STATE OF MICHIGAN

COURT OF APPEALS

MARK PACKOWSKI,

Plaintiff-Appellant,

v

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 951,

Defendant-Appellee.

FOR PUBLICATION
July 8, 2010
9:00 a.m.

No. 282419
Kent Circuit Court
LC No. 03-007476-CZ

Before: BECKERING, P.J., and WILDER and DAVIS, JJ.

WILDER, J.

Plaintiff, Mark Packowski, appeals by right the circuit court's order granting summary disposition for defendant, United Food and Commercial Workers Local 951 (defendant, or the union), under MCR 2.116(C)(4), and an order denying plaintiff's motion for reconsideration. Because we agree with the circuit court that federal preemption applies to plaintiff's remaining claim, we affirm.

I

Defendant employed plaintiff as a business agent, and later, as an organizer. In his complaint, plaintiff alleged that he was demoted from business agent to organizer in 1999 after he assisted in a federal Department of Labor investigation of defendant's election activities. Plaintiff further alleged that he was treated differently and excluded from staff events, such as training, because he refused to contribute to defendant's legal defense fund. Plaintiff alleged that, for these reasons, defendant subsequently terminated him against public policy. In an amended complaint, plaintiff also alleged that his termination violated defendant's just-cause policy, prohibiting employees from being discharged except for just cause. The sole issue before us on appeal is plaintiff's claim that he was terminated without just cause.

Plaintiff's complaint alleged that he had worked for defendant since in 1995, and he took a medical leave from work from September 10, 2001, to September 14, 2001. However, plaintiff alleged that he returned to work for a half-day on September 14, but then a flare-up of his health condition forced him to leave work.

Defendant asserted below that it discharged plaintiff on September 27, 2001, for being absent from work without authorization. Defendant also has asserted that it terminated plaintiff for falsifying records, including his daily itinerary and mileage records for September 14, 2001.

Defendant admitted that it has an employment policy that employees, including plaintiff, can only be terminated for just cause, but defendant denied that its termination of plaintiff violated that policy.

Defendant has employment policies and standards that govern automobile use and business mileage reporting. The policies prohibit reimbursement for personal miles, and require a monthly report specifying business and personal miles. The policies require accurate record keeping ensuring that defendant complies with the law. Department staff who have organizing duties, such as plaintiff, are also required to contact defendant by 9:00 a.m. every day to report their itineraries to the supervisor, and to promptly contact the supervisor if any changes in itinerary occur.

Defendant argued below that on or about September 9, 2001, plaintiff informed defendant by a voicemail message of a flare-up in his health condition, but he did not communicate with defendant again regarding his condition or his resulting inability to work, until September 14, 2001, when he faxed a note from his doctor indicating that he would be absent from September 10 to September 14. Defendant asserted that plaintiff reported that he was going to work the second shift at the Wal-Mart store in St. John's, Michigan, on September 14. Defendant later determined that plaintiff did not work the full shift, because he left to referee a football game, and that plaintiff failed to report a change in his itinerary. Defendant also asserted that plaintiff claimed that he intended to stop at the Wal-Mart stores in Alma and Mt. Pleasant after the game, but that he did not inform defendant of this change in his itinerary, and regardless, defendant contends that plaintiff went home after the game rather than to work as he stated he would. Defendant further maintained that plaintiff falsified his mileage report for September 14, by overstating his business miles.

II

After plaintiff filed this action, defendant filed several motions for summary disposition. This appeal involves defendant's summary disposition motion regarding plaintiff's cause of action involving wrongful termination in violation of defendant's just-cause policy. Defendant contended below that this claim was preempted by the Labor Management Reporting and Disclosure Act of 1959, 29 USC 401, *et seq*. (LMRDA). Defendant argued that, under *Finnegan v Leu*, 456 US 431; 102 S Ct 1867; 72 L Ed 2d 239 (1982), the primary purpose of the LMRDA is to ensure union democracy. Thus, a union president, elected by the rank-and-file members, may terminate policymaking or policy implementing employees without violating the LMRDA, because the LMRDA does not restrict an elected union official's freedom to choose staff whose views reflect his or her own (which would be the views based on which, he or she was elected). Further, defendant argued that courts from other jurisdictions have interpreted the purpose of the LMRDA, as interpreted in *Finnegan*, to preempt state-law wrongful discharge claims by policymaking or policy implementing employees, because such claims would interfere with the elected union leader's ability to implement the policy upon which the union members elected the leader.

Defendant also argued that plaintiff claimed that he was terminated because he cooperated with the Department of Labor's investigation of defendant's election activities, and that this contention directly implicated the LMRDA's regulatory scheme, because 29 USC 521(a)[1] addresses this specific conduct, and authorizes an investigation, and 29 USC 412[2] provides for a civil action in federal court if there is retaliation based on giving truthful testimony to the Department of Labor. Thus, defendant argued, plaintiff's exclusive remedy was to file a retaliation claim under the LMRDA in federal court, and his state law claim interferes with and is preempted by federal law. In response, plaintiff argued that his claim was not preempted by the LMRDA; that the LMRDA did not prohibit defendant from adopting a policy prohibiting termination without just cause, and that he was not a management-level employee to which the LMRDA and interpreting case law would apply.

The circuit court granted defendant's motion. The circuit court concluded that plaintiff was a policy-implementing employee of defendant, and that, as such, his state-law wrongful termination claim based on the just-cause policy was preempted by the LMRDA because it would interfere with the union president's authority to choose his own staff, and would thereby jeopardize union democracy. The circuit court denied plaintiff's subsequent request for reconsideration, determining that plaintiff merely reiterated the same arguments addressed in the summary disposition motion, and clarifying that summary disposition of plaintiff's claim was granted under substantive preemption, not jurisdictional preemption.

III

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[1] 29 USC 521(a) provides:

> The Secretary shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this chapter (except subchapter II of this chapter) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto. The Secretary may report to interested persons or officials concerning the facts required to be shown in any report required by this chapter and concerning the reasons for failure or refusal to file such a report or any other matter which he deems to be appropriate as a result of such an investigation.

[2] 29 USC 412 provides:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Plaintiff argues on appeal that the circuit court erred in granting defendant's motion for summary disposition, and in holding that his claim of termination in violation of defendant's just-cause-for-termination policy is not preempted by the LMRDA. We disagree.

A

We review summary dispositions de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Issues of law, such as federal preemption of state law, are reviewed de novo. *City of Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). Whether a court has subject-matter jurisdiction is an issue of law, reviewed de novo. *Fisher v Belcher*, 269 Mich App 247, 252-253; 713 NW2d 6, 10 (2005). We review the circuit court's denial of plaintiff's motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Defendant moved for summary disposition under MCR 2.116(C)(4), (8) and (10). The circuit court decided the motion under subrule (C)(4). Summary disposition is appropriate when the trial court "lacks jurisdiction of the subject matter." MCR 2.116(C)(4). For jurisdictional questions under MCR 2.116(C)(4), this Court "determine[s] whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate . . . [a lack of] subject matter jurisdiction." *L & L Wine & Liquor Corp v Liquor Control Comm'n*, 274 Mich App 354, 356; 733 NW2d 107 (2007) (citation omitted).

B

The supremacy clause of the United States constitution gives Congress the authority to preempt state laws. *City of Detroit*, 481 Mich at 35-36. The supremacy clause of the United States constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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 (emphasis added).]

Under the supremacy clause, then, this Court is bound by federal statutes, despite any state law to the contrary. In other words, this Court is bound to find preemption where it exists, because federal law is the supreme law of the land. See *City of Detroit*, 481 Mich at 36.

Whether a federal statute preempts a state-law claim is a question of federal law. *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 are bound to follow the prevailing opinions of the United States Supreme Court. *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994). Where a state-law proceeding is preempted by federal law, the state court lacks subject matter jurisdiction to hear the state law cause of action. *Ryan v Brunswick Corp*, 454 Mich 20,

28; 557 NW2d 541 (1997), abrogated in part on other grounds by *Sprietsma v Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002).

Preemption occurs when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *City of Detroit*, 481 Mich at 36. Preemption can also occur where a state or local regulation prevents a private entity from performing a function that Congress has tasked it with performing. *Id*

There are three types of federal preemption: *express preemption, conflict preemption,* and *field preemption*. *X v Peterson*, 240 Mich App 287, 289; 611 NW2d 566 (2000). Express preemption occurs when the federal statute clearly states an intent to preempt state law, or such intent is implied in the federal law's purpose or structure. *Ryan*, 454 Mich at 28. Under conflict preemption, a federal law preempts state law to the extent that the state law directly conflicts with federal law, or with the purposes and objectives of Congress. *Id.* at 28, citing *Cipollene v Liggett Group, Inc*, 505 US 504, 516; 112 S Ct 2608; 120 L Ed 2d 407 (1992). Under field preemption, the federal statute acts to preempt state law where federal law so thoroughly occupies a legislative field, that it is reasonable to infer that Congress did not intend for states to supplement it. *Id*.

A few of our sister states have considered analogous situations, and analogous state-law claims, and have found that the LMRDA conflict-preempted those claims. While we are not bound by those decisions, we may follow them if we find them persuasive. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221 n 6; 761 NW2d 293 (2008).

One closely analogous case is *Screen Extras Guild, Inc v Superior Court*, 800 P 2d 873, 876-879 (Cal, 1990), in which it was held that California common-law, which implied a covenant of good faith and fair dealing into some employment relationships, conflicted with the LMRDA and was preempted. The plaintiff in *Screen Extras* was employed by the union as a business agent, and was discharged for alleged dishonesty and insubordination. The plaintiff sued for wrongful discharge, among other claims, and alleged that the union breached a state-law covenant of good faith and fair dealing. *Id.* at 879. Analyzing whether the plaintiff's state law cause of action conflicted with the LMRDA's policy, the court relied on *Finnegan* in holding that in order to ensure union democracy, "Congress must have intended that elected union officials would retain *unrestricted freedom to select business agents, or, conversely, to discharge business agents* with whom they felt unable to work or who were not in accord with their policies." *Id.* at 876-877 (emphasis added).

The plaintiff in *Screen Extras* argued that her claims for wrongful discharge in breach of contract, negligent and intentional infliction of emotional distress and defamation were not preempted, because she was terminated, not because of a policy disagreement with the union's elected officials, but because of her alleged incompetence and dishonesty. *Screen Extras*, 800 P 2d at 879. The court found this distinction between a termination for policy reasons and a "garden-variety" termination not implicating policy unpersuasive, because it was unworkable in the real world, and involved highly subjective determinations. *Id*. *"If a business agent, for example, were discharged for failing to efficiently adopt a new set of procedures for prioritizing routine tasks which had been endorsed by elected officials, should that be characterized as a termination to facilitate policy, or as a 'garden-variety' termination for inefficiency?*" *Id*. (emphasis added). The court in *Screen Extras* noted it would be impossible to develop an

objective test to distinguish the two, and "*every wrongful discharge claim brought against a union by a business agent will be cast in 'garden-variety' terms if that is all it takes to survive preemption*." *Id*. (emphasis added). Relying on *Finnegan*, the court held that the plaintiff's claim was preempted because it conflicted with the LMRDA:

> To allow a state claim for wrongful discharge to proceed from the termination of a union business agent by elected union officials would interfere with the ability of such officials to implement the will of the union members they represent. This would frustrate full realization of the goal of union democracy embodied by the LMRDA, in contravention of the supremacy clause. Consequently, the LMRDA and the supremacy clause preempt wrongful discharge claims brought against labor unions or their officials by former policymaking or confidential employees. [*Id.* at 881 (citations omitted).]

See also *Tyra v Kearney*, 153 Cal App 3d 921, 923, 926; 200 Cal Rptr 716 (1984) (relying on *Finnegan*, 456 US at 441, to hold that the plaintiff's claim for wrongful discharge, following termination from her *position as a business agent* for union after running against the winning candidate, was preempted by the LMRDA's purpose of ensuring democratically governed unions and union official's concomitant authority to select business agents).

Also analogous is *Vitullo v Int'l Brotherhood of Electrical Workers, Local 206*, 317 Mont 142; 75 P3d 1250 (2003), in which the plaintiff was a former assistant business manager for a union local. A newly elected official fired the plaintiff after the plaintiff accepted a nomination to run against the official. The plaintiff brought a claim under Montana's wrongful discharge from employment act, which created a just-cause for termination requirement and a probationary period. The court held that the statutory claim conflicted with the LMRDA and *Finnegan*, and was therefore conflict-preempted. See also *Smith v Int'l Brotherhood of Electrical Workers, Local Union 11*, 109 Cal App 4th 1637, 1648; 1 Cal Rptr 3d 374 (Cal App, 2003) (the plaintiff, a union organizer employee, was discharged and brought a breach of contract claim, among other claims, against the union; the court held that he was a policymaking employee and his claim was preempted by the LMRDA).

In another case finding preemption, *Dzwonar v McDevitt*, 791 A2d 1020, 1022 (NJ, 2002), the plaintiff was discharged from her position as a union arbitration officer for inappropriate behavior at an arbitration proceeding and for involvement in disputes with other union members. The plaintiff brought an action under New Jersey's conscientious employee protection act, arguing that she was fired in retaliation for objecting to a union official's acts that allegedly violated the LMRDA. *Id*. at 1022-1023. Although the LMRDA contained no express provision that limited a state's right to protect union employees from retaliation in plaintiff's circumstances, the court held that "such a limitation may be inferred from" the LMRDA's scope. *Id.* at 1024. Although the court adopted a preemption exception for claims based on an employee's unwillingness to aid in the violation of a criminal statute, *Bloom v Gen Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F2d 1356, 1357-1360 (CA 9, 1986) (discussed further *infra*), the court held that the plaintiff's claim was preempted because it was not based on an allegation that the union official's acts were criminal. *Id.* at 1026. "Rather, this case involves, at most, the federal regulatory scheme and the union's own internal operating policies." *Id*.

We conclude that the reasoning in *Screen Extras, Tyra, Vitullo, Smith and Dzwonar* is persuasive, and we adopt the reasoning and apply it here. 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.

We decline to follow *Young v International Brotherhood of Locomotive Engineers*, 683 NE2d 420, 421-422 (Ohio App, 1996), a case in which the court concluded that preemption was not applicable. The plaintiff in *Young* was fired from her position as a union employee for allegedly being insubordinate, uncooperative, and making derogatory remarks about the union president. Denying these allegations, the plaintiff brought a breach of contract action, based on her alleged ten-year contract with the union. *Id.* at 422-423. The trial court granted summary judgment, and the court of appeals reversed and remand for trial, which resulted in a judgment for the plaintiff and an appeal by the union. In the second appeal, the court held that whether the plaintiff's claim was preempted by the LMRDA depended on whether the plaintiff was a policymaking employee, which was an issue of fact for the jury to resolve. *Id*.

Unlike the parties in *Young*, plaintiff and defendant do not dispute the circuit court's finding that he was a policy-implementing employee. Therefore, *Young* is distinguishable from the instant case. We also find *Young* unpersuasive in that it concludes the question of preemption is a jury question, despite that fact that whether state law conflicts with federal law is more properly characterized as a question of law. *City of Detroit*, 481 Mich at 35.

Other cases finding no conflict preemption are also more easily distinguished from the instant case than those cases finding preemption. In *Bloom*, 783 F2d at 1357-1360, the plaintiff was a union business manager who sued the union for, among other claims, wrongful discharge, after he was terminated because *he refused to falsify the union's minutes to cover up an unapproved expenditure*. The plaintiff argued that his claim was not preempted because he was an at-will employee, and because there was no federal statute directly covering his employment. *Id.* The court held that the state had a strong interest in preventing criminal actions such as embezzlement, and that the LMRDA supported the plaintiff's position, because it expressly "saves both state criminal actions and state-imposed responsibilities of union officers" in 29 USC 523(a) and 29 USC 524. *Id.* at 1361. The court stated that there was an exception to preemption "*to the extent a claim is based on an employee's unwillingness to aid his superior in the violation or concealment of a violation of a criminal statute*." *Id*. at 1356 (emphasis added). The court further determined that, because the plaintiff alleged that he was fired for refusing to illegally alter minutes, and not for political reasons, the federal interest in union democracy recognized in *Finnegan* was not implicated, and the state cause of action would not interfere with that statutory purpose. *Id.* at 1362.

Similarly, in *Montoya v Local Union III of the Int'l Brotherhood of Electrical Workers*, 755 P2d 1221, 1224 (Colo App, 1988), the plaintiff claimed that he was discharged from his position as a union business manager for uncovering illegal union practices and refusing to vote for the candidate that the business manager favored. Because the court found that the business manager could hire and fire his representatives and assistants at any time and discharge would not affect the plaintiff's union membership, the plaintiff's wrongful discharge claims generally conflicted with LMRDA and were preempted. *Id.* at 1223. However, the court held that the doctrine of preemption did not bar the plaintiff's wrongful discharge claim "insofar as he

allege[d] that he was discharged because he refused to aid [the business manager] in his alleged criminal misuse of union funds." *Id*. at 1224.

Whereas *Bloom* and *Montoya* involved discharges for the plaintiffs' alleged refusal to commit or aid in committing a crime, here, plaintiff was terminated for failing to abide by legitimate policies, such as itinerary and mileage recording, designed to *comply* with law.[3]

Finally, we consider the decision in *Ardingo v Local 951, United Food & Commercial Workers Union*, unpublished opinion of the Sixth Circuit Court of Appeals, issued May 29, 2009 (Docket No. 08-1078). In *Ardingo*, the United States Court of Appeals held that the LMRDA did not preempt a wrongful termination claim almost identical to the claim at issue here. For the reasons stated below, we do not follow *Ardingo*.[4]

The plaintiff in *Ardingo* was a business agent for the same union which employed the plaintiff in this case. The same policy requiring that employees be terminated only for just cause was in force. *Ardingo*, unpub op at p 2. After rumors circulated that Ardingo might mount a campaign against the union's president, the union president insinuated that Ardingo was a "pipeline to the Department of Labor." *Id*. Thereafter, Ardingo cooperated with a Department of Labor investigation concerning financial irregularities in the union, and then testified before a grand jury concerning the same issues. *Id*. at 2-3. Ardingo was then reassigned, in rapid succession, to jobs in other states, allegedly for organizing. *Id*. at 3. But the union was also experiencing substantial declines in revenue. *Id*. Later, Ardingo, who earned $100,000 per year and had less seniority than other similarly situated employees, was one of ten employees who were discharged. *Id*. The union president testified that the discharge of Ardingo was for economic and other reasons. Ardingo argued that the economic reasons were not the real reason for his discharge, but a mere pretext, and that his discharge was retaliatory, and in violation of the just-cause policy. *Id*. at 3-4.

The United States Court of Appeals held that the LMRDA did not preempt Ardingo's state-law claim of discharge in violation of the just-cause policy. *Ardingo*, unpub op at 5-10. The court reasoned that "[t]he fact that the LMRDA does not provide a cause of action to union employees who have been fired for political reasons does not mean that state law could never restrict a union leader's discretion to terminate a union employee." *Id*. at 10, citing *Bloom*. The court further reasoned that "[s]uch a question was not even before the *Finnegan* Court. Therefore, it would be wrong to say that *Finnegan* stands for the proposition that the LMRDA gives union officials unlimited discretion in employment matters." *Id*. at 11.

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[3] 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. 29 USC 412 provides for a civil action in federal court if there is retaliation based on giving truthful testimony to the Department of Labor.

[4] Although *Ardingo* does address a question of federal law, i.e. federal preemption, we are not required to follow decisions of the United States Court of Appeals. *Abela*, 469 Mich at 606. In addition, *Ardingo* is unpublished, and was not recommended for full-text publication. *Ardingo*, unpub op at 1.

We disagree with *Ardingo*'s reasoning, and decline to follow it. While *Finnegan* does not absolutely decide the question of whether this exact claim is preempted by the LMRDA, *Finnegan* is clear that at least one of the purposes of the LMRDA was to promote union democracy and ensure that the representatives whom union members elect are able to carry out the policies on which they were elected. See *Finnegan*, 456 US at 442 ("in enacting Title I of the Act, Congress simply was not concerned with perpetuating appointed union employees in office at the expense of an elected president's freedom to choose his own staff. Rather, its concerns were with promoting union democracy . . ."). Preemption applies when a state-law claim conflicts with the purposes of federal law. *City of Detroit*, 481 Mich at 36. We believe that, here, plaintiff's claim would conflict with the efforts of union elected officials to implement the policies on which they were elected, and, in that way, interfere with one of the purposes of the LMRDA.

IV

In sum, the cases finding preemption under similar circumstances are more numerous, more analogous on their facts, and more persuasive than the cases finding no preemption by the LMRDA of similar wrongful discharge claims. The cases finding preemption of state common-law claims by the LMRDA illustrate that wrongful discharge claims by discharged or demoted union employees, who were in policymaking or policy-implementing positions, would counteract one of the purposes and goals of the LMRDA, namely, the purpose and goal of protecting democratic processes in union leadership. If union members cannot choose their leaders, or if the chosen leaders cannot then implement the policies they were elected to implement, then the rights of union members (as represented by their elected leaders) would be thwarted, or at least diminished. Accordingly, the circuit court correctly held that the LMRDA preempts plaintiff's claim of wrongful discharge in violation of the union's just cause policy and, because of federal preemption, the circuit court correctly held that it lacked subject matter jurisdiction to hear that claim. *Ryan*, 454 Mich at 28.[5]

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Alton T. Davis

[5] Because the circuit court correctly granted summary disposition, its denial of plaintiff's motion for reconsideration was not an abuse of discretion.