No. 33243 *Grace Lontz and Beverly Pettit v. Joyce Tharp; Elizabeth Doak; James Baish; Sandeep Thakrar; and Monical, LLC, d/b/a/ Holiday Inn Express*

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OF WEST VIRGINIA

Starcher, J., dissenting:

I dissent from the conclusion reached in the majority opinion that the National Labor Relations Act (hereinafter "NLRA") preempts the appellants state law claims.

The majority has departed from a long line of cases where this Court has guarded against unnecessary federal preemption of our state's right to provide a remedy for wrongful acts. *See, e.g., In Re: West Virginia Asbestos Litigation*, 215 W.Va. 39, 592 S.E.2d 818 (2003) (preemption the exception, not the rule); Syllabus Point 3, *State ex rel. Orlofske v. City of Wheeling*, 212 W.Va. 538, 575 S.E.2d 148 (2002) (West Virginia state courts have subject matter jurisdiction over federal preemption defenses); *Chevy Chase Bank v. McCamant*, 204 W.Va. 295, 512 S.E.2d 217 (1998), *citing FMC Corp. v. Holliday*, 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990) (addressing the issue of whether the West Virginia Consumer Credit and Protection Act was preempted by the federal Fair Debt Collections Practices Act, holding that there is a strong presumption that Congress does not intend to preempt areas of traditional state regulation); *Martin Oil Co. v. Philadelphia Life Ins. Co.*, 203 W.Va. 266, 507 S.E.2d 367 (1997) (state law actions having incidental involvement or referral to ERISA plans do not present risk of conflicting or inconsistent state law application and are not preempted); *Hartley Marine Corp. v. Mierke*, 196 W.Va. 669, 474 S.E.2d 599 (1996), *cert denied sub nom, Hartley Marine Corp. v. Paige*, 519 U.S. 1108,

117 S.Ct. 942, 136 L.Ed.2d 832 (1997) (preemption is disfavored in the absence of convincing evidence warranting its application).

In preemption cases, this Court has followed the United States Supreme Court's teaching that "[b]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all preemption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700, 715 (1996) (internal quotations and citation omitted). *Cf. In re: West Virginia Asbestos Litigation*, 215 W.Va. 39, 42-43, 592 S.E.2d 818, 821-22 (2003).

In the present case, it cannot be said that the clear and manifest intent of the Congress in passing the NLRA was to deprive West Virginia of the ability – indeed, to deprive our state of the fundamental right of jurisdiction – to legislate or provide common law relief for alleged wrongful acts, even if those acts occurred as part of a unionizing effort. The majority opinion, while discussing the case failed to heed the *guidance* offered by the United States Court of Appeals in the related case of *Lontz v. Tharp*, 413 F.3d 435 (4th Cir. 2005). The Federal Court of Appeals in *Lontz* found that sections 7 and 8 of the NLRA did "not work to completely preempt the kind of state law claims that the plaintiffs are

pressing. . .. In this case, we cannot find complete preemption if for no other reason than that Congress has chosen not to create a cause of action" in the federal courts. *Lontz* at 442-443. The "sine qua non of complete preemption is a pre-existing *federal* cause of action that can be brought in the district courts." *Lontz* at 442, *citing Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003) (emphasis in original opinion).

The Court of Appeals in *Lontz*, therefore, concluded that Sections 7 and 8 did not create a cause of action, and that the issue of preemption would be left to West Virginia to decide. Unfortunately for West Virginia, the majority has "decided" that the appellants' claims are "preempted" by the NLRA because the appellants' allegations "implicate the scope and reach of sections 7 and 8 of the [NLRA]." This conclusion is wrong. It was "not the intent of Congress to preempt all labor disputes" that merely implicate federal labor laws; more is required to be shown before there is preemption. *General Motors Corp. v. Smith*, 216 W.Va. 78, 84, 602 S.E.2d 521, 527 (2004) (discussing, *inter alia*, preemption in Employee Retirement Income Security Act and Labor Management Relations Act cases).

Appellants Lontz and Pettit were supervisors for the appellee Holiday Inn Express. Appellant Lontz has alleged that members of the management of Holiday Inn Express "met with her and instructed her to seek the assistance of a deputy sheriff (a friend of [Lontz's]) and have a union organizer arrested." *Lontz*, *supra*, at 438. Lontz refused, and management allegedly made her work place environment intolerable following her refusal, resulting in the constructive firing of Lontz. Appellant Pettit was allegedly fired because management became convinced she assisted and encouraged unionizing activities.

Under West Virginia law, the appellants *had* legal remedies for the alleged wrongful acts of the appellees prior to the majority's opinion. One such remedy was the tort of outrage, whereby conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community" can form the basis for an action in West Virginia. *Hines v. Hills Dept. Stores, Inc*., 193 W.Va. 91, 454 S.E.2d 385 (1994), *citing* comment (d) to Section 46 of the *Restatement (Second) of Torts*, and Syllabus Point 6 of *Harless v. First National Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692 (1982).[1]

In the instant case, the allegation that management conspired to have a person wrongfully arrested – to wrongfully deprive another person of his or her liberty – and then retaliated against appellant Lontz when she refused to be a part of that illegal conspiracy, certainly qualifies, if proven, as "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Hines*, *supra*, at 95.

Whether Lontz was constructively discharged for refusing to be a part of a criminal conspiracy does not require the interpretation of any federal statutes to provide her relief. She either was, or was not, required to have someone wrongfully arrested as a condition of her employment and thereby herself engage in illegal activity. Whether the

[1]Syllabus Point 6, *Harless*, *supra*, "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

basis for management's alleged criminal activity arose from "unionizing activity" is not a fact that any jury would be required to find in order to grant relief to Lontz. Therefore, appellants' state law claims do not even implicate the NLRA, except in an incidental, non-germane, manner. As in *Martin Oil Co.*, *supra*, the appellants state law claims had only "incidental involvement or referral" of the NLRA and therefore "do not present the risk of conflicting or inconsistent state law" in the application of the NLRA. Whether Lontz was constructively fired for refusing to engage in illegal activity is the sole issue that a jury must decide, not some intricacy of the NLRA. The majority opinion fails to see this distinction.

The majority opinion has failed to protect the sovereignty of our state and has surrendered West Virginia's jurisdiction where it was completely unnecessary to do so. For this reason, I dissent.