effect, prohibiting courts from
2 applying state law to claims regarding collective bargaining agreements. *Local*
3 *174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas*
4 *Flour Co.*, 369 U.S. 95, 103-04 (1962) (“[W]e cannot but conclude that in enacting
5 § 301 Congress intended doctrines of federal labor law uniformly to prevail over
6 inconsistent local rules.”).

7 Later, the Supreme Court summarized the holding in *Lucas Flour Co.*,
8 stating that “a suit in state court alleging a violation of a provision of a labor
9 contract must be brought under § 301 and be resolved by reference to federal law.
10 A state rule that purports to define the meaning or scope of a term in a contract suit
11 therefore is pre-empted by federal labor law.” *Allis-Chalmers Corp. v. Lueck*, 471
12 U.S. 202, 210 (1985). More so, “questions relating to what the parties to a labor
13 agreement agreed, and what legal consequences were intended to flow from
14 breaches of that agreement, must be resolved by reference to uniform federal law .
15 . . .” *Id.* at 211. “Therefore, state-law rights and obligations that do not exist
16 independently of private agreements, and that as a result can be waived or altered
17 by agreement of private parties, are pre-empted by those agreements.” *Id.* at 213.
18 However, “as long as the state-law claim can be resolved without interpreting the
19 agreement itself, the claim is ‘independent’ of the agreement for § 301 pre-emption
20 purposes.” *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 410 (1988).

1 International union constitutions are “contracts” under § 301. *Wooddell v.*
2 *Int’l Broth. Of Elec. Workers, Local 71*, 502 U.S. 93, 99-100 (1991) (“Since union
3 constitutions were at the time of enactment of Taft-Hartley (and remain) probably
4 the most commonplace form of contract between labor organizations, we
5 concluded that Congress would not likely have used the unqualified term ‘contract’
6 without intending to encompass union constitutions.”). Similarly, a union’s bylaws
7 constitute a contract under § 301. *Wooddell*, 502 U.S. at 100. The parties have not
8 presented any case law finding that an international labor union’s policy, such as
9 the Subsidized Organizer Policy, constitutes a contract under § 301. However, for
10 purposes of this analysis, the Court will presume that a labor union policy is
11 analogous to a union’s bylaws and therefore constitutes a contract under § 301.

12 Mr. Wright cites *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22 (2d Cir.
13 1988), to show that a state law implied contract claim is not preempted by § 301.
14 *Derrico* is inapposite. In *Derrico*, a plaintiff sought to enforce the terms of an
15 expired collective bargaining agreement. *Derrico*, 844 F.2d at 23. The Second
16 Circuit found that § 301 did not apply to the plaintiff’s claim because the collective
17 bargaining agreement was expired. *Id.* at 25. The court stated that “the district
18 court correctly held that section 301 has no application in the absence of a
19 currently effective CBA. Section 301 would of course preempt any attempt to
20 enforce the CBA itself by resort to state law.” *Id.* at 25. Only after forming this

1 conclusion did the court state that its holding was “bolstered” by the fact that the
2 plaintiff’s claim alleged an implied contract. *Id.* at 25. The Circuit stated that it
3 knew of “no case holding that a contract between an employer and an individual
4 employee falls under section 301.” *Id.* at 26.

5 Mr. Wright’s argument that the Court only need analyze the constitution and
6 policy indirectly is unpersuasive. Mr. Wright alleges that an International
7 employee, Sean Mahoney, showed him the provisions in the constitution and
8 Subsidized Union Organizers’ Policy that applied to his position. He argues that in
9 showing him these provisions, SMART Local #55 adopted the terms of the
10 documents, and that combined with statements made by other employees, an
11 implied contract was formed between Mr. Wright and SMART Local #55. Mr.
12 Wright contends that the actions and words of union personnel comprise the
13 alleged implied contract because there is no written employment contract between
14 Mr. Wright and SMART Local #55. Therefore, the act of showing Mr. Wright the
15 constitution and policy itself arguably makes up part of the implied contract.⁴

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18 ⁴ The Court notes that Mr. Mahoney is not an employee of SMART Local #55.
19 Whether he had the authority to bind SMART Local #55 is an issue not briefed by
20 the parties.

1 In this case, Mr. Wright alleges that the constitution and policy are at least
2 part of the alleged implied contract. Therefore, the Court must read the
3 constitution and policy in order to determine which provisions allegedly make up
4 the implied contract, as well as read the context of those provisions. Under *Lucas*
5 *Flour Co.* and *Allis-Chalmers Corp.*, the Court is prohibited from analyzing the
6 constitution, and arguably the policy, in order to determine a claim pursuant to
7 state law.

8 Defendants also argue that Mr. Wright’s second cause of action is preempted
9 by the NLRA because it is based on Mr. Wright’s having engaged in “concerted
10 protected activities” and because the second cause of action is related to his
11 termination. ECF No. 29. Therefore, under *Garmon*, Mr. Wright’s breach of
12 contract claim is preempted. ECF No. 15 at 2 – 5.

13 In *Garmon*, the Supreme Court held that “[w]hen an activity is arguably
14 subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must
15 defer to the exclusive competence of the National Labor Relations Board if the
16 danger of state interference with national policy is to be averted.” *Garmon*, 359
17 U.S. at 245. Section 7 of the NLRA protects workers’ rights to “self-organization,
18 to form, join, or assist labor organizations, to bargain collectively through
19 representatives of their own choosing, and to engage in other concerted activities
20 for the purpose of collective bargaining or other mutual aid or protection” 29

1 U.S.C. § 157. Under § 8 of the NLRA, it is an “unfair labor practice” for an
2 employer to “interfere with, restrain, or coerce employees in the exercise of the
3 rights guaranteed” by § 7. 29 U.S.C. § 158(a)(1).

4 This Court previously considered whether an employee’s claim of wrongful
5 termination, based on the employee’s participation in an election, was preempted
6 by § 7 of the NLRA. *Kirwin v. Teamsters Local Union No. CV-10-365-RMP*,
7 2012 WL 553993, *7 (E.D. Wa. Feb. 21, 2012). The Court reasoned that because
8 the employees’ state law claim “springs from their employment with the Union,
9 not their membership in the union,” the state law claim is “included within the
10 protections of § 157, and the NLRA is applicable.” *Kirwin*, 2012 WL 553993, at
11 *8. The Court concluded that “the adverse employment action resulting from the
12 campaign conduct described in this record is ‘arguably’ protected under the
13 NLRA. [] As that is all that is required for state remedial schemes to be
14 preempted,” the Court held the employees’ wrongful termination claim to be
15 preempted by the NLRA. *Id.* at *9.

16 Mr. Wright relies on *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), for the
17 contention that “independent state law contract claims” are not preempted by the
18 NLRA. ECF No. 20 at 8. In *Belknap*, the Court considered whether a suit alleging
19 misrepresentation and breach of contract with replacement workers was preempted
20

1 by the NLRA. *Belknap*, 463 U.S. at 496. The Court held that the contract claims
2 were not preempted by the NLRA. *Id.* at 510.

3 The Court relied on the rule that “[u]nder *Garmon*, a state may regulate
4 conduct that is of only peripheral concern to the Act or which is so deeply rooted
5 in local law that the courts should not assume that Congress intended to preempt
6 the application of state law.” *Id.* at 509. The Court cited three previous cases in
7 support of the rule: *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), holding that
8 the NLRA did not preempt an action based on false and malicious statements in the
9 course of a labor dispute; *Farmer v. Carpenters*, 430 U.S. 290 (1977), holding that
10 the NLRA did not preempt a state action for intentional infliction of emotional
11 distress; and *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), holding
12 that the NLRA did not preempt a trespass action. *Id.* The Court stated that the
13 “critical inquiry in applying the *Garmon* rules, where the conduct at issue . . . is
14 said to be arguably prohibited by the Act and hence within the exclusive
15 jurisdiction of the NLRB, is whether the controversy presented . . . is identical with
16 that which could be presented to the Board.” *Id.* at 510.

17 The analysis applied by this Court in the *Kirwin* case applies here. “[T]he
18 adverse employment action resulting from the campaign conduct described in this
19 record is ‘arguably’ protected under the NLRA.” *Kirwin*, 2012 WL 553993, at *9.
20 Conduct only need be “arguably subject to § 7 or § 8 of the [NLRA]” to be

1 preempted under *Garmon*. *Garmon*, 359 U.S. at 245. Accordingly, Mr. Wright’s
2 implied contract claim is preempted under *Garmon*.

3 *Belknap* provides a poor basis for finding an exception in this case, since the
4 three cases it cites in support of an exception are all distinguishable from the
5 instant case. A claim for breach of an implied employment contract is not
6 “peripheral” to the NLRA in the same way that a claim for false and malicious
7 statements, intentional infliction of emotional distress, or trespass, may be
8 peripheral. Additionally, the claim alleged in this case by Mr. Wright is identical
9 to a claim Mr. Wright could have brought before the NLRB, but chose not to
10 pursue. Indeed, Mr. Wright’s former co-plaintiff did file a claim with the NLRB
11 on the same basis. Wright Dep., ECF No. 17, Ex. E.

12 Defendants also argue that, if the Court were to reach the merits of Mr.
13 Wright’s breach of implied contract claim, the claim fails on the merits because
14 Mr. Wright cannot show that the implied contract contained a “promise of specific
15 treatment in specific situations,” as required under Washington law. ECF No. 15
16 at 12 (citing *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 222 (1984) (en
17 banc)). Because the Court finds that Mr. Wright’s second cause of action is
18 preempted by federal labor law, the Court need not reach the issue of whether Mr.
19 Wright’s claim fails on the merits.

1 Therefore, the Court grants Defendant’s motion for summary judgment on
2 Mr. Wright’s second cause of action alleging a breach of an implied contract of
3 continued employment because that claim is preempted under § 301 of the LMRA
4 and under the NLRA and *Garmon*.

5 **B. Motion to Amend Complaint**

6 Mr. Wright moves to amend his complaint to include two additional causes
7 of action based on federal labor law: a claim for violation of rights secured under
8 §§101-102 of the LMRDA, and a claim to enforce the provisions of the Subsidized
9 Organizer Policy under § 301 of the LMRA. ECF No. 23. Mr. Wright argues that
10 he should be permitted to amend his complaint under Federal Rule of Civil
11 Procedure 15(a)(2), which permits a party to amend a pleading with leave of the
12 court. ECF No. 23 at 3. The rule states that “[t]he court should freely give leave
13 when justice so requires.” Fed. R. Civ. P. 15(a)(2).

14 Defendants contend that Mr. Wright must be required to meet the higher
15 burden of good cause, because Mr. Wright seeks to amend the complaint after the
16 deadline set by the Court in the Court’s scheduling Order, ECF No. 23. The Order
17 required that any motion to amend pleadings be filed no later than November 20,
18 2014, and states that the “schedule shall not be modified unless the Court finds
19 good cause to grant leave for modifications” pursuant to Rule 16. The Court
20

1 agrees with Defendants that Mr. Wright must show good cause to amend the
2 Complaint because he failed to meet the deadline established in the Court’s Order.

3 Pursuant to Rule 16(b), a party must establish “good cause” to justify
4 modification of a scheduling order. *See* Fed. R. Civ. P. 16(b)(4). “Unlike Rule
5 15(a)’s liberal amendment policy which focuses on the bad faith of the party
6 seeking to interpose an amendment and the prejudice to the opposing party, Rule
7 16(b)’s ‘good cause’ standard primarily considers the diligence of the party
8 seeking the amendment.” *Johnson*, 975 F.2d at 609. “If that party was not
9 diligent, the inquiry should end.” *Id.*

10 *i. Diligence*

11 Defendants contend that Mr. Wright was not diligent in amending the
12 complaint. ECF No. 27 at 2. First, Defendants note that Mr. Wright “knew all the
13 facts necessary to plead an LMRDA violation at the time he filed the Complaint,”
14 as evidenced by the fact that he states that his complaint “provide[s] a sufficiently
15 plausible factual basis” for the claim. ECF No. 27 at 2. Second, Defendants state
16 that, prior to filing the complaint, Mr. Wright’s attorney sent Defendants’ attorney
17 a letter explaining his LMRDA theory, which he now seeks to add to the
18 complaint. ECF No. 27 at 2; ECF No. 28-1. Third, Defendants note that Mr.
19 Wright’s attorney was on notice of the § 301 claim he now seeks to add because
20 Defendants described the Subsidized Organizer Policy as “a contract between two

1 labor organizations” under § 301 of the LMRA in the Notice of Removal. ECF
2 No. 27 at 2; ECF No. 1. Finally, Defendants argue that Mr. Wright’s attorney is an
3 experienced lawyer who has been licensed since 1982, and that therefore he is
4 “presumed to know the law.” ECF No. 27 at 2.

5 Mr. Wright did not reply to Defendants’ response memorandum. During
6 oral argument, Mr. Wright’s attorney did not provide any justification for the delay
7 in seeking amendment of the complaint, stating only that he has seen delayed
8 complaint amendments in similar cases before, and asking the Court to forgive the
9 error.

10 Based on the evidence available to the Court, it does appear that Mr.
11 Wright’s attorney was not diligent in seeking amendment of the complaint and that
12 there was no justifiable excuse for the delay. Typically, the Court is hesitant to
13 fault a plaintiff for his counsel’s error. However, the Court also finds and
14 discusses below that amendment of the complaint to include Mr. Wright’s
15 LMRDA claim likely would be futile, and amendment may be futile as to Mr.
16 Wright’s LMRA claim. Additionally, amending the complaint to add the LMRA
17 claim would require additional discovery and a continuance of the trial date which
18 would unfairly prejudice Defendants.

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20 / / /

1 ii. *Futility*

2 Mr. Wright seeks to amend his complaint to add a claim for violation of
3 rights secured under §101of the LMRDA, which “guarantee[s] equal voting rights,
4 and rights of speech and assembly, to every member of a labor organization.”
5 *Finnegan v. Leu*, 456 U.S. 431, 436 (1982) (quoting sections 101(a)(1) and (2) of
6 the LMRDA, codified at 29 U.S.C. §§ 411(a)(1)) (internal quotation marks
7 omitted). Mr. Wright also seeks to amend his complaint to add a claim under §
8 102 of the LMRDA, which provides a civil right of action for persons whose rights
9 secured in § 101 are violated. 29 U.S.C. § 412.

10 The Supreme Court in *Finnegan* held that § 101 of the LMRDA did not
11 apply to “union officers or employees.” *Finnegan*, 456 U.S. at 437. However, the
12 Supreme Court specifically “le[ft] open the question whether a different result
13 might obtain in a case involving nonpolicymaking and nonconfidential
14 employees.” *Id.* at 441, n.11.

15 Mr. Wright argues that as a union organizer, he was a nonpolicymaking and
16 nonconfidential employee falling outside the scope of *Finnegan*. Wright Decl.,
17 ECF No. 19 at 7-8. Defendants contend that Mr. Wright was a “policymaking
18 employee” who does not fall under the footnote exception to the *Finnegan* rule.
19 ECF No. 27 at 6. Both parties present testimony from Mr. Wright and Mr. Merk in
20 support of their positions, although Mr. Merk admits that Mr. Wright’s position

1 was “in a policy-implementing level.” ECF No. 21-1 at 75; *see supra* Background
2 section.

3 In support of their position, Defendants cite two cases from other circuit
4 courts, *Witmeyer v. Brotherhood of Ry. Airline & S.S. Clerks*, 779 F.2d 206, 208
5 (4th Cir. 1985), and *Rutledge v. Aluminum, Brick & Clay Workers, Int’l Union*,
6 737 F.2d 965 (11th Cir. 1984), as well as two cases from state courts of appeal.
7 ECF No. 27 at 6-7. None of the cases cited by Defendant is binding precedent in
8 this Court. The Eleventh Circuit case cited by Defendants, *Rutledge*, held that
9 *Finnegan* applies to union employees who implement policy as well as those that
10 make policy. *Rutledge*, 737 F.2d at 967. Given Mr. Merk’s admission that Mr.
11 Wright was a policy-implementing employee, Defendants appear to be relying on
12 the *Rutledge* case for their position that *Finnegan* bars claims by employees who
13 implement policy as well as those who make policy.

14 The Ninth Circuit held that *Finnegan* barred the wrongful discharge claims
15 of a local union business representative brought pursuant to the LMRDA because
16 her membership rights were not affected by her employment termination. *Childs v.*
17 *Local 18, Intern. Broth. Of Elec. Workers*, 719 F.2d 1379, 1383-84 (9th Cir. 1983),
18 *abrogation on unrelated grounds recognized by Swift v. Realty Exec. Nev. Choice*,
19 211 F. App’x 571 (9th Cir. 2006). The court in *Childs* did not address whether the
20 plaintiff had held a policy-making or policy-implementing role, and that distinction

1 did not appear relevant to the court's analysis. *Id.* at 1384; *see Lynn v. Sheet Metal*
2 *Workers' Int'l Ass'n*, 804 F.2d 1472 (1986) (finding that a discharged business
3 representative whose membership rights were unaffected by his termination could
4 not bring a claim under § 101 of the LMRDA and neglecting to consider whether
5 the employee served in a policy-making or policy-implementing role). This Court
6 is not aware of a Ninth Circuit case discussing the distinction between a policy-
7 making and a policy-implementing employee under *Finnegan*. Therefore, the
8 Court declines to find that alleged distinction has any bearing on whether Mr.
9 Wright's proposed LMRDA claim is viable.

10 In *Lynn v. Sheet Metal Workers' Int'l Ass'n*, the Ninth Circuit expressly
11 considered whether a discharged business representative could bring a claim
12 against a local union under §§ 101 and 102 of the LMRDA after *Finnegan*. *Lynn*,
13 804 F.2d at 1478. The plaintiff in *Lynn* had spoken out against a union policy at a
14 union meeting and subsequently been fired. *Id.* at 1476. The court concluded that
15 the plaintiff's union employment did not qualify as a right protected by § 101, but
16 that the plaintiff's free speech rights were protected by § 101. *Id.* at 1478.

17 However, the Court noted that the plaintiff's free speech rights were not
18 directly infringed because the plaintiff was not prevented from attending or
19 speaking at the union meeting. *Id.* at 1479. The court concluded that under
20 *Finnegan*, the plaintiff could not state a claim for relief under § 101 of the

1 LMRDA because his membership rights had not been directly infringed as required
2 under *Finnegan*. *Id.* at 1478-79 (“[A]n individual may state a cause of action
3 under section 101 only for those acts which violate his membership rights, and not
4 for those which infringe upon whatever rights he may have acquired by virtue of
5 his status as an officer or employee.”).

6 The *Lynn* court next considered whether the plaintiff had a cognizable claim
7 under § 102 of the LMRDA. *Id.* The court noted that, in *Finnegan*, the Supreme
8 Court “neither defined the scope of a section 102 claim nor held that only a direct
9 infringement of a Title I right was actionable.” *Id.* However, in *Finnegan*, the
10 Court stressed that the “overriding objective” of the LMRDA was “to ensure that
11 unions would be democratically governed, and responsible to the will of the union
12 membership as expressed in open, periodic elections.” *Id.* (quoting *Finnegan*, 456
13 U.S. at 441) (internal quotation marks omitted). Accordingly, the Supreme Court
14 protected the right of an elected president to select her appointed administrators.
15 *Id.* (citing *Finnegan*, 456 U.S. at 441).

16 However, the *Lynn* court also recognized that “the power to remove an
17 official from office may also be used to suppress dissent, either through retaliation,
18 or through intimidation.” *Id.* (citing *Finnegan*, 456 U.S. at 441). “The removal of
19 an official under these circumstances can only impede the democratic governance
20 of the union.” *Id.* Based on the theory that removing an elected official from

1 union employment can serve to impede the democratic process, the Ninth Circuit
2 held that the plaintiff had a cognizable claim against the local union under § 102 of
3 the LMRDA. *Id.*

4 The Ninth Circuit has limited *Lynn*'s holding to the removal of elected
5 officials, as opposed to appointed officials:

6 The *Finnegan* Court twice pointed out that the foremost objective of
7 the LMRDA "was to ensure that unions would be democratically
8 governed, and responsive to the will of the union membership as
9 expressed in open, periodic elections." *Finnegan*, 456 U.S. at 441.
10 Given this emphasis, it follows that newly elected officers should be
11 given a free rein to remove their predecessor's appointees. The
12 mandate of an appointee stems directly from the elected official who
13 appointed her, and once the elected official has been removed from
14 office by the membership, it would be anti-democratic to forbid the
15 removal of that official's functionaries. This rationale does not
16 support the removal of elected union officers. Their mandate comes
17 directly from the membership, and the more democratic result would
18 obtain were the membership able to maintain its authority over elected
19 positions.

20 *Brett v. Hotel, Motel, Rest., Const. Camp Emps. and Bartenders Union, Local 879*,
828 F.2d 1409, 1415 (9th Cir. 1987).

Like the plaintiff in *Lynn*, Mr. Wright's free speech rights were not directly
infringed by his termination. To the contrary, Mr. Wright actively participated in
the election process, campaigning for himself and others while speaking out
against the incumbent, Mr. Merk. Therefore, like the plaintiff's § 101 claim in
Lynn, Mr. Wright's proposed § 101 claim is not cognizable. Amendment of the
complaint to add a § 101 claim is futile. Additionally, unlike the plaintiff in *Lynn*,

1 Mr. Wright was an appointed employee. Under *Brett*, the *Lynn* holding permitting
2 an elected employee to bring a claim under § 102 of the LMRDA does not apply to
3 Mr. Wright. Amendment of Mr. Wright’s complaint to add a § 102 claim is also
4 futile.

5 Mr. Wright also seeks to amend his complaint to include a claim under § 301
6 of the LMRA. ECF No. 23. Defendants argue that Mr. Wright may not bring a §
7 301 claim under the LMRA because he is suing as an employee of the union rather
8 than as a member. ECF No. 27 at 7-8. In *Wooddell*, the Supreme Court held that a
9 union member could sue a local union under § 301 of the LMRA for violations of
10 the union’s constitution. *Wooddell*, 502 U.S. at 101-102. The Court stated:

11 Collective-bargaining agreements are the principal form of contract
12 between an employer and a labor organization. Individual union
13 members, who are often the beneficiaries of provisions of collective-
14 bargaining agreements, may bring suit on these contracts under § 301.
15 Likewise, union constitutions are an important form of contract
16 between labor organizations. Members of a collective-bargaining unit
17 are often the beneficiaries of such inter-union contracts, and when
18 they are, they likewise may bring suit on these contracts under § 301.

19 *Id.* at 101.

20 Defendants attempt to distinguish *Wooddell* by arguing that it applies only to
“members” of a collective-bargaining unit, instead of union employees. ECF No.
27 at 8. Defendants cite to three cases from other circuits, none of which is
binding on this Court. ECF No. 27 at 8-9. Additionally, the Seventh Circuit case

1 cited by Defendants, *Korzen v. Local Union 705, Int'l Bhd. Of Teamsters*, supports
2 the conclusion that Mr. Wright's claim does fall within the ambit of § 301.

3 In *Korzen*, two employees brought suit against a local union employer after
4 the union terminated their employment, allegedly in retaliation for their support of
5 the former Chief. *Korzen v. Local Union 705, Int'l Bhd. Of Teamsters*, 75 F.3d
6 285, 287 (7th Cir. 1996). The union employees claimed a violation of the
7 international union's constitution under § 301 of the LMRA. *Id.* The Seventh
8 Circuit considered whether the federal court had jurisdiction over the claim and
9 concluded: "there is federal jurisdiction over the plaintiffs' claims for breach of
10 the international's constitution, of which they as members of the union are third-
11 party beneficiaries" *Id.* at 288. However, after analyzing the terms of the
12 constitution, the court held that it did not grant the plaintiffs any rights to
13 employment that had been infringed by their termination, and thus the claim failed
14 on its merits. *Id.* at 289. Therefore, under *Korzen*, it seems that a union employee
15 may assert a claim as a beneficiary to a § 301 contract depending on the content of
16 that contract.

17 Additionally, the Ninth Circuit has permitted a union employee to bring suit
18 against a local union for violation of the union's constitution under § 301, albeit in
19
20

1 an unpublished decision. *Canzen v. Laborers' Int'l Union of North America*, 40
2 F.3d 1246 (9th Cir. 1994).⁵

3 Under *Wooddell*, *Korzen*, and *Canzen*, Mr. Wright may be able to bring a §
4 301 claim as a union employee. Additionally, in this case, both the constitution
5 and the Subsidized Organizer Policy reference Mr. Wright's position as a Union
6 Organizer. Thus, there may exist a genuine issue of material fact as to whether the
7 relevant provisions created rights to employment that were infringed by Mr.
8 Wright's termination.

9 However, additional discovery is necessary regarding whether the
10 International Constitution and the Subsidized Organizer Policy gave Mr. Wright

11
12 ⁵ The Court notes that the Ninth Circuit in *Canzen* permitted the plaintiff to bring a
13 claim under § 301 based on the local union's constitution, rather than the
14 international constitution. *Cazen*, at *3. The Seventh Circuit in *Korzen* held that
15 union employees could not bring a claim in federal court under § 301 for violations
16 of a union's local constitution because the local constitution did not constitute a
17 contract between two labor organizations. *Korzen*, 75 F.3d at 288. However, the
18 court noted that, since a claim alleging a violation of a local constitution was a
19 state law claim, a federal court might exercise supplemental jurisdiction over it.
20 *Id.* at 289.

1 employment rights. Defense counsel noted at oral argument that whether or not
2 Mr. Wright, in his position as a Union Organizer, was an individual intended to be
3 protected by the constitution and policy, is a question of fact requiring additional
4 discovery and depositions. The Court agrees.

5 The discovery deadline was April 17, 2015, and trial is scheduled to begin
6 on October 5, 2015. Requiring the parties to reopen discovery and continue the
7 trial date would unfairly prejudice Defendants, especially in light of the lack of
8 diligence by Mr. Wright in amending the complaint. Therefore, the Court will not
9 permit Mr. Wright to amend the complaint.

10 Accordingly, **IT IS HEREBY ORDERED:**

11 1. Defendants' Motion for Summary Judgment, **ECF No. 15**, is

12 **GRANTED.**

13 2. Plaintiff's Motion to Amend Complaint, **ECF No. 23**, is **DENIED.**

14 The District Court Clerk is directed to enter this Order, enter Judgment
15 accordingly, provide copies to counsel, and **close** this case.

16 **DATED** this 28th day of July 2015.

17
18 *s/ Rosanna Malouf Peterson*

19 ROSANNA MALOUF PETERSON
20 Chief United States District Court Judge