STATE OF MICHIGAN

COURT OF APPEALS

GERALD RADZIKOWSKI,

Plaintiff-Appellant,

v

BASF CORPORATION,

Defendant-Appellee.

UNPUBLISHED
December 14, 2004

No. 250198
Oakland Circuit Court
LC No. 2002-044326-CL

Before: Murphy, P.J., and White and Kelly, JJ.

MEMORANDUM.

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 US 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 US 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.

s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly