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NO. 64908-6-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

ROGER DAIGNAULT,

Appellant

v.

PACIFIC NORTHWEST REGIONAL COUNCIL OF CARPENTERS,
DOUG TWEEDY, AND CASS PRINDLE

Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT
NO. 09-2-15934-3 KNT

REPLY BRIEF OF APPELLANT

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I. Summary of the Argument

The trial judge correctly found that Daignault's breach of contract claim was not preempted by the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"). Despite the Council's claims to the contrary, the LMRDA does not provide elected union leadership with "plenary authority" to terminate union employees; the LMRDA is silent on the matter. Whether LMRDA preemption of state law claims exists is an issue of first impression in Washington, and the few federal and out-of-state cases that do exist are not in agreement. Because Congress did not intend to occupy the entire field of regulation with the LMRDA, and because it is not impossible to comply simultaneously with both the LMRDA and with state law pertaining to breach of contract claims, there is no LMRDA preemption in this case. Because Washington is an at-will employment state, there is no public policy need to allow union employers to break employment contracts with its employees with impunity.

Daignault properly raised his breach of contract theories based on the employer writings promising just cause and a fair opportunity to appeal any termination decision. The Council's emphasis on its "unfettered discretion" to terminate its employees renders those promises to its employees illusory. Employers in Washington are not permitted to

make specific promises of treatment to its employees that they have no intention of keeping.

The Council's policy, signed by Daignault, CP 192, promised termination only for just cause. Daignault offered consideration for this promise, and he submitted a deposition in the trial court averring his reliance on the Council's policy. CP 191-192. While the trial court found that the Council's policy was effectively disclaimed, for the reasons discussed in Daignault's opening brief, the Council's disclaimer was ineffective.

The Council now argues that Daignault *was* terminated for just cause. There was no evidence presented in the trial court that Daignault was unwilling or unable to faithfully carry out Tweedy's goals once Tweedy was re-elected to office. Whether there was sufficient cause for termination under the policy is a question of fact which should be properly submitted to the jury. Furthermore, the Council's policy did not list "political reasons," or any similar reason, as a just cause for termination. CP 137-38. Viewed in the light most favorable to the non-moving party, the evidence presented questions of material fact that should have precluded summary judgment.

II. Argument

A. The trial court correctly found that Daignault’s breach of contract claim was not preempted by the LMRDA.

1. LMRDA Preemption is an Issue of First Impression in Washington

Since the Labor Management Reporting and Disclosure Act (“LMRDA”) was enacted in 1959, neither the U.S. Supreme Court nor any Washington appellate court has ever addressed the issue of whether the LMRDA preempts a state law employment contract claim.¹ The Council implies that the U.S. Supreme Court addressed the issue of preemption in *Finnegan v. Leu*, 456 U.S. 431, 435, 102 S. Ct. 1867, 72 L. Ed. 2d 239 (1982). As discussed below, *Finnegan* was a case brought under the LMRDA; as there were no state-law claims at issue in *Finnegan*, it is not a preemption case.

The only federal appellate court to address the issue directly is the Sixth Circuit Court of Appeals, which found that there is no preemption. *Ardingo v. Local 951, United Food & Commercial Workers Union*, 333 Fed. Appx. 929, 2009 U.S. LEXIS 11694 (6th Cir. 2009) (see appendix). In addition, several state courts have addressed the issue with varying

¹ The Council cites *Williams v. Great Northern Ry. Co.*, 108 Wn. 344, 184 P. 340 (1919), in support of its contention that the Washington Supreme Court has reached an analogous result in the corporations context. Resp. Br. at 22. In *Williams*, the Court held that an employee could not sue a corporation for breach of contract, because corporations at that time were authorized by *state* statute to “remove” employees for any reason. The case is no longer good law and was not a preemption case. It is not applicable here.

results. Contrary to the Respondents' assertions about long-standing precedent, there is no binding precedent in Washington on this issue, and little persuasive authority to draw from outside the state.

2. Narrow scope of LMRDA preemption

The LMRDA, 29 U.S.C. § 401 *et seq.*, was enacted because of Congress's perception of abuse and corruption among union officials. *Finnegan v. Leu*, 456 U.S. 431, 435, 102 S. Ct. 1867, 72 L. Ed. 2d 239 (1982). The overriding objective of the LMRDA was "to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Finnegan v. Leu*, 456 U.S. at 441. A lawsuit, such as Daignault's, that seeks to vindicate an employee's rights under a just-cause employment contract does not interfere with this objective. Despite the Council's contention that the LMRDA gives it unfettered discretion to ignore state contract and tort laws with regard to all union employees, "neither the language nor the legislative history of the Act suggests that it was intended even to address the issue of union patronage." *Id.*

The party seeking the benefit of preemption bears the burden of establishing the preemption. *De Buono v. NYSA-ILA Med. and Clinical Serv. Fund*, 520 U.S. 806, 814, 117 S. Ct. 1747, 138 L.Ed.2d 21 (1997).

The burden is a “considerable” one, in that it requires “overcoming the starting presumption that Congress did not intend to supplant state law.”

Id. Here, the Council bears the considerable burden of establishing LMRDA preemption.²

A federal law may preempt a state law claim either expressly or by implication. *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152-53, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982). A state law is expressly preempted when a federal law contains express language indicating that such lawsuits are preempted. *Id.* at 153. There is a strong presumption against preemption. *Stevedoring Servs. of Am., Inc. v. Eggert*, 129 Wn.2d 17, 24, 914 P.2d 737 (1996).

Implied preemption, on the other hand, exists where there is either “field preemption” or “conflict preemption.” *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992). Field preemption exists “where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.” *Id.* at 98. Conflict preemption refers to situations “where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the

² As an initial matter, the Council has not properly argued the issue of preemption. It has not explained whether, in its view, LMRDA preemption is express, field, or conflict preemption, nor has it explained the doctrine of preemption in a way that would allow the Court to determine whether preemption should be applied in this case.

accomplishment and execution of the full purposes and objectives of Congress.” *Id.*; see also *City of Seattle v. Burlington N. R.R. Co.*, 145 Wn.2d 661, 667, 41 P.3d 1169 (2002).

The preemptive scope of the LMRDA is narrow. *Davis v. UAW*, 392 F.3d 834, 839 (6th Cir. 2004), overruled on other grounds by *Blackburn v. Oaktree Mgmt. LLC*, 511 F.3d 633 (6th Cir. 2008). Daignault is not challenging union election results; he makes no claim under the LMRDA. There is no express preemption in this case.

Field preemption exists only when Congress intends for a statutory scheme to occupy an entire field of regulation. With the LMRDA, it is clear that Congress did not intend to occupy the entire field of regulation, as the text of LMRDA contains a savings clause that explicitly references the continuing effectiveness of state laws. *O'Hara v. Teamsters Union Local No. 856*, 151 F.3d 1152, 1161 (9th Cir. 1998). Thus, there can be no field preemption in this case.

Furthermore, there is no conflict preemption in this case, because it is not impossible to comply simultaneously with both the LMRDA and with state law pertaining to breach of contract claims and wrongful discharge. For example, in *Bloom v. Gen. Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F.2d 1356 (9th Cir. 1986), the Ninth Circuit Court of Appeals held that a state law cause of action for wrongful

discharge based on the employee's refusal to violate state law is not preempted by the federal labor policies reflected in the LMRDA. The court stated that "[p]rotecting such a discharge by preempting a state law cause of action based on it does nothing to serve union democracy or the rights of union members; it serves only to encourage and conceal such criminal acts and coercion by union leaders." *Bloom*, 783 F.2d at 1362.³ Likewise, the enforcement of a state law contract entered into voluntarily by the union and union employee does not conflict with the application or purpose of the LMRDA.

The Council argues that *Finnegan v. Leu*, 456 U.S. at 431, supports its preemption argument and provides language giving it unfettered authority to terminate its employees. However, *Finnegan* is inapposite to the case at hand and is misinterpreted by the Council. *Finnegan* did not address the issue of preemption; rather, it held that the petitioners in that case did not have a cause of action under the LMRDA, as the protections of the LMRDA do not apply to union employees who have been terminated for political reasons.

³ Although the California Supreme Court in *Screen Extras Guild v. Super. Ct.*, 51 Cal. 3d 1017, 800 P.2d 873 (Cal. 1990), limited the holding of *Bloom*, courts in other jurisdictions have read the case more broadly. See, e.g., *Casumpang v. ILWU, Local 142*, 94 Hawai'i 330, 13 P.3d 1235 (Hawaii 2000) (holding that the LMRDA did not preempt a state law wage claim).

In addition, *Finnegan* does not stand for the proposition that the LMRDA gives union officials unfettered discretion in employment matters. “The 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 can never restrict a union leader’s discretion to terminate a union employee.” *Ardingo*, 333 Fed. Appx at 936. When a union chooses to offer a just-cause employment provision to its employees, there is nothing in *Finnegan* or the LMRDA that would prevent the contract from being enforced.⁴

According to the Council’s argument, by enacting a statute intended to curb union corruption, Congress has provided union leadership with unfettered discretion to deceive and discriminate against their employees despite the existence of contrary state laws – a power that no private employer possesses. Under this line of reasoning, a discrimination claim brought by a union business agent under the Washington Law Against Discrimination would also be preempted by the LMRDA. But unions are not immune from state law claims of employment discrimination. *See Blaney v. Int’l Ass’n of Machinists and Aerospace*

⁴ Federal cases cited by Respondents for the proposition that a union leader has right to choose his own business agents are also cases brought under the LMRDA and so are not preemption cases. *See Franza v. Int’l Bhd. of Teamsters*, 869 F.2d 41 (2d Cir. 1989); *Nixon v. United Food and Commercial Workers*, 751 F. Supp. 1491 (D. Colo.1990); *Cehaich v. UAW*, 710 F.2d 234 (6th Cir. 1983)

Workers, Dist. No. 160, 151 Wn.2d 203, 87 P.3d 757 (2004) (upholding jury finding of sex discrimination against a union employee by the union). The scope of a statute's preemption is determined by the intent of Congress; it cannot be seriously contended that Congress enacted a statute in response to its findings of union corruption that would allow elected union officials to ignore state anti-discrimination laws or contracts entered into with employees.

Daignault's breach of contract lawsuit does not pose an obstacle to the LMRDA's purposes and objectives. Congress was silent on this issue, and Congress's silence cannot imply an intention to award the union unfettered discretion to terminate employees in violation of state law. The purpose of the LMRDA was to eliminate corruption within unions, deter wrongful conduct by union leaders, and promote union democracy.

Mallick v. Int'l Bthd. of Electrical Workers, 814 F.2d 674, 677 (D.C. Cir. 1987) (citing H.R. Rep. No. 86-741 at 8 (1959)). If the LMRDA were to be interpreted as requiring preemption of breach of contract claims, union democracy would be hindered.

3. Washington is an "at-will" employment state, with a strong public policy in promoting an employee's right to contract.

Washington state law recognizes "employment at will" with few exceptions. *See Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685

P.2d 1081 (1984). The “at will” employment doctrine provides the elected union officials with the freedom to choose their own business agents. Thus, any concerns that a union may have about undue interference from the courts would be addressed simply by the unions making clear to its employees that they are employed at will. However, once a union promises employees that it will terminate only for cause, it should be bound by those promises.

The Council also finds it significant that there Congress did not mention job security protection for union employees in the LMRDA. Here, however, the job security was provided by *the Council* itself, not by the LMRDA. Congress did not require a just-cause provision in a union employee contract. If there is one, however, it should be enforceable.

The Council’s claim that every court to consider the issue has found preemption is incorrect.⁵ In *Ardingo*, 333 Fed. Appx. at 929, the Sixth Circuit found no preemption in facts similar to the facts in this case. Respondents must be aware of this case from the Michigan case it attached as an appendix to its response brief, as that case discussed *Ardingo* at

⁵ Respondents apparently have no qualms about citing unpublished opinions, as they have cited numerous unpublished opinions in violation of General Rule (GR) 14.1. At least one unpublished opinion was cited in Respondents’ brief from a jurisdiction which would not permit citation to the opinion, and no unpublished opinions were attached as an appendix to the response brief. Despite Respondents’ willingness to cite unpublished opinions, they have not cited or mentioned *Ardingo*, a case the *Packowski* court admitted had “nearly identical” facts.

length, yet declined to follow *Ardingo's* reasoning. *Packowski v. United Food & Commercial Workers Local 951*, No. 282419, *1, *8 (Mich. July 8, 2010).

In *Ardingo*, the defendant hired the plaintiff as a business agent years prior to his termination. The plaintiff was hired under a just-cause employment policy that permitted the union to terminate him only if he “failed to meet employment performance standards” or if his termination would further the needs of the union “as construed by the Supreme Court in *Finnegan v. Leu* and its progeny.” *Id.* at *2. The Sixth Circuit Court of Appeals upheld the jury verdict for the plaintiff after finding that his state law cause of action was *not* preempted by the LMRDA. The court determined that no express or field preemption could exist for the reasons described above, and went on to determine that there could be no conflict preemption “because it is not physically impossible to comply with those restrictions while simultaneously complying with state wrongful-discharge law.” *Id.* at *9. The court went on to hold that there was no conflict preemption because *Ardingo's* lawsuit did not pose an obstacle to the LMRDA's purposes. *Id.*

Despite its finding that the facts in *Ardingo* were “nearly identical,” the Michigan Court of Appeals declined to follow it. Instead, it held that the plaintiff's wrongful discharge claim under Michigan state law

did conflict with the LMRDA and was, therefore, conflict-preempted. *Packowski*. at *1. The dissenting judge in *Packowski* would have followed the reasoning in *Ardingo*, contending that enforcement of a just-cause provision would not conflict with the LMRDA's goals of ensuring union democracy. *Packowski*, dissent at *2 (Beckering, J. dissenting). According to the dissent, "To hold otherwise would permit unions to award employment contracts with just cause provisions that the employees have no ability to enforce, at least in state court, rendering the provisions virtually meaningless." *Id.*

Other state cases have held that the LMRDA does not preempt state law claims brought by union employees or that preemption is a jury question.⁶ The state cases relied on by the Council in its response should be distinguished from the present case because, in those cases, the plaintiffs brought wrongful discharge claims under state law or public policy rather than attempting to enforce written policies provided to the employee by the union.

For example, the Council cites a Montana case brought under a state wrongful discharge statute. *Vitullo v. IBEW Local 26*, 317 Mont. 142, 75 P.3d 1250 (2003). Montana is not an at-will employment state.

⁶ See, e.g., *Casumpang v. ILWU, Local 142*, 94 Hawai'i 330, 13 P.3d 1235 (Haw. 2000) (finding no LMRDA preemption for an elected union employee); *Young v International Brotherhood of Locomotive Engineers*, 683 N.E. 2d 420, 421-422 (Ohio App. 1996) (finding the preemption question to be one for the jury).

Unlike Montana, Washington has not imposed any law or policy on the union that frustrated federal policy. If the federal government intended to preempt state contract law with respect to employees of unions, it would have provided a federal remedy to replace the ability of individuals to enforce any employment contracts. *See McCurry v. Chevy Chase Bank, FSB*, No. 81896-7, *14-15 (June 24, 2010) (finding no preemption of state law contract claims and CPA claims by federal regulation of federal savings associations). To hold otherwise would be to allow unions to put just cause provisions in contracts that employees would never be able to enforce in state courts.

The Council relies heavily on a wrongful discharge case based on an implied breach of a state-law covenant of good faith and fair dealing in *Screen Extras Guild v. Superior Court*, 51 Cal.3d 1017, 275 Cal. Rptr. 395 (1990).⁷ The Council, however, reads *Screen Extras Guild* too broadly. In *Screen Extras Guild*, the court made a policy decision not to permit wrongful discharge cases for union employees fired due to political activity. *Screen Extras Guild* is distinguishable from this case because it did not involve a contract based on a just cause policy. *Id.* at 1029.

⁷ The Council also relies on *Tyra v. Kearney*, 153 Cal. App. 3d 921; 200 Cal. Rptr. 716 (1984), a case whose reasoning was largely adopted by the California supreme court in *Screen Extras Guild* and thus which does not need to be discussed separately.

A strongly worded dissent in *Screen Extras Guild* concluded that even where union politics are involved, it is clear that the LMRDA does not preempt state rights. *Screen Extras Guild* at 1033 (Eagleson, J., dissenting). Because *Finnegan* does not suggest that the LMRDA protects the freedom of union officials to terminate employees with unfettered discretion, the majority erred by relying on the language of *Finnegan* in reaching its result. *Id.* at 1035; *see also Screen Extras Guild* at 1053 (Arabian, J., dissenting) (“Ironically, in seeking to preserve the federal interest, the majority subverts it by sanctioning arbitrary discharge”).

Washington has a strong public policy in promoting an employee’s right to contract. RCW 49.36.020 (“the right to enter into the relation of employer and employee or to change that relation except in violation of contract is a legal right”). Washington’s strong interest in favor of freedom of contract outweighs any federal interest in allowing unions to terminate its employees despite the existence of those contracts or enforceable handbook policies. The wrongful discharge claim in *Bloom* was not preempted because the state’s strong interest in allowing the wrongful discharge action outweighed the federal interest under the facts of the case. *Id.* Similarly, Daignault’s breach of contract claim should not be preempted due to the strong competing state interest.

B. Daignault's opening brief properly argued for his contract claims under the handbook theory of *Thompson* and its progeny.

Rather than attack the reasoning of Appellant's arguments, the Council argues that Daignault cannot make them on appeal because Daignault did not raise them at his deposition.⁸ To be clear, Daignault is not making any new claims in this appeal. Once a claim is properly presented, a party can make any argument on appeal in support of that claim; parties are not limited to the precise arguments they made below. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 78 n.2, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988). In his opening brief, Daignault presents several arguments in support of his breach of contract claim. Each of these arguments should be considered by the Court. *See Yee v. City of Escondido*, 503 U.S. 519, 534-535 (1992) (stating that petitioners could have formulated any argument in their opening brief before the Supreme Court for support of the claims raised in the state courts).

The Council argues that Daignault did not properly raise an express contract theory in his opening brief. This is incorrect. Daignault's opening brief referenced the *Thompson* rule that breach of contract claims

⁸ The Council argues that Daignault should be limited to legal theories of breach of contract listed by Daignault in his deposition. Of course, Daignault as a lay witness is not required to assert particular legal theories in his deposition. The cases cited by Respondents involved plaintiffs' sham affidavits constructed in an attempt to create an issue of material fact to preclude summary judgment. The cases do not support limiting a Plaintiff's case in the way Respondents suggest.

can be brought on the basis of employer-issued handbooks under traditional contract theory or a promissory-estoppel type analysis. App.'s Br. at 13 (citing *Thompson*, 102 Wn.2d 219). The brief discusses the rule that, under express contract theory, offer, acceptance, and consideration are required. App.'s Br. at 14 (citing *Swanson v. Liquid Air*, 118 Wn.2d 509, 521, 762 P.2d 1143 (1988)). Daignault then applies those rules to the facts in his case. App.'s Br. at 16.

In addition, the Council argues that Daignault did not properly argue for an implied contract claim in its opening brief, and thus any implied contract claim is not before the court. Daignault disagrees. In a case cited by the Council in its Respondents' brief, *Droby v. Boeing Co.*, 80 Wn. App. 97, 907 P.2d 299 (1995), this Court stated:

[I]f an employer issues an employment handbook or manual, these materials might create an implied modification of the at-will employment contract. This is true if the manual or handbook contains promises that the employer will provide the employee specific treatment under specific circumstances or in specific situations....If, however, the manual terms as written amount only to general policy statements, then the manual will not create an implied contract.

Id. at 100 (citations omitted). It is because of the language of this still frequently cited case and similar cases that Daignault used the language of "specific treatment in specific circumstances" both for contract theory and for a promissory-estoppel type reliance theory, despite

language in other cases that suggest the *Thompson* handbook exception is a different species of claim altogether. Whether these theories are analytically distinct or entangled is unclear; however, under either theory, a specific promise to employees could bind an employer. *Id.*

Reliance on a promise is not required for an express or implied contract, if one can be established. Such a contract can be established by providing additional consideration to the employer, showing that the promise was bargained-for. *Swanson v. Liquid Air Corp.*, 118 Wn.2d at 523. The Council's argument that Daignault's payment of the union dues could not constitute consideration for an implied contract is not persuasive: he was asked to sign an agreement to pay dues as a condition of employment. CP 190-192. Furthermore, consideration could take other forms, such as Daignault continuing in employment, not seeking representation by another union, or running for union office.

The Council admits that Daignault's handbook claim based on the Council's personnel policy is properly raised (although it attempts to limit the theories of the breach by referencing Daignault's deposition). A handbook claim does not require the traditional formalities of contract formation. *Korlund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005). Thus, the Council's argument that Daignault's contract theories fail for lack of independent consideration do not apply to

his claim based on the Council's specific promises made in the personnel policy. *See* Resp. Br. at 42.

The Council argues that Daignault cannot prevail on his promissory-estoppel type handbook claim because the personnel policies provided no clear and definite promise. Daignault argued in his opening brief that the personnel policy contains promises of specific treatment in specific situations for progressive discipline, termination only for just cause, and a fair appeal process. It is clear that for an employee to prevail on a promissory-estoppel type handbook claim, the promises do not need to be specifically bargained for. *See Thompson*, 102 Wn.2d at 229.

In addition, there is sufficient evidence of Daignault's reliance on the Council's policies in the record. Daignault was induced by the policy's promises to remain employed by the Council. CP 190-192. As stated in Daignault's opening brief, the question of whether Daignault justifiably relied on promises of specific treatment in specific situations was properly a question for the trier of fact. Appellant's Br. at 36.

C. Whether Daignault's behavior constituted just cause under the policy is a jury question.

The Council now alleges that Daignault was terminated by Tweedy for just cause. Whether Daignault was fired for just cause is a question for the jury. *See Baldwin v. Sisters of Providence in Washington, Inc.*, 112

Wn.2d 127, 769 P.2d 298 (1989) (discussing jury instructions for “just cause” and the proper definition of the term).

In *Baldwin*, the Washington Supreme Court discussed the standard for a just cause discharge. The Court held that:

"[J]ust cause" is a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. We further hold a discharge for "just cause" is one which is not for any arbitrary, capricious, or illegal reason and which is based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true.

Id. at 134. Thus, the reason must be regulated by “good faith.”

In addition, there is simply no evidence in this case that Daignault was terminated for just cause. Evidence that he was a “rogue employee” is not in the record; in fact, he had faithfully worked for Tweedy for years. CP at 178. Daignault did his campaigning during his vacation time. Complaint ¶ 24, CP 1-13. There was no evidence presented that Daignault was unwilling or unable to faithfully carry out Tweedy’s goals once Tweedy was re-elected to office.

D. Whether Daignault’s “appeal” was decided with good faith and fair dealing is a question for the jury.

The Council does not appear to disagree that it promised Daignault an appeal process. Resp’s Br. at 32. It argues that Daignault can show no promise related to the appeal process or his alleged lack of union

representation. As an initial matter, the Council is improperly importing promissory estoppel cases into a *Thompson*-type handbook case. In addition, Daignault did not bring a claim for lack of union representation; he understood that the union would not represent him in an employment grievance.

The unpublished district court case presented by the Council in support of its argument that Daignault had his “day in court” with his sham appeal is completely inapplicable to Daignault’s case, as it involved an employer *investigation* of a violent employee. Resp’s Br. at 31. Defendant cites no published case law supporting its position that simply permitting Daignault to speak before a Board that had already decided to terminate him for political reasons constituted treating Daignault with good faith and fair dealing. This is clearly a question of fact for the jury. *See Baldwin*, 112 Wn.2d at 134 (discussing jury instructions for just cause).

In its brief, the Council contends that any attempt to argue that the promised appeal needed to be conducted with good faith and fair dealing is preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). Daignault, however, is basing his argument on employer policies--*not* union bylaws or parts of a collective bargaining agreement. Accordingly, his claims are not preempted by the LMRA.

E. The disclaimer cases cited by Daignault are more persuasive.

The Council does not address many of the cases cited by Daignault for his contention that the Council's disclaimer in its personnel policy is ineffective. Instead, the Council relies on several inapposite cases.⁹

An early case cited by the Council, *Messerly v. Asamera Minerals*, 55 Wn. App. 811, 780 P.2d 1327 (1989) held that construction of a disclaimer is a question of law. This contention, however, was later rejected by the Washington Supreme Court in *Swanson v. Liquid Air*, 118 Wn.2d 512, 529, 826 P.2d 664 (1992). The construction and interpretation of a disclaimer is generally a jury question. *Swanson*, 118 Wn.2d at 529.

Another early case the Council cites as dispositive is *Birge v. Fred Meyer*, 73 Wn. App. 895, 872 P.2d 49 (1994). *Birge* is distinguishable from this case, in that Fred Meyer clearly reserved for itself the ability to fire employees at will, and communicated that to its employees. *Id.* at 900. There was no "just cause" provision; the dispute was not over whether an employee could be terminated without cause, but whether the employee could be terminated without a warning. *Id.*

⁹ One of the cases relied on by the Council for its disclaimer argument, *Smith v. Island Transit*, 1996 U.S. App. LEXIS 26713 (9th Cir. 1996), is an unpublished Ninth Circuit case from 1996. As the Ninth Circuit does not permit citation to its unpublished opinions prior to 2007, and as the case was not provided with Respondents' brief, Respondents' citation is in violation of General Rule (GR) 14.1.

In his opening brief, Daignault cited *Payne v. Sunnyside Hospital*, 78 Wn. App. 34, 894 P.2d 1379 (1995). In *Payne*, the court reversed a grant of summary judgment for the employer, holding that a disclaimer similar to the one in *Birge* was ineffective because inconsistent with other language in the policy statements, including provisions requiring progressive discipline. *Id.* The Council has not addressed this or most of the other disclaimer cases discussed by Daignault in his opening brief. *See also Carlson v. Lake Chelan Community Hospital*, 116 Wn. App. 718, 75 P.3d 533 (2003) (finding that the language of the disclaimer was ineffective because it was too unclear and inconsistent).

In addition, the Council appears to misunderstand Daignault's argument about the effect of the noninclusion of "at will" in its disclaimer. Daignault's point is that the disclaimer itself references the just cause policy. The lack of the words "at will" in a disclaimer after a policy promising termination only for a list of specified reasons and providing for progressive discipline is a significant omission. After reading the disclaimer, a reasonable person could believe that they would have a fair appeal and that they could only be terminated for cause.

F. Collateral Estoppel does not apply.

The Council, for the first time on appeal, raises the affirmative defense of collateral estoppel. Failure to raise an issue before the trial

court usually precludes a party from raising it on appeal. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

To establish collateral estoppel, a party must prove all four prongs: (1) the issue decided in the prior action was identical to the issue presented in the second action; (2) the prior action ended in a final judgment on the merits; (3) the party to be estopped was a party or in privity with a party in the prior action; and (4) application of the doctrine would not work an injustice. *State v. Vasquez*, 148 Wn.2d 303, 59 P.3d 648 (2002).

The Council cannot establish all four prongs here. Daignault has stated that he relied on the just cause policy and submitted a sworn declaration in the trial court to that effect. CP 190-192. As this is a fact-specific inquiry, there is no identity of issues here.

In addition, Daignault was not a party to his co-worker's case. The Council cites no Washington cases in support of its argument that, because a co-worker of Daignault's also sued the Council, Daignault's case is barred by the doctrine of collateral estoppel. The Washington case cited by the Council, *Brown v. Scott Paper Worldwide Co.*, 98 Wn. App. 349, 989 P.2d 1187 (1999), was a case finding no collateral estoppel when a plaintiff brought a lawsuit against supervisors of an employer sued in a previous lawsuit. *Brown* does not apply. The unpublished district court

cases cited by the Council are irrelevant to the present case and do not support the Council's argument. Resp. Br. at 54.

G. The Trial Judge Erred by Not Granting a Continuance for Daignault's New Counsel to Take Depositions.

As noted in Daignault's opening brief, the plaintiffs in both *Butler* and *Coggle* obtained new counsel shortly before the summary judgment hearing, and neither counsel had adequate time to respond to the summary judgment motion. *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003); *Coggle v. Snow*, 56 Wn. App. at 508, 784 P.2d 554 (1990). In both cases, the retention of new counsel was the primary reason for finding an abuse of discretion by the trial court for failing to grant a continuance of the summary judgment proceedings.

The court in *Briggs v. Nova*, 135 Wn. App. 955, 961, 147 P.3d 616 (2006), distinguished those cases and reached a different result, at least in part because the plaintiff in *Briggs* had not retained new counsel shortly before the summary judgment hearing. Daignault's case can be distinguished from *Briggs* on the same basis.

The Council argues that Daignault did not inform the trial court of the reason why he did not obtain discovery at an earlier date. The Council is incorrect. Daignault's prior counsel submitted a declaration explaining the discovery delays, CP at 188-189, and Daignault's new counsel

appeared after the date the summary judgment response was due. CP at 176.

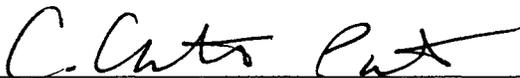
The Council argues that to allow Daignault a continuance after it had already “showed its cards” in a summary judgment motion would have caused it prejudice. This appears to be an argument against the fairness of Rule 56(f), which does contemplate continuances in situations where defendants file early summary judgment motions. The interests of justice would have best been served by providing Daignault’s new counsel with time to take depositions and conduct discovery on the specific issues outlined in his motion for continuance. *See, e.g.*, CP at 85 n.3.

III. Conclusion

For all of the reasons set out above, the Appellant requests that this Court reverse the grant of summary judgment to Respondents.

RESPECTFULLY SUBMITTED this 7th day of September,
2010,

LAW OFFICES OF MATTHEW J. BEAN, P.S.



Matthew J. Bean, WSBA #23221
C. Christine Porter, WSBA #41900
Attorneys for Appellant

APPENDIX

2 of 4 DOCUMENTS

**CHARLES ARDINGO, Plaintiff-Appellee, v. LOCAL 951, UNITED FOOD AND
COMMERCIAL WORKERS UNION, Defendant-Appellant.**

No. 08-1078

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**09a0383n.06; 333 Fed. Appx. 929; 2009 U.S. App. LEXIS 11694; 2009 FED App.
0383N (6th Cir.); 186 L.R.R.M. 2616**

May 29, 2009, Filed

NOTICE: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: [1]**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN.

Ardingo v. Potter, 445 F. Supp. 2d 792, 2006 U.S. Dist. LEXIS 55001 (W.D. Mich., 2006)

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant seeks review of a decision of the U.S. District Court for the Western District of Michigan, which awarded to appellee former union business agent recovery in his wrongful termination lawsuit. On appeal, the union raised numerous issues, including challenges to the award of damages and a claim that the suit was preempted by the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C.S. § 411 et seq.

OVERVIEW: The union's policy permits the employer's termination only if the skills, knowledge and training standards and performance requirements are met. The union argued that the employer's termination of appellee was in violation of the LMRDA. On appeal, the union argued that the employer's termination of appellee was in violation of the LMRDA. The court found that the union's objections to the employer's termination and the district court's award of damages were not supported by proof that not excessive.

OUTCOME: The court affirmed the district court's decision.

CORE TERMS: termination, economic necessity, terminated, just-cause, preemption, wrongful-discharge, jury instructions, reinstatement, terminate, election, pretext, retaliation, union members, fired, lawsuit, jurors, state law,

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cause of action, applicable law, union officials, union leaders, business agent, membership, admissible, preempted, front, employment contracts, grand jury, summary judgment, admissibility

LexisNexis(R) Headnotes

Civil Procedure > Federal & State Interrelationships > Federal Common Law > Preemption

[HN1] A federal law may preempt a state law cause of action either expressly or impliedly. A state law cause of action will be expressly preempted where a federal statute or regulation contains express language indicating that such lawsuits are preempted. Implied preemption, on the other hand, exists where there is either "field preemption" or "conflict preemption." Field preemption is found where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. Conflict preemption refers to situations where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Civil Procedure > Federal & State Interrelationships > Federal Common Law > Preemption Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

[HN2] The preemptive scope of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.S. § 411 et seq., is narrow.

Civil Procedure > Federal & State Interrelationships > Federal Common Law > Preemption Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

[HN3] The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C.S. § 411 et seq., regulates relationships between union leaders and their subordinates by preventing rank-and-file union members from being disciplined for exercising certain rights such as the right to vote in union elections and the right to speak and assemble. The LMRDA clearly does not occupy the entire field of regulation with respect to union employees because it contains a savings clause that provides that except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or the law of any state. 29 U.S.C.S. § 523(a). The savings clause makes it clear that the LMRDA does not occupy the field of regulation with respect to the relationships between union leaders and subordinates so thoroughly that union employees cannot enter into and enforce just-cause employment contracts under state law.

Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview Labor & Employment Law > Employment Relationships > Employment Contracts > Breach

[HN4] When a union chooses to offer a just-cause employment contract to an employee, there is nothing in Finnegan or the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.S. § 411 et seq., that would prevent that contract from being enforced.

Evidence > Relevance > Relevant Evidence

[HN5] All relevant evidence is admissible, Fed. R. Evid. 402, and relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, Fed. R. Evid. 401.

Labor & Employment Law > Discrimination > Disparate Treatment > Defenses & Exceptions > General Overview Labor & Employment Law > Wrongful Termination > Defenses > General Overview

[HN6] Under Michigan law, economic necessity can constitute just cause for discharging an employee, but economic necessity cannot be used as a pretext for discharges which would otherwise be subject to just-cause attack by the employee.

Evidence > Relevance > Confusion, Prejudice & Waste of Time

[HN7] Fed. R. Evid. 403 allows relevant evidence to be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay,

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waste of time, or needless presentation of cumulative evidence. Within the context of Rule 403, unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather, it refers to evidence which tends to suggest a decision on an improper basis.

Evidence > Relevance > Relevant Evidence

[HN8] All that Fed. R. Evid. 401 requires is that the evidence make a party's case somewhat more or less likely. The fact that a plaintiff's evidence fails to make the plaintiff's case likely enough for the plaintiff to win does not mean that the evidence fails to make the plaintiff's case more likely than it would have been without the evidence.

Civil Procedure > Trials > Jury Trials > Jury Instructions > Requests for Instructions

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > Reversible Errors

[HN9] A trial court's refusal to give a requested jury instruction is reviewed for abuse of discretion, and it constitutes reversible error if (1) the omitted instruction is a correct statement of law, (2) the instruction is not substantially covered by other delivered charges, and (3) the failure to give the instruction impairs the requesting party's theory of the case. A judgment may be reversed only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial.

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Evidence > Procedural Considerations > Burdens of Proof > Burden Shifting

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burdens of Proof

Labor & Employment Law > Wrongful Termination > General Overview

[HN10] Under Michigan law, a wrongful-discharge plaintiff does not have to disprove every potential basis for just cause. Instead, a wrongful-discharge plaintiff must prove nothing more than that: (1) he was terminated by the defendant; (2) he was performing the duties of his employment until the time of his termination; and (3) he suffered economic damages as a result of the termination. When these prima facie elements are satisfied, the burden shifts to the defendant to prove a basis for just cause. If the defendant demonstrates that it had just cause to terminate the plaintiff, then the burden shifts back to the plaintiff to show that the reason set forth by the defendant was merely a pretext for terminating the plaintiff for a reason that did not constitute just cause.

Labor & Employment Law > Discrimination > Disparate Treatment > Defenses & Exceptions > General Overview

Labor & Employment Law > Wrongful Termination > Defenses > General Overview

[HN11] Under Michigan law, the question of pretext does not arise until a defendant has demonstrated that there was just cause for the termination at issue.

Labor & Employment Law > Discrimination > Disparate Treatment > Remedies

Labor & Employment Law > Wrongful Termination > Remedies > Reinstatement

[HN12] The availability or propriety of reinstatement is a matter for a court to decide because reinstatement is an equitable remedy.

Evidence > Procedural Considerations > Objections & Offers of Proof > Objections

[HN13] See Fed. R. Evid. 103(a)(1).

Civil Procedure > Judgments > Relief From Judgment > Additurs & Remittiturs > Remittiturs

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN14] An appellate court reviews a refusal to remit a verdict for abuse of discretion. A trial court should not remit a verdict unless it is (1) beyond the range supportable by proof; or (2) so excessive as to shock the conscience; or (3) the result of a mistake.

Civil Procedure > Judgments > Relief From Judgment > Additurs & Remittiturs > Remittiturs

[HN15] Excessiveness of a verdict is primarily a matter for a trial court which has the benefit of hearing the testimony

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and of observing the demeanor of the witnesses.

COUNSEL: For CHARLES ARDINGO, Plaintiff - Appellee: Joel E. Krissoff, Farr Oosterhouse & Krissoff, Grand Rapids, MI.

For LOCAL 951, UNITED FOOD & COMMERCIAL WORKERS UNION, Defendant - Appellant: Jonathan D. Karmel, Karmel & Gilden, Chicago, IL.

JUDGES: Before: KENNEDY and BATCHELDER, Circuit Judges; and THAPAR, District Judge. * Kennedy, Circuit Judge, dissenting.

* The Honorable Amul R. Thapar, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION BY: THAPAR

OPINION

[*931] **THAPAR, District Judge.** Plaintiff Charles Ardingo won a jury verdict of \$ 819,614 in his wrongful-termination lawsuit against Defendant Local 951, United Food & Commercial Workers Union. On appeal, the defendant contends that the judgment in favor of Ardingo should be reversed because Ardingo's wrongful-termination claim is preempted by the Labor-Management Reporting and Disclosure Act of 1959 (the "LMRDA"). In the alternative, the defendant asks for a new trial on the grounds that: (1) the trial court made several prejudicial evidentiary errors; (2) the trial court erred in refusing to give certain jury instructions proposed by the [**2] defendant; (3) the trial court erroneously permitted the plaintiff's expert to testify; and (4) the trial court erred in not remitting the amount of damages awarded to Ardingo. Because these arguments are unavailing, we affirm.

I. Background

The defendant is a labor organization representing thousands of grocery store workers--largely Meijer employees--in Michigan. The defendant hired Ardingo as a business agent in 1990 under a just-cause employment policy that permitted the defendant to terminate him only if he "failed to meet employment performance standards," or if his termination would further the needs of the union "as construed by the Supreme Court in *Finnegan v. Leu* and its progeny." J.A. at 440, 590-91. ¹

¹ *Finnegan v. Leu*, 456 U.S. 431, 102 S. Ct. 1867, 72 L. Ed. 2d 239 (1982) is a Supreme Court case that discusses, in dictum, the need for unions to be able to terminate employees for political reasons. This case figures prominently in the defendant's preemption argument and is discussed at length below.

Ardingo's employment with the defendant went well for the first decade. During this time, he gained a seat on the union's executive board, *id.* at 598, and was given important assignments, like negotiating critical [**3] contracts with major employers. *See id.* at 592-93.

In 2001, however, his relationship with the union leaders changed for the worse. *See id.* at 596. After rumors started circulating that Ardingo was going to run a campaign against Robert Potter, the union's president, in the next election cycle, Potter and other union officials accused Ardingo of being a traitor. *See id.* at 596-99. Ardingo requested a meeting with Potter to discuss these issues, and the two met at a union office in Livonia, Michigan. *See id.* at 600. The meeting became heated, and Potter insinuated that Ardingo was a "pipeline to the Department of Labor." *Id.* at 602. Shortly thereafter, Ardingo was reassigned to a different position and told to have no contact with members of Local

951. *See id.* at 32.

In the spring of 2002, Ardingo cooperated with a Department of Labor investigation concerning financial irregularities with the defendant. *See id.* at 608, 619-20. Shortly after participating in interviews with the Department of Labor, Ardingo testified before a grand jury concerning the same issues. *See id.* at 32, 620.

Starting in early 2003, Ardingo was reassigned in rapid succession to jobs in North Carolina, Indiana, and [**4] Washington [*932] state. *See id.* at 32, 603-04. The ostensible purpose of each of these temporary assignments was to assist in union organizing campaigns in those states. Ardingo, however, claims that these assignments were a form of retaliation for his cooperation with the Government.

By the beginning of 2004, Local 951 was experiencing financial hardship due to the loss of members. It had lost a total of \$ 1,282,709 over the previous two years, and it was on its way to losing \$ 950,360 during 2004. *Id.* at 447. This was a significant amount of money for an organization that had an average annual income around \$ 10,000,000. *See id.* As a result, the union leadership decided to pare down the number of its employees. Ardingo--who was making nearly \$ 100,000 per year at that time and had less seniority than other similarly situated individuals--was chosen to be one of ten employees who were released in January of 2004. Robert Potter testified that Ardingo was selected for termination because of economic reasons and because Potter had lost confidence in Ardingo due to the fact that Ardingo had sought employment with Meijer, the largest employer of Local 951's members. *See id.* at 994-95.

Ardingo [**5] was told that he was being released for financial reasons, but he believed that excuse to be a ruse for retaliation since the defendant had recently hired at least one additional employee. *See id.* at 623. Therefore, on December 13, 2004, Ardingo filed this lawsuit against Potter and the union, alleging that they had: (1) violated his rights under the LMRDA, (2) forced him to pay assessments to the union in violation of the LMRDA, (3) terminated him in violation of Michigan public policy, and (4) wrongfully discharged him in violation of the union's just-cause policy. *See id.* at 23-24. Judge Richard Alan Enslin granted summary judgment in favor of the defendants on all but the wrongful-discharge claim, *see id.* at 318-29, and Potter was dismissed as a defendant shortly before the trial commenced. Thus, the only claim left for trial was the wrongful-discharge claim against the union. The parties consented to have this claim tried by Magistrate Judge Ellen S. Carmody.

On July 6, 2007, three days before the trial began, Ardingo supplemented his previous expert disclosures by submitting to the defendant an updated report from Dr. Marvin DeVries, the expert who ultimately testified about the [**6] financial damages that Ardingo had suffered. The defendant filed a motion in limine to exclude this supplemental report, and the trial court granted that motion. *Id.* at 527-28.

The trial began on July 9, 2007, and lasted for five days. In his opening statement, Ardingo's counsel told the jury that the evidence would show that Ardingo was not terminated for just cause. The defendant's counsel, on the other hand, told the jury that the evidence would show that Ardingo was terminated out of economic necessity, which amounted to just cause. *See id.* at 569. Following the opening arguments, Ardingo proceeded to present evidence showing that he had been terminated not out of economic necessity, but out of retaliation for his cooperation with the Government and his testimony before a grand jury. Conversely, the defendant introduced evidence to support its theory that Ardingo had been terminated because of economic necessity. *See id.* at 666-67, 978-92. Particularly, the defendant argued that its shrinking membership required it to cut costs by reducing the number of its employees. The defendant maintained its economic-necessity theory [*933] all the way through to the closing arguments. *See, e.g., id.* at 1194. [**7] The jury, however, apparently did not buy into the defendant's theory and therefore returned a verdict in favor of Ardingo.

The judgment in favor of Ardingo is now on appeal before this court. In particular, the defendant argues that the judgment should be reversed because Ardingo's claim is preempted by the LMRDA, and in the alternative, the defendant argues that the judgment should be reversed because the trial court erred by: (1) admitting evidence pertaining to the alleged retaliation against Ardingo; (2) rejecting the defendant's proposed jury instructions with respect to the significance of *Finnegan v. Leu*, the burden of proof in wrongful-discharge cases, and the possibility of

reinstatement in lieu of front-pay damages; (3) permitting Ardingo's expert to testify; and (4) refusing to remit the jury verdict.

II. LMRDA Preemption

[HN1] A federal law may preempt a state law cause of action either expressly or impliedly. *See State Farm Bank v. Reardon*, 539 F.3d 336, 341 (6th Cir. 2008) (citing *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982)). A state law cause of action will be expressly preempted where a federal statute or regulation contains express language [**8] indicating that such lawsuits are preempted. *See id.* at 341-42 (citing *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 153). Implied preemption, on the other hand, exists where there is either "field preemption" or "conflict preemption." *Id.* at 342 (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992)). Field preemption is found "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.* (quoting *Gade*, 505 U.S. at 98). Conflict preemption refers to situations "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting *Gade*, 505 U.S. at 98). None of these types of preemption, however, apply to Ardingo's wrongful-discharge claim. This is not surprising considering that the Sixth Circuit has previously stated that [HN2] "the preemptive scope of the LMRDA is narrow." *Davis v. UAW*, 392 F.3d 834, 839 (6th Cir. 2004), *overruled on other grounds by Blackburn v. Oaktree Cap. Mgmt., LLC*, 511 F.3d 633 (6th Cir. 2008).

First, Ardingo's [**9] claim is not expressly preempted because 29 U.S.C. § 483, the express preemption provision in the LMRDA, does not apply to state-law wrongful-discharge claims. Instead, it only applies to state-law challenges to union elections. *Id.* As Ardingo's claim is clearly not a state-law challenge to a union election, it does not succumb to express preemption.

Nor does Ardingo's claim fall prey to field preemption. It is true that [HN3] LMRDA regulates relationships between union leaders and their subordinates by preventing rank-and-file union members from being disciplined for exercising certain rights such as the right to vote in union elections and the right to speak and assemble. *See Finnegan v. Leu*, 456 U.S. 431, 436-37, 102 S. Ct. 1867, 72 L. Ed. 2d 239 (1982). However, the LMRDA clearly does not occupy the entire field of regulation with respect to union employees because it contains a [**934] savings clause that provides that "except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or the law of any State." 29 U.S.C. § 523(a). Thus, the savings clause makes it clear that the LMRDA does not occupy [**10] the field of regulation with respect to the relationships between union leaders and subordinates so thoroughly that union employees cannot enter into and enforce just-cause employment contracts under state law.

Furthermore, there is no conflict preemption here because it is not physically impossible to comply simultaneously with both the LMRDA and the state law pertaining to wrongful discharge. The LMRDA restricts union officials from retaliating against union members for exercising political rights such as their right to free speech. It is not physically impossible to comply with these restrictions while simultaneously complying with state wrongful-discharge law. Moreover, there is no conflict preemption because Ardingo's lawsuit does not pose an obstacle to the LMRDA's purposes and objectives. The LMRDA's "overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Finnegan*, 456 U.S. at 441 (citing *Wirtz v. Hotel Employees*, 391 U.S. 492, 497, 88 S. Ct. 1743, 20 L. Ed. 2d 763 (1968)). There is no danger that this objective will be interfered with by a lawsuit that seeks to vindicate an employee's rights [**11] under a just-cause employment contract.

The defendant, however, suggests that conflict preemption does apply in this instance. According to the defendant, the Supreme Court's decision in *Finnegan* construed the LMRDA in a way that requires a finding of preemption in this case. Essentially, the defendant argues that the LMRDA, as interpreted in *Finnegan*, provides union officials with an

affirmative right to exercise unfettered discretion in union employment matters. The defendant's reliance on *Finnegan*, however, suffers from two fatal defects. First, *Finnegan* is inapposite to the case at hand. Second, the defendant misinterprets *Finnegan*. To see why this is so, it will be helpful to review *Finnegan*.

The petitioners in *Finnegan* were union members who--just like the plaintiff in this case--had been employed by their union as business agents. *Id.* at 433. Unlike the plaintiff in this case, however, the petitioners in *Finnegan* were not suing for wrongful discharge in violation of a just-cause employment contract. Instead, each of the petitioners was claiming that his termination was a violation of the LMRDA. *Id.* at 434. The *Finnegan* petitioners' claims arose out of an election for the presidency [**12] of Local 20 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *See id.* at 433-34. After the election, the newly elected president fired the petitioners because they had supported his opponent. *See id.* The petitioners then sued the new president on the ground that he had violated their rights under the LMRDA. *See id.* at 434. The question presented to the Supreme Court was "whether the discharge of a union's appointed business agents by the union president, following his election over the candidate supported by the business agents, violated the Labor-Management Reporting and Disclosure Act of 1959." *Id.* at 432.

[*935] In addressing that question, the Supreme Court first engaged in a discussion of the background and purposes of the LMRDA. The Court observed that the statute "was the product of congressional concern with widespread abuses of power by union leadership," *id.* at 435, and the Court further noted that the statute was intended to ensure "that unions would be democratically governed and responsive to the will of their memberships." *Id.* at 436. To this end, the LMRDA granted rights to union members "paralleling certain rights guaranteed by [**13] the Federal Constitution." *Id.* Specifically, the LMRDA sought to ensure that union members would be able to exercise their rights "to freedom of expression without fear of sanctions by the union, which in many instances could mean loss of union membership and in turn loss of livelihood." *Id.* at 435-36. Against this backdrop, the Supreme Court concluded that the LMRDA was intended to protect "rank-and-file union members--not union officers or employees." *Id.* at 437. Thus, it was clear that the LMRDA would have protected the petitioners if they had been punished in their capacity as union members. However, they were not punished in that capacity. Instead, the union president only exacted retribution against them in their capacity as union employees.

After discussing the background of the LMRDA, the Court turned its attention to the question of whether the LMRDA protected the petitioners from political retribution in their capacities as union employees as well as in their capacities as union members. First, the Court rejected the petitioners' claims that the union president's actions violated § 609 of the LMRDA (codified at 29 U.S.C. § 529), which makes it unlawful for a union officer [**14] to "fine, suspend, expel or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of [the LMRDA]." According to the petitioners, their termination as business agents was an act of discipline that violated § 609. The Supreme Court, however, concluded that § 609 did not provide the petitioners with a cause of action because § 609 only applies to "punitive actions diminishing membership rights, and not to termination of a member's status as an appointed union employee." *Finnegan*, 456 U.S. at 438. Next, the Court rejected the petitioners' attempts to establish a cause of action under § 102 of the LMRDA (codified at 29 U.S.C. § 412), which allows a person to sue in a district court of the United States if that person's rights under the LMRDA have been infringed. The Court held that the petitioners could not sue under § 102 because their rights under the LMRDA had not been infringed. *See Finnegan*, 456 U.S. at 440-42. In particular, the Court stated that:

[The LMRDA] does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own. Indeed, neither the language nor the legislative history [**15] of the Act suggests that it was intended even to address the issue of union patronage. To the contrary, the Act's overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections. Far from being inconsistent with this purpose, the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election.

[*936] *Id.* at 441 (citation and footnotes omitted). Therefore, the Supreme Court affirmed the summary judgment that had been entered in favor of the union. *See id.* at 442. Considering that the Court had already found that the statute was

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intended to protect union members instead of union employees, it is not surprising that the Court held that the LMRDA provided no protection for the petitioners.

The most glaringly obvious defect in the defendant's reliance on *Finnegan* is that *Finnegan* is inapposite to the case at hand. *Finnegan* simply held that the petitioners in that case did not have a cause of action under the LMRDA because the protections of the LMRDA do not apply to union employees [**16] who have been terminated for political reasons. This holding has nothing to do with the instant case because Ardingo is not asserting a cause of action under the LMRDA. Instead, he is suing to enforce his state-law contract rights under his just-cause employment contract, and these contract rights simply are not impacted by *Finnegan*. It would be a non-sequitur to say that Ardingo is precluded from bringing a lawsuit to enforce his contract rights simply because the LMRDA does not provide him with a cause of action against the defendant. Indeed, there are many federal laws that do not provide Ardingo with a cause of action, but that does not mean that each one of them preempts his wrongful-discharge lawsuit. In short, [HN4] when a union chooses to offer a just-cause employment contract to an employee, there is nothing in *Finnegan* or the LMRDA that would prevent that contract from being enforced.

The defendant erroneously believes that *Finnegan* is relevant to this case because the defendant misinterprets *Finnegan* as standing for the proposition that the LMRDA gives union officials unfettered discretion in employment matters. The holding of *Finnegan*, however, clearly does not support this interpretation. [**17] The 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. See *Bloom v. Gen. Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F.2d 1356, 1360-62 (9th Cir. 1986) (holding that a wrongful-discharge lawsuit was not preempted by the LMRDA where a business agent claimed to have been terminated for refusing to violate state law). Such 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.

Finally, it is true that the defendant's just-cause policy allows employees to be terminated for political reasons along the lines discussed in *Finnegan*, but this is not a basis for finding preemption. Instead, this fact is only relevant to the issue of whether Ardingo's termination was a violation of the just-cause policy. The question of whether Ardingo was fired for just cause was a matter for the jury to decide, and the sufficiency of the evidence has not been challenged [**18] on appeal.

III. Evidentiary Objections

At trial, Ardingo presented evidence that he had cooperated with a Department of Labor investigation and had testified before a grand jury, and he also presented evidence indicating that he was terminated in retaliation for these acts rather than for any just cause. The defendant [**937] objects to the admissibility of this evidence on the ground that it was irrelevant and prejudicial. This argument, however, lacks merit. [HN5] All relevant evidence is admissible, Fed. R. Evid. 402, and relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," Fed. R. Evid. 401. In this case, the issue before the jury was whether Ardingo was terminated in violation of the defendant's just-cause policy. Thus, the reason for Ardingo's termination was a fact that was of consequence to the determination of the action. As result, any evidence bearing on the reason for Ardingo's termination would have been relevant and therefore generally admissible. Because the evidence of retaliation undeniably had some bearing on the [**19] reason for Ardingo's termination, it was relevant and admissible.

The evidence was also relevant and admissible because it rebutted the union's defense that Ardingo was terminated out of economic necessity. [HN6] Under Michigan law, economic necessity can constitute just cause for discharging an employee, see *Ewers v. Stroh Brewery Co.*, 178 Mich. App. 371, 443 N.W.2d 504 (Mich. Ct. App. 1989), but economic necessity cannot be used as a pretext "for discharges which would otherwise be subject to just-cause attack by the employee." *Id.* at 507. Therefore, Ardingo was entitled to present evidence showing that the purported economic necessity was just a pretext for termination without cause.

The defendant, however, contends that the evidence pertaining to retaliatory discharge was irrelevant and inadmissible because it had no bearing on the issue before the jury. According to the defendant, the only issue properly before the jury was the question of whether the defendant was in such dire financial straits that it terminated Ardingo out of economic necessity. Therefore, the defendant contends that the only evidence that was admissible at trial was evidence pertaining to the its financial circumstances. The defendant ****20** bases this argument on Judge Enslin's opinion denying the defendant's motion for summary judgment on the wrongful-discharge claim. From the defendant's viewpoint, Judge Enslin's opinion had the effect of definitively establishing that the only issue to be decided by the jury was the question of whether the defendant actually had an economic need to terminate Ardingo. Thus, according to the defendant, Ardingo was limited to presenting evidence on only that issue. This argument, however, is plainly wrong because it relies on a gross misreading of Judge Enslin's opinion. In denying the defendant's motion for summary judgment, Judge Enslin clearly did not limit the issues to be decided by the jury. *See* J.A. at 327-28. Instead, he simply found that the claim must be decided by a jury because the defendant's two defenses to this claim did not demonstrate that the defendant was entitled to judgment as a matter of law. *See id.* Rather than intending to limit the issues, Judge Enslin was simply responding to the two specific arguments raised by the defendant: (1) Ardingo was not terminated, but was merely laid off; and (2) Ardingo's layoff/termination was due to economic necessity. Judge Enslin ****21** found that there were genuine issues of material fact with respect to these defenses, but he did not hold that these were the *only* issues on which there were genuine issues of material fact. *See* J.A. at 327-28. A contrary holding would not only be factually wrong, but it ***938** would produce the absurd result of allowing a defendant to limit a plaintiff's evidence according to the issues that the defendant chose to raise in its motion for summary judgment.

The defendant also argues that the trial court should have excluded the retaliatory discharge evidence under Fed. R. Evid. 403 because that evidence was unfairly prejudicial. [HN7] Rule 403 allows relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "Within the context of Rule 403, '[u]nfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather, it refers to evidence which tends to suggest [a] decision on an improper basis.'" *United States v. Lawson*, 535 F.3d 434, 442 (6th Cir. 2008) ****22** (quoting *United States v. Newsom*, 452 F.3d 593, 603 (6th Cir. 2006)). The evidence at issue here does not suggest a decision on an improper basis. Indeed, the trial court took appropriate measures to ensure that would not happen by preventing Ardingo and his witnesses from testifying about the substance of either the Government's investigation or the grand jury proceedings. *See, e.g.*, J.A. at 35-36, 725-26. Ardingo was permitted to reveal nothing other than the fact that there had been a Government investigation with which he cooperated, that there had been a grand jury proceeding before which he testified, and that union officials reacted to these actions with hostility. *See id.* at 35-36. As this evidence was necessary for the presentation of Ardingo's theory of the case, and did not suggest a decision on an improper basis, it cannot be said that the trial court abused its discretion in admitting the evidence. *See United States v. Goosby*, 523 F.3d 632, 638 (6th Cir. 2008) (stating that evidentiary rulings are reviewed for abuse of discretion).

Finally, the defendant also asserts that the evidence of Ardingo's cooperation with the Government and testimony before a grand jury was not ****23** admissible because those acts were too temporally remote from his discharge to prove that the discharge was in retaliation for those acts. This argument, however, is misdirected. The lack of temporal proximity between Ardingo's termination and his cooperation with the Government and testimony before a grand jury might be valid basis for finding that the defendant was entitled to judgment as a matter of law, *see Aho v. Dep't of Corr.*, 263 Mich. App. 281, 688 N.W.2d 104, 110 (Mich. Ct. App. 2004), but it is not a valid basis for finding that the evidence of retaliation should have been excluded at trial. [HN8] All that Rule 401 requires is that the evidence make Ardingo's case somewhat more or less likely, and there can be no doubt that the evidence at issue here had the effect of making his case somewhat more likely. The fact that the evidence may not have been enough to make Ardingo's claim more likely than not does not mean that it was irrelevant. In other words, the fact that a plaintiff's evidence fails to make the plaintiff's case likely enough for the plaintiff to win does not mean that the evidence fails to make the plaintiff's case more likely than it would have been without the evidence.

IV. Jury [**24] Instructions

[HN9] A trial court's refusal to give a requested jury instruction is reviewed for abuse of discretion, and it constitutes reversible error if "(1) the omitted instruction is a correct statement of law, (2) the instruction [**939] is not substantially covered by other delivered charges, and (3) the failure to give the instruction impairs the requesting party's theory of the case." *Tompkin v. Philip Morris USA, Inc.*, 362 F.3d 882, 901 (6th Cir. 2004) (quoting *Hisrich v. Volvo Cars of N. Am., Inc.*, 226 F.3d 445, 449 (6th Cir. 2000)). "A judgment may be reversed only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Id.* (quoting *Hisrich*, 226 F.3d at 449). The defendant contends that the trial court committed reversible error by refusing to give the defendant's requested instructions with respect to: (1) the union president's right to terminate union employees for political reasons pursuant to *Finnegan*; (2) the burden of proof for a wrongful-discharge claim; and (3) the possibility that Ardingo could be reinstated rather than awarded front pay. However, because the district court's refusal to give these instructions was not an abuse of discretion, this [**25] court will not disturb the jury's verdict.

A. The Defendant's Proposed *Finnegan* Instruction

The defendant requested that the trial court instruct the jury that because the just-cause policy incorporated *Finnegan*, it allowed employees to be terminated for political reasons. *See* J.A. at 342. The trial court provided such an instruction during trial, but declined to so instruct the jury at the close of evidence because the defendant had built its case around the theory that Ardingo was terminated for economic reasons, not political reasons. *See id.* at 39. Therefore, the trial court concluded that giving this instruction would only serve to confuse the jury. *See id.* While the trial court could have reminded the jury of its previous instruction at the close of evidence--and that may have even been preferable--the trial court did not abuse its discretion in refusing to give the instruction a second time, especially where it did not impair the defendant's theory of the case in any way. *See Tompkin*, 362 F.3d at 901 (quoting *Hisrich*, 226 F.3d at 449).

The defendant's sole defense from the beginning to the end of this case was that Ardingo was terminated for economic reasons. The defendant's counsel [**26] clearly established this as the defendant's theory of the case when he announced in his opening statement that "We claim [Ardingo] was laid off due to economic and financial circumstances," J.A. at 569. The defendant's counsel continued to advance this theme throughout the trial and, to a large extent, focused its cross examinations and the testimony of its own witnesses on the issue of its economic circumstances. *See, e.g., id.* at 666-67, 978-92. Thus, it is clear that the defendant's theory of the case was that Ardingo was terminated because of economic necessity. As a result, the trial court did not impair the defendant's theory of the case by refusing to instruct the jury a second time that a union employee could be fired for political reasons. Accordingly, the refusal to give the defendant's requested *Finnegan* instruction did not impair the defendant's theory of the case and therefore cannot constitute reversible error. *See Tompkin*, 362 F.3d at 901 (quoting *Hisrich*, 226 F.3d at 449).

Moreover, the refusal to give the requested *Finnegan* instruction at the close of evidence did not render the jury instructions confusing or misleading with respect to the contours of the defendant's [**27] just-cause policy. To say otherwise would ignore the fact that the entire just-cause policy was admitted into evidence, J.A. 436-41, as well as the fact that the jury [**940] actually was instructed on the meaning of *Finnegan* and *Finnegan's* significance within the just-cause policy, *id.* at 1006. The trial court's instruction on the meaning and significance of *Finnegan* occurred during Robert Potter's testimony on behalf of the defendant. Potter had been asked by the defendant's counsel to explain the defendant's just-cause policy to the jury, *id.* at 997-98, but when he started to explain the meaning of *Finnegan*, the judge immediately stopped him, *id.*, which was appropriate in light of the fact that witnesses are not allowed to explain the applicable law to the jury, *see United States v. Safa*, 484 F.3d 818, 821 (6th Cir. 2007). In lieu of allowing Mr. Potter to testify on that issue, the trial court instructed the jurors on the meaning of *Finnegan* and further instructed them that the just-cause policy allowed employees to be fired for political reasons because it incorporated *Finnegan*. *See* J.A. at 1006. The jurors presumably remembered this instruction when it came time for their deliberations, [**28] and the defendant has not presented any evidence that they failed to understand the instruction when given. *See Girtman v. Lockhart*, 942 F.2d 468, 474 (8th Cir. 1991) (holding that defense attorney's failure to object to prosecutor's

misstatement of the burden of proof during closing argument was not ineffective assistance of counsel since the jury was presumably capable of remembering the judge's instructions regardless of when those instructions were given). Given this presumption, and the fact that the jurors had the just-cause policy available to them as an exhibit, this court can only conclude that the final jury instructions did not confuse or mislead the jurors about what did and did not constitute just cause under the defendant's policy. As a result, it cannot be said that the trial court's refusal to give the requested *Finnegan* instruction prejudiced the defendant since it neither impaired the defendant's theory of the case nor confused or misled the jurors. Moreover, the defendant has not presented any evidence that the jury was in fact confused or the trial court's decision not to reiterate this instruction at closing left the jury with a misunderstanding of the law.

Having [**29] failed to present any such evidence of jury confusion, the defendant argues that the trial court's refusal to give the requested *Finnegan* instruction prevented it from fully developing its theory of the case. The defendant readily admits that it did not set forth the theory that Ardingo was fired for political reasons, but it claims that this fact should not have stopped the trial court from delivering the proposed instruction because it was the trial court's fault that the defendant did not argue that Ardingo was terminated for political reasons. According to the defendant, it was not able to make the argument because the trial court prevented Robert Potter from testifying about the meaning of *Finnegan*. This argument is not compelling for two reasons. First, the defendant staked out its theory of the case in its opening statement, long before Potter ever took the stand. Second, the trial court's refusal to permit Potter from testifying about the meaning of *Finnegan* was proper as discussed above and did not in any way prevent the defendant from arguing or presenting evidence that Ardingo was fired for political reasons. To the contrary, the defendant's failure to offer such proof was [**30] simply the result of its own strategic decision to focus on the economic, rather than political, reasons for terminating Ardingo.

The defendant also argues that the failure to provide the requested *Finnegan* [**941] instruction at the close of evidence prevented the jury from properly evaluating whether Ardingo had proven that he was terminated without just cause. This argument, however, reverses the applicable burden of proof. [HN10] Under Michigan law, a wrongful-discharge plaintiff does not have to disprove every potential basis for just cause. Instead, a wrongful-discharge plaintiff must prove nothing more than that: (1) he was terminated by the defendant; (2) he was performing the duties of his employment until the time of his termination; and (3) he suffered economic damages as a result of the termination. *See Rasch v. City of E. Jordan*, 141 Mich. App. 336, 367 N.W.2d 856, 858 (Mich. Ct. App. 1985). When these prima facie elements are satisfied, the burden shifts to the defendant to prove a basis for just cause. *See id.* If the defendant demonstrates that it had just cause to terminate the plaintiff, then the burden shifts back to the plaintiff to show that the reason set forth by the defendant was merely a pretext [**31] for terminating the plaintiff for a reason that did not constitute just cause. *See Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 292 N.W.2d 880, 896 (Mich. 1980); *Ewers v. Stroh Brewery Co.*, 178 Mich. App. 371, 443 N.W.2d 504, 507 (Mich. Ct. App. 1989). Thus, in light of this burden shifting analysis, it is clear that the only grounds for just cause that matter--at least as far as the jury is concerned--are those set forth by the defendant as the purported reasons for the termination. Here, the defendant clearly attempted to satisfy its burden of proving just cause by showing that Ardingo was terminated solely for economic reasons. Since the defendant never set forth the theory that Ardingo was terminated in whole or in part for political reasons, a second *Finnegan* instruction was not necessary.

B. The Defendant's Proposed Wrongful-Discharge Burden-of-Proof Instruction

The defendant proposed a wrongful-discharge burden-of-proof instruction that was substantially similar to the one the trial court provided. They both set forth the burden shifting analysis that is required for wrongful-termination claims under Michigan law, and they each instructed the jurors that they were not to substitute their own business [**32] judgment for that of the defendant. The primary difference between the two instructions was that the defendant's proposed instruction provided additional direction on the issue of pretext. With respect to pretext, the instruction given to the jury simply said that the jurors should find for Ardingo if they concluded that the defendant's purported basis for just cause--i.e., economic necessity--was not the real reason that Ardingo was fired. The instruction requested by the defendant, however, added that the jurors could not find economic necessity to be a pretextual reason for Ardingo's termination if the defendant held an honest--albeit incorrect--belief that there was an economic need to terminate him.

The defendant's requested instruction is compelling at first glance, but upon deeper analysis, it becomes clear that it is an incorrect statement of law because it is logically inconsistent with the rest of the wrongful-discharge instructions. [HN11] Under Michigan law, the question of pretext does not arise until the defendant has demonstrated that there was just cause for the termination at issue. *See Toussaint*, 292 N.W.2d at 896; *Ewers*, 443 N.W.2d at 507. Since the purported basis for [**33] just cause was economic necessity in this case, that means that the jury could not have considered [**942] the issue of pretext unless it had first determined that the defendant had an economic need to terminate Ardingo. Herein lies the problem with the defendant's requested instruction; if the jury has already determined that an economic necessity exists, then it makes no sense to ask whether the defendant had an honest but incorrect belief in the existence of an economic necessity. A finding of economic necessity necessarily precludes a finding that the defendant had an honest but incorrect belief in the existence of an economic necessity because the two findings are manifestly inconsistent. In other words, if an economic necessity existed, then the defendant could not have had an incorrect belief that an economic necessity existed. Nevertheless, this is what the defendant's requested instruction invited the jury to find. In light of the logical inconsistency presented by that instruction, it is clear that the instruction was not an accurate statement of the law. Therefore, the trial court was correct to reject the instruction. *See Tompkin*, 362 F.3d at 901 (quoting *Hisrich*, 226 F.3d at 449).

C. [**34] The Defendant's Proposed Instruction on Front Pay and Reinstatement

The defendant requested that the jury be instructed that it should not award "front pay" damages if it determined that reinstatement of Ardingo to his previous job was possible. The trial court rejected this instruction because it concluded that reinstatement was not a feasible remedy. In evaluating the propriety of this refusal, one must keep in mind that the court--not the jury--orders reinstatement. It is the jury's job to determine the damages suffered by the plaintiff, and then the trial court has the discretion to order reinstatement in lieu of front pay if it finds reinstatement to be a more appropriate remedy. *See, e.g., Davis v. Combustion Eng'g*, 742 F.2d 916, 922 n.5 (6th Cir. 1984); *see also Stafford v. Elec. Data Sys. Corp.*, 741 F. Supp. 664, 665 (E.D. Mich. 1990) (holding that [HN12] the availability or propriety of reinstatement is a matter for the court to decide because reinstatement is an equitable remedy). Therefore, it is not the jury's place to decide that the availability of reinstatement precludes the award of front pay damages. Here, the trial court appropriately determined that reinstatement was not [**35] a viable remedy since Ardingo had found another job and relocated to Washington state. *See Roush v. KFC Nat'l Mgmt. Co.*, 10 F.3d 392, 398 (6th Cir. 1993) (stating that reinstatement is not appropriate "where the plaintiff has found other work" (citing *Henry v. Lennox Indus.*, 768 F.2d 746, 753 (6th Cir. 1985))). Accordingly, the trial court did not abuse its discretion in refusing to instruct the jury on the possibility of reinstatement.

V. The Plaintiff's Expert Witness

The defendant argues that the trial court erred by permitting the plaintiff's expert witness, Dr. Marvin DeVries, to testify. According to the defendant, Dr. DeVries should not have been allowed to testify because his final expert report was not disclosed in a timely fashion. The problem with this argument, however, is that the defendant did not object to Dr. DeVries' testimony at the time of trial. It is true that the defendant filed a motion in limine to exclude the final expert report, but that motion did not request that Dr. DeVries be prohibited from testifying. However, when the trial court heard oral argument on this motion, the defendant's counsel did suggest that the court should exclude Dr. DeVries' testimony [**36] as well as his report. The trial court agreed to exclude [**943] the report, but it explicitly deferred ruling on the admissibility of the testimony. With respect to the admissibility of Dr. DeVries' testimony, the trial court stated, "I am going to take up your motion in the context of objections to Mr. [sic] DeVries' testimony at the time he testifies," J.A. at 527, and "So that's my ruling, and I will take up any specific objections you have to his testimony at the time of his testimony," *id.* at 528. Since those statements did not amount to an explicit and definitive ruling as to the admissibility of Dr. DeVries' testimony, the defendant was required to contemporaneously object to the testimony at trial in order to preserve the issue of its admissibility for appeal. *See Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 791-92 (6th Cir. 2002) (citing *United States v. Brawner*, 173 F.3d 966, 970 (6th Cir. 1999)). When Dr. DeVries took the stand to testify at the trial, however, the defendant failed to make any objections. Indeed, not only did the defendant's counsel fail to object, but he affirmatively consented to Dr. DeVries' expert testimony; when the plaintiff's

counsel moved the court [**37] to accept Dr. DeVries as an expert witness in this case, the defendant's counsel responded, "No objection, your Honor." In light of the defendant's failure to make a contemporaneous objection to the testimony, the defendant cannot now claim that the admission of Dr. DeVries testimony was error. *See id.*; *see also* Fed. R. Evid. 103(a)(1) ([HN13] "Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike appears of record . . .").

VI. Remittitur

[HN14] This court reviews a refusal to remit a verdict for abuse of discretion. *See Denhof v. City of Grand Rapids*, 494 F.3d 534, 548 (6th Cir. 2007). A trial court should not remit a verdict "unless it is (1) beyond the range supportable by proof; or (2) so excessive as to shock the conscience; or (3) the result of a mistake." *Gregory v. Shelby County, Tenn.*, 220 F.3d 433, 443 (6th Cir. 2000) (citing *Bickel v. Korean Air Lines Co., Ltd.*, 96 F.3d 151, 156 (6th Cir. 1996)). None of these situations exist in the case at hand. First, given that Ardingo's economic expert testified that Ardingo had suffered a total economic loss of \$ 943,479, J.A. at [**38] 818-19, the jury verdict of \$ 819,614 is well within the range supportable by proof. Second, the jury's award may be somewhat excessive, but it is not so high as to shock the conscience. The trial court reached this same conclusion, and the trial court's decision in this regard is entitled to substantial deference because "the [HN15] excessiveness of the verdict is primarily a 'matter . . . for the trial court which has the benefit of hearing the testimony and of observing the demeanor of the witnesses.'" *Slayton v. Ohio Dep't of Youth Servs.*, 206 F.3d 669, 679 (6th Cir. 2000) (quoting *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 922 (8th Cir. 1986)); *see also Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 905 (6th Cir. 2004) ("We undertake a highly deferential review of the district court, which itself is sharply limited in its ability to remit a jury verdict."). The defendant's arguments in favor of remittitur do little more than emphasize the uncertain and speculative nature of Ardingo's damages, a fact that is almost certainly present to some degree in any case where front pay damages are available. Those arguments simply do not overcome the high degree of deference that is owed to the [**39] trial court's ruling, and therefore, this court will not second guess the trial court's conclusion that the jury award is [*944] not shocking to the conscience. Finally, there is no indication that the verdict was the result of mistake. To the contrary, the jury was given a clear picture of the extent of Ardingo's economic loss by the testimony of his expert witness and the defendant's effective cross examination of that witness. Thus, the jury's award must be upheld because it is not beyond the range supportable by proof, is not so excessive as to shock the conscience, and is not the result of a mistake. *See Gregory*, 220 F.3d at 443.

VII. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.

DISSENT BY: Kennedy

DISSENT

Kennedy, Circuit Judge, dissenting.

Jury instructions exist to submit the case's issues to the jury so that it can decide the case in accordance with the applicable law. *See Morgan v. N.Y. Life Ins. Co.*, 559 F.3d 425, 434 (6th Cir. 2009). The Union employment policy here stated that it could terminate an employee for "fail[ure] to meet employment performance standards" or if "[t]he Union's needs will be furthered by said termination, particularly as construed by the Supreme [**40] Court in *Finnegan v. Leu* and its progeny." Ample evidence existed in the record for the jury to draw the conclusion that the Union terminated Ardingo in accordance with *Finnegan*. I conclude that the district court should have instructed the jury on the employment policy's *Finnegan* clause, as the Union requested, and for that reason, I respectfully dissent.

I.

In *Finnegan*, the Supreme Court held that former union employees employed by the union lacked a cause of action

against their union under the LMRDA for terminations based on political opposition. 456 U.S. at 441-42 (reasoning, in part, that the LMRDA assures "the ability of an elected union president to select his own administrators [as] an integral part of ensuring a union administration's responsiveness to the mandate of the union election"). In view of the above, *Finnegan* occupies a central role in this appeal. Its scope is a question of federal statutory interpretation with regard to the LMRDA and the preemption question, and a question of state law as to the contractual provision's effect. I question the majority's determination that the LMRDA does not preempt this action based in state law. Preemption protects the "uniform [**41] national labor relations policy" enacted in the LMRDA. See *Vandeventer v. Local Union No. 513 of the Int'l Union of Operating Eng'rs*, 579 F.2d 1373, 1377-78 (8th Cir. 1978). However, I need not decide the question, because even if I accept the majority's preemption argument and its concomitant interpretation of *Finnegan*, the Union nevertheless deserved a jury instruction on it under its employment policy.

II.

I agree with the majority's characterization of the applicable law as to Ardingo's underlying claim. See Maj. Op. at 18. The plaintiff has the burden of proving that he was living up to the contract and the terms of employment up to his termination. The burden then shifts to the defendant to show that the termination was legal. If the defendant makes this showing, the burden shifts back to the plaintiff to show that the proffered reason was mere pretext. Over the course of [**945] trial, the Union argued that it did not terminate Ardingo--it laid him off, and should the jury conclude that it did terminate Ardingo, economic necessity motivated the termination. Ardingo offered evidence that the Union terminated him; also, Ardingo presented two alternative, individually sufficient theories [**42] in response to Ardingo's purported termination for economic necessity: (1) the Union did not face financial circumstances necessitating a reduction in workforce; and (2) the Union fired him in retaliation for his participation in the Department of Labor investigation, as part of suspicion that he planned to run against Potter, and for political opposition generally. Ardingo's own testimony provided much of the evidence for the Union's requested jury instruction.

In *Harvey v. Hollenback*, 113 F.3d 639 (6th Cir. 1997), we explained that, "[i]n *Finnegan*, a newly elected union leader was able to fire appointed union officials who had campaigned against him because ultimately, he was expressing the will of the majority by selecting a staff that shared his views and could be trusted to faithfully execute and implement his policies." *Id.* at 643. A jury could have narrowly construed Ardingo's retaliation theory as termination for lack of political accord with the Union administration. Rumors had swirled around the Union in early- to mid-2001 that Ardingo intended to run against Potter for President in the upcoming election, which built up animosity against Ardingo within Potter's administration. [**43] Later, Potter and his administration perceived that Potter volunteered information to the Department of Labor to undermine them politically. The jury might have concluded that the Union terminated Potter because he could not be trusted to faithfully execute Potter's policies to further the Union's needs.

Without a jury instruction on the meaning of *Finnegan*, the district court did not make the jury aware of the legality of this articulated ground for Ardingo's termination. Put differently, the district court did not adequately describe the case's applicable law to the jury such that it could come to an accurate verdict after applying its findings of fact to said applicable law.

III.

The majority is correct in pointing out that the Union largely relied upon economic necessity as the legal ground for Ardingo's termination. Maj. Op. at 16. I do not dispute that as a strategic matter, the Union appeared to have determined that presenting an extensive case on characterizing Ardingo's termination as political would weaken its primary defense that economic necessity motivated the firing. Nevertheless, the majority does not deny that the Union sought testimony from Potter on the meaning of the [**44] employment policy's *Finnegan* clause so as to get that issue before the jury. *Id.* at 16-17. It even does not deny that this represented an attempt by the Union to argue that the employment policy made legal a certain type of termination for political opposition. To the contrary, Ardingo himself presented ample evidence that the Union terminated him for political opposition upon which the jury could have concluded in the Union's favor on this ground.

In actual practice, a party's theory of the case is not monolithic. This case was complex and took nearly a week to try. As a matter of strategy, the Union intoned loudly its economic necessity argument while whispering its political opposition theory. That fact alone does not eviscerate the Union's right under the policy to terminate Ardingo in accordance with *Finnegan*, [*946] nor its concomitant right to have the jury decide the case in accordance with the applicable law. See *Taylor v. Teco Barge Line, Inc.*, 517 F.3d 372, 387 (6th Cir. 2008) ("A party needs only a slim amount of evidence to support giving a jury instruction . . .")

IV.

By denying the Union's request for an instruction on the policy's *Finnegan* clause, the district court, in essence, [**45] ruled that the Union's argument that it legally terminated Ardingo in accordance with said clause failed as a matter of law only for failure to *produce* sufficient evidence to support that conclusion, because plenty of evidence in the record, produced by Ardingo, suggested that the Union terminated him for his political opposition. The question then becomes: does Ardingo deserve summary disposition on this issue or should the district court have submitted it to the jury, simply because he, not the Union, produced the relevant evidence?

The theory of Ardingo's termination as political opposition could either fit into the legal framework given above as one of the Union's legal reasons for termination, or as one of Ardingo's showings of pretext. Either Ardingo refuted the Union's economic necessity rationale by arguing both lack of economic necessity and political-opposition termination, or the Union put forth economic necessity and political opposition as legal reasons for termination and Ardingo refuted both. No doubt the majority states correctly that the Union failed to produce evidence of political opposition, so that it did not put forth political opposition as a lawful ground for [**46] termination alongside its economic necessity argument. Ardingo, not the Union, injected political opposition into the case to show pretext; the law burdens him with production on his theories of pretext. In short, a proffered "theory of the case" encompasses more than the evidence a party produces, particularly when the law tasks the opposing party with the burden of production.

The district court allowed the jury to decide whether economic necessity was a pretextual reason for Ardingo's termination because the Union actually terminated Ardingo in accordance with some other unlawful reason. To decide that issue is to decide that the Union had not terminated Ardingo in accordance with the *Finnegan* clause, a lawful grounds for termination. Ardingo put forth the larger issue of pretext that included the narrower issue of political opposition to support his position. Ardingo's entitlement to have his political opposition theory get before the jury to respond to the Union's economic necessity argument then implies the same for the Union's *Finnegan-clause* argument. Summary disposition of the *Finnegan-clause* issue in Ardingo's favor does not follow when ample evidence in the record existed, [**47] produced by Ardingo and gestured at by the Union, to conclude in the Union's favor.

V.

Abundant evidence of political opposition existed. The Union attempted to argue the theory that even if economic necessity was a pretextual reason for Ardingo's termination because the Union actually terminated him for political opposition, such a termination would be legal as well. The [**947] jury instructions were prejudicial.² For the foregoing reasons, the Union deserved a jury instruction on *Finnegan*, and so, I would reverse the judgment of the district court and remand for a new trial.

² The majority argues that no prejudice existed because the district court admitted the just-cause policy into evidence and read the Supreme Court's holding in *Finnegan* to the jury during Potter's direct testimony. Maj. Op. at 16. This ignores that the district court gave the following jury instructions:

In order for you to decide whether there was a good or just cause for the termination of plaintiff's employment under defendant's policy you must determine whether defendant was actually in financial circumstances necessitating a reduction in its work force, and whether that circumstance was the actual reason for termination [**48] of plaintiff's employment.

333 Fed. Appx. 929, *947; 2009 U.S. App. LEXIS 11694, **48;
2009 FED App. 0383N (6th Cir.); 186 L.R.R.M. 2616

If defendant was not in circumstances requiring a reduction in its work force or if that was not the actual reason for plaintiff's termination then there was not good or just cause for termination.

These instructions render the policy's *Finnegan* clause inoperative as far as the jury is concerned.

STATE OF MICHIGAN
COURT OF APPEALS

MARK PACKOWSKI,

Plaintiff-Appellant,

v

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 951,

Defendant-Appellee.

UNPUBLISHED

July 8, 2010

No. 282419

Kent Circuit Court

LC No. 03-007476-CZ

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

BECKERING, J. (*dissenting*).

Plaintiff claims that his employment was terminated in violation of defendant's just cause policy. I write separately because I respectfully disagree with the majority's conclusion that plaintiff's wrongful discharge claim is preempted by the Labor-Management Reporting and Disclosure Act, 29 USC 401 *et seq.* (LMRDA). I would reverse the trial court's orders granting summary disposition to defendant and denying plaintiff's motion for reconsideration.

The trial court granted defendant summary disposition under MCR 2.116(C)(4), based on a lack of subject matter jurisdiction. As indicated by the majority, this Court reviews a trial court's decision on a motion for summary disposition *de novo*, *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999), and a motion for reconsideration for an abuse of discretion, *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). Whether a trial court has subject matter jurisdiction is a question of law, which this Court reviews *de novo*. *Fisher v Belcher*, 269 Mich App 247, 252-253; 713 NW2d 6 (2005).

"Where the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction." *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), overruled in part on other grounds *Sprietsma v Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002). In the absence of express preemption, federal preemption may be implied in the form of conflict or field preemption. *Id.* at 28. Here, the majority concludes that plaintiff's wrongful discharge claim under state law conflicts with the LMRDA and is, therefore, "conflict-preempted." "Conflict preemption acts to preempt state law to the extent that it is in direct conflict with federal law or with the purposes and objectives of Congress." *Id.*

In *Finnegan v Leu*, 456 US 431, 441; 102 S Ct 1867; 72 L Ed 2d 239 (1982), the United States Supreme Court stated that when the LMRDA was enacted, its "overriding objective was to

ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections.” The Court further stated that “the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration’s responsiveness to the mandate of the union election.” *Id.* According to the majority in this case, allowing plaintiff’s state claim for wrongful discharge to proceed would conflict with the LMRDA’s purpose of ensuring union democracy and elected union officials’ authority to select staff members.

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), however, the court concluded that “[t]here is no danger that [the LMRDA’s] objective will be interfered with by a lawsuit that seeks to vindicate an employee’s rights under a just-cause employment contract.” *Id.* at 7. Although this Court is not required to follow decisions of the United States Court of Appeals, *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004), and *Ardingo* is unpublished, I find the *Ardingo* court’s reasoning persuasive. See *id.* at 607. Like *Ardingo*, this case presents a unique set of facts in that plaintiff is suing to enforce his contractual rights under his just cause employment contract with defendant. None of the out-of-state cases relied upon by the majority involve a just cause contract provision. As noted by the *Ardingo* court, “when a union chooses to offer a just cause employment contract to an employee, there is nothing in *Finnegan* or the LMRDA that would prevent that contract from being enforced.” *Ardingo*, unpub op at 10. *Finnegan* does not stand for the proposition “that state law could never restrict a union leader’s discretion to terminate a union employee.” *Id.*, citing *Bloom v Gen Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F2d 1356 1360-1362 (CA 9, 1986) (holding that a wrongful discharge claim was not preempted by the LMRDA where a business agent claimed to have been discharged for refusing to violate state law). While the majority is correct that the LMRDA was enacted to ensure that unions are democratically governed and that elected union officials have the ability to select staff members, and, in that way, respond “to the mandate of the union election,” *Finnegan*, 456 US at 441, a union, or its democratically elected officials, may choose to offer an employee a just cause employment contract, omit a just cause provision from an employment contract, or tailor such a provision by, for example, defining the term “just cause” in the contract. Thus, enforcing a union’s just cause policy does not conflict with the LMRDA’s objective of ensuring union democracy. To hold otherwise would permit unions to award employment contracts with just cause provisions that the employees have no ability to enforce, at least in state court, rendering the provisions virtually meaningless.^{1, 2}

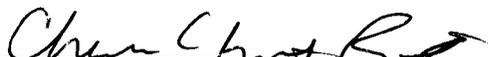
¹ In footnote three of its opinion, the majority states that plaintiff may bring a civil action in federal court under 29 USC 412 if he was discharged in retaliation for participating in a Department of Labor investigation. I note, however, that in general, the LMRDA protects the rights afforded union *members* due to their status as members, not the rights afforded appointed union *employees* due to their status as employees. See generally *Finnegan*, 456 US at 431.

² Defendant claims on appeal that the just cause provision of plaintiff’s employment contract could only be enforced through arbitration. I will not address this claim, as it is irrelevant to the question of preemption.

I would hold that plaintiff's wrongful discharge claim is not preempted by the LMRDA because his claim does not directly conflict with the act or with any of its purposes or objectives, see *Ryan*, 454 Mich at 28, and would reverse the trial court's orders granting summary disposition to defendant and denying plaintiff's motion for reconsideration. Whether plaintiff can prevail on his claim of wrongful discharge is still in dispute.

/s/ Jane M. Beckering

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