

No. 39564-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JERRY KILB, Appellant,

v.

FIRST STUDENT TRANSPORTATION, LLC, a Delaware limited liability company, FIRST STUDENT, INC., a Florida corporation, FIRSTGROUP AMERICA, INC., a Florida corporation, Respondents.

APPELLANT'S REPLY BRIEF

STEWART SOKOL & GRAY LLC

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COURT OF APPEALS
DIVISION II

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I. INTRODUCTION

Plaintiff-Appellant Jerry Kilb (“Kilb”) submits this reply brief in support of his appeal of the Superior Court’s ruling granting the Motion to Dismiss Under CR 12(b)(1) for Lack of Subject Matter Jurisdiction filed by Defendants-Respondents First Student Transportation, LLC, First Student, Inc. and FirstGroup America, Inc. (collectively “First Student” or “Defendants”).

None of the assertions in Defendants’ brief alters the fact that there exist three separate, independent bases requiring the reversal of the Superior Court’s decision that Kilb’s action for wrongful discharge in violation of public policy is preempted by the National Labor Relations Act (the “Act”) under the Garmon doctrine. First, since Kilb had been employed by Defendants as a supervisor, he was not entitled to the protections of the Act, nor was he eligible to alone pursue administrative remedies before the National Labor Relations Board (“NLRB”). Therefore, the Garmon preemption doctrine does not apply to Kilb’s current case. Second, even if Kilb was within the provisions of the Act, the Garmon analysis would not support preemption in this case, because the issues raised by the current action are not identical to the issues that

would face the NLRB. Third, notwithstanding the first two points, preemption is inappropriate in this case because Kilb's claim falls squarely within at least one of the two widely recognized exceptions to the Garmon doctrine.

II. ARGUMENT IN REPLY

Pursuant to RAP 10.3(c), this Reply is limited to responding to the issues raised in the Brief of Respondent, which are organized by Kilb's assignments of error. However, this Reply begins by emphasizing the applicable legal standards governing preemption motions, which Defendants' brief essentially ignored.

A. Preemption Standards

Washington courts disfavor preemption of claims grounded in Washington law. See, e.g., Hume v. American Disposal Co., 124 Wn.2d 656, 664, 880 P.2d 988 (1994) ("Hume") ("reiterati[ng] [Court's] general prejudice against preemption."). Courts "cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously much of this is left to the States." Beaman v. Yakima Valley Disposal, Inc., 116 Wn.2d 697, 702, 807 P.2d 849 (1991) ("Beaman") (quoting

Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971)).

With respect specifically to the Garmon preemption doctrine, Washington Courts are not to apply it in a “literal, mechanical fashion”:

inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State’s interest is one that does not threaten undue interference with the federal regulatory scheme.

Hume, 124 Wn.2d at 663 (quoting Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25, 430 U.S. 290, 302 (1977)). Before a state cause of action is preempted, the party asserting preemption has the burden to “put forth enough evidence to enable a court to conclude that the activity is arguably subject to the Act.” Int’l Longshoremen’s Ass’n v. Davis, 476 U.S. 380, 396-98 (1986) (“Davis”).

B. As A Supervisor, Kilb Is Not Covered Under The Act.

Defendants do not dispute that Kilb was a supervisor, nor do they dispute that supervisors do not fall within the definition of “employees” covered under the Act. Instead, Defendants’ brief cites to ***non-binding*** cases from other jurisdictions that, to varying degrees, discuss when the NLRB from time-to-time may end up addressing issues involving supervisors in connection with claims of qualifying “employees” or

“labor organizations” protected under the Act. Aside from the fact that these cases are not legally binding on this Court, most are on their face readily distinguishable from the current case, because they address the issues pertaining to the supervisors only because either the NLRB claim was initiated by a qualifying “employee” or “labor organization,” and/or because the supervisor’s discharge “directly interfered” with the rights of “employees” under the Act.

One of the first cases cited by Defendants, Automobile Salesmen’s Union, Local 1095 v. NLRB, 711 F.2d 383, 386-88 (D.C. Cir. 1983) (“Local 1095”) reflects both of the above-referenced categories of cases and is actually analogous (in Kilb’s favor) to the current case before the Court. In Local 1095, the union initiated a proceeding before the NLRB following the discharge of six employees and a supervisor named Doss who had attended the union’s organization meeting. 711 F.2d at 385. The administrative law judge (ALJ) concluded that the discharges of the employees constituted violations of the Act and also concluded that the discharge of the supervisor Doss “was part of an overall plan to discourage the rank-and-file employees from exercising their rights, and that,

notwithstanding the exclusion of supervisors from the Act's protection, such conduct . . . violated section 8(a)(1) of the Act." Id.

The Board affirmed the ALJ's decision with respect to the subordinate employees, but it reversed the ALJ's ruling regarding the supervisor, finding that his discharge did not directly interfere with the employees' rights under the Act. Id. The union petitioned the Court of Appeals for the District of Columbia for review of that decision.

The D.C. Court of Appeals reviewed the line of cases considered by the NLRB and the law as applied to supervisor Doss' situation, and denied the union's petition for review. Id. at 388. The Court of Appeals concluded that the NLRB's decision to overrule the "pattern of conduct" line of cases was justified and that it was proper for the NLRB to only address the discharge of supervisors where such discharge "directly interferes" with the rights of employees covered under the Act. Id.

As in the Local 1095 case, Defendants' discharge of Kilb in the current case does not fall within the gambit of the Act, because Kilb was not fired in connection with Defendants' discharge of any statutorily-protected "employees." Nothing in the record before the Court indicates that any subordinate "employees" possessed or could have

pursued a claim before the NLRB against Defendants for unlawful practices. This is true whether or not such practices had anything to do with or were close in proximity or time with Kilb's discharge. Likewise, there is no indication in the record, and certainly no allegation on the face of Kilb's Complaint, that Kilb's discharge in any way "directly" interfered with statutorily-protected employees' exercise of any rights under the Act. Kilb did not engage in the practices Defendants asked him to carry out, so no employees' rights were inhibited. Similarly, there is no evidence that any employees were "directly" harmed by Kilb's discharge. As the NLRB and Court of Appeals determined in the Local 1095 case, as a discharged supervisor, Kilb is not entitled to any recourse under the Act.

Defendants' brief baldly cites to a broadly worded NLRB procedural rule as support for the proposition that "any person" may file a charge with the NLRB. This purported interpretation of the procedural rule is directly contrary to the statutory provisions of the Act specifically excluding supervisors from the definition of "employee." 29 U.S.C. § 152(3) ("Employee . . . shall **not** include . . . any individual employed as a supervisor.") (emphasis added). Other NLRB resources also confirm that supervisors "are excluded from the National Labor Relations Act."

See Frequently Asked Questions, NLRB website at www.nlr.gov under question “What individuals are excluded from the Act?,” a copy of which is included in Appellant’s Supplemental Appendix filed herewith.

Finally, Defendants’ brief largely overlooks one of the Washington appellate case relied upon by Kilb that addressed the current issue. In Hotel Employees and Restaurant Employees, Local 8 v. Jensen, 51 Wn. App. 676, 685, 754 P.3d 1277 (Div I 1988) (“Hotel Employees”), Division One held:

We hold that only those parties named in the act, i.e., employers, employees and labor organizations, are subject to the act and the jurisdiction of the NLRB.

51 Wn. App. at 685-86 (emphasis added). This standard of law as enunciated by Washington’s judiciary is consistent with the statutory definitions set forth in the Act and should not be ignored by the Court in the face of the non-binding and distinguishable authority from other jurisdictions cited by Defendants.

Rather, the Court should reverse the Superior Court’s dismissal of Kilb’s action on the basis of preemption, which ruling necessarily was premised upon the erroneous conclusion that Kilb was an “employee” covered under the Act.

C. **The Issues Raised By Kilb’s Wrongful Discharge Claim Are Not Identical To The Issues That Would Have Been Presented To The NLRB.**

It is undisputed that in order for a state law cause of action to be preempted under the Garmon doctrine, the Court must determine as a matter of law that the elements of the state law claim and the elements of the federal claim under the Act must be *identical*. Hotel Employees, 51 Wn. App. at 679 (“critical determination for preemption purposes is whether a state or federal claim involves an *identical* controversy to that which could have been brought before the NLRB.”); Beaman, 116 Wn.2d at 709 (“Thus, the ‘critical inquiry’ under Garmon is whether controversy presented to the state court is identical with that which could be presented to the NLRB.” (emphasis in original)). Though Defendants’ brief does not dispute that the claims must be *identical* in order for preemption to be appropriate, the Defendants’ discussion mischaracterizes the exact test, and attempts to draw the Court’s attention away from directly analogous Washington precedent in favor of non-binding and distinguishable cases from other jurisdictions.

Defendants’ brief glosses over the import of Brundridge v. Fluor Federal Services, 109 Wn. App. 347, 360-61, 35 P.3d 389 (Div III 2001)

(“Brundridge”), in which Division Three of the Court of Appeals reversed the trial court’s dismissal on Garmon preemption grounds of the plaintiffs’ state law claims for wrongful discharge in violation of Washington public policy. The situation and especially the Court of Appeal’s analysis in Brundridge is directly analogous to the current case. As Defendants’ brief too narrowly notes, the plaintiffs’ claims in Brundridge *in part* involved local concerns over the health and safety of workers. However, Defendants focus on only an incomplete part of the story.

The Brundridge Court also based its rejection of the employer’s preemption argument on the fact that all of the discharged workers were members of the same labor union and the fact that “Washington has a substantial interest in regulating discriminatory employment practices.” 109 Wn. App. at 359-360. For these reasons, the Court found it at least “arguable [under Garmon] that the pipe fitters engaged in concerted activities for mutual aid and protection in the pursuit of their claim,” that would have arguably been covered by the Act and, therefore, otherwise preempted. Id. at 359. Nonetheless, the Brundridge Court looked primarily at the *elements* of the respective state and federal/NLRB claims to determine whether they were identical as required under Garmon:

Washington has a substantial interest in regulating discriminatory employment practices, and this regulation does not threaten undue interference with federal labor law. . . We have already established that no term of the [collective bargaining agreement] must be interpreted in the resolution of the pipe fitters' claim. Further, the elements for proving wrongful discharge in violation of public policy include (1) existence of a clear public policy; (2) evidence that discouraging the conduct in which the plaintiffs are engaged would jeopardize the public policy; (3) proof that the public-policy-linked conduct caused the dismissal; and (4) no overriding justification for the dismissal. The clarity element requires evidence that the employer's conduct contravened the "letter or purpose of a constitutional, statutory, or regulatory provision or scheme." In establishing their claim, the pipe fitters will necessarily cite constitutional, statutory, and/or regulatory laws evidencing Washington's interest in protecting the health and safety of its workers and citizens.

Ultimately, the claim of wrongful discharge in violation of public policy is different from any claim that could have been brought before the NLRB. The claim does not implicate collective bargaining or unionization.

Brundridge, 109 Wn. App. at 360 (quoting Ellis v. City of Seattle, 142 Wn.2d 450, 459 (2000) (quoting Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)) (other internal citations omitted, emphasis added)).

As discussed at some length in Kilb's opening brief, the same is true in the current case. The elements of Kilb's claim of wrongful discharge in violation of public policy are identical to those set forth in Brundridge. 109 Wn. App. at 360; Thompson, 102 Wn.2d at 232.

Defendants have not met their burden of establishing that these elements are in all respects “identical” to the elements of a claim arising under the Act -- which would necessarily only involve the interpretation and application of federal statutes and regulation not at all relevant to Kilb’s current claims -- that allegedly may have been brought before the NLRB.

Defendants’ brief merely contends that the pertinent state statutes enunciating Washington’s public policy are similar to some sections of the Act. However, that is not the correct standard. Washington’s legislature promulgated its own statutes enunciating the public policy of the State of Washington regarding the rights of workers to organize,¹ and Washington’s courts have issued decisions confirming that such public policies give rise to claims such as Kilb’s claim in this action.² The fact that some of these statutes and policies may be similar to provisions of the Act is insufficient to mandate preemption. The claims, and the elements thereof, must be identical and in the current case they simply are not.

¹ See, e.g., RCW 49.36.010, 49.32.020.

² Bravo v. The Dolsen Companies, 125 Wn.2d 745, 888 P.2d 147 (1995) (“Bravo”) (“This Court has held both that RCW 49.32.020 confers substantive rights upon employees to be free from interference, restraint, or coercion, and that the statute enunciates an important public policy of the State of Washington.”).

The Superior Court erred as a matter of law in granting Defendants' motion to dismiss based upon the Garmon Doctrine.

D. Kilb's Action Falls Within One Of The Two Exceptions To The Garmon Doctrine.

Even if the Court determines that Defendants met their burden with respect to the first two mandatory elements of preemption set forth above (which they have not), the Superior Court's finding of preemption is still in error, because Kilb's cause of action for wrongful discharge in violation of Washington public policy fits within one (or both) of the recognized exceptions to the Garmon preemption doctrine.

(1) The "Peripheral Concern" Exception.

Defendants' brief utterly mischaracterizes Kilb's argument under the peripheral concern exception by unduly focusing on the case of Delahunty v. Cahoon, 66 Wn. App. 829, 832 P.2d 1378 (1992), which was not even discussed in Kilb's opening brief in connection with this issue. Defendants completely ignore Kilb's main point, which is that the Act is (at most) only peripherally concerned with the discharge of supervisors like Kilb. As discussed at length in Kilb's opening brief and herein, supervisors are expressly excluded from the definition of "employee," which is the only group entitled to protection under the Act. Davis,

476 U.S. at 383, n. 1; 29 U.S.C. §§ 152, 157. If Congress was primarily concerned with protecting the rights of supervisors like Kilb and intended to completely preempt the field with respect to their discharge where it may touch upon labor relation issues, certainly the Act would specifically include supervisors within the class of protected “employees,” and Sections 7 and 8 would specifically include as violations the discharge of supervisors in these circumstances. Since this is not the case and, at most, the NLRB is only peripherally concerned with the discharge of supervisors, claims like Kilb’s current claim are excepted from preemption. The Superior Court erred in not applying the peripheral concern exception to the Garmon doctrine and in dismissing Kilb’s action.

(2) The “Local Concern” Exception.

Even more directly applicable to the current case is the “local concern” exception. Defendants’ discharge of Kilb directly contravenes well-established public policy of the State of Washington regarding the rights of its citizens, which public policy is clearly enunciated in Washington statutes and has been confirmed by Washington’s appellate courts.

Respondent's brief basically ignores the Bravo case and unconvincingly attempts to distinguish the facts of the Hume case, but Defendants miss the point. In Hume, though the underlying *factual* situation differed slightly from the facts giving rise to Kilb's claim, the Washington Supreme Court's legal analysis and explanation of Washington's approach to applying the local concern exception to the Garmon preemption doctrine are identical to the legal issues facing this Court. In rejecting the employer's preemption argument, the Washington Supreme Court in Hume found that the applicable Washington statute "contains a clear legislative expression" of the State's public policy and that the "Plaintiffs' claims are based upon a statute which reflects a legitimate local concern rooted in a strong and clearly articulated public policy." 124 Wn.2d at 665.

Likewise, it is evident from the plain language of RCW 49.32.020 that it is the "public policy of the state of Washington . . . that [a Washington citizen] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents."

RCW 49.32.020 (emphasis added). Prior Washington cases have recognized that a claim for wrongful discharge may be stated by those terminated for exercising these statutorily-protected rights. Bravo, 125 Wn.2d at 745; Lund v. Grant County Public Hospital District No. 2, 85 Wn. App. 223, 932 P.2d 183 (Div III 1997).

Applying the foregoing statutory enunciation of public policy and the Washington appellate courts' confirmation that employment actions contravening that very same policy give rise to the same wrongful discharge claim Kilb asserts in this action, there can be no question that the "local concern" exception applies in this action. Kilb's discharge serves to undermine and violate the clearly expressed "important public policy of the State of Washington" to prevent interference, restraint or coercion of Washington's citizens' rights to organize or join labor unions, which policy is recognized in RCW 49.32.020 and Bravo. Like in Hume, this statute and prior case law reflect a "legitimate local concern rooted in a strong and clearly articulated public policy," and the local concern exception should be applied. Hume, 124 Wn.2d 665. Washington's state courts are more properly suited to adjudicate this type of claim than the NLRB, and Kilb should not be totally deprived of a remedy, especially

given Washington courts' prejudice against preemption. Hume, 124 Wn.2d at 664.

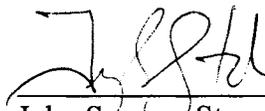
The "local concern" exception to the Garmon doctrine applies in this case and the Superior Court erred in failing to apply it and in dismissing Kilb's action on the basis of preemption.

VI. CONCLUSION

Based upon the foregoing, the Court should reverse the Superior Court's dismissal of Kilb's action for lack of subject matter jurisdiction and should remand the action to the Superior Court for a trial on the merits.

Respectfully submitted this 23rd day of December, 2009.

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APPELLANT'S SUPPLEMENTAL APPENDIX

STEWART SOKOL & GRAY LLC

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Category
Other Workplace Rights
NLRB Jurisdiction
Rights NLRB Enforces
Publications

What individuals are excluded from the Act?

Question

What individuals are excluded from the National Labor Relations Act?

Answer

The Act states that the term employee shall include any employee except the following
Agricultural laborers

Domestic servants

Any individual employed by his parent or spouse.

Independent contractors

Supervisors.

Individuals employed by an employer subject to the Railway Labor Act.

Government employees, including those employed by the U .S. Government, any Government corporation or Federal Reserve Bank, or any State or political subdivision such as a city, town, or school district.

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CERTIFICATE OF FILING AND SERVICE
OF
APPELLANT'S REPLY BRIEF

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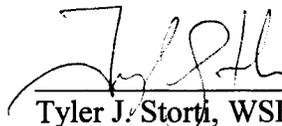
CERTIFICATE OF FILING AND SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the state of Washington as follows:

I am an attorney of the firm of Stewart Sokol & Gray LLC. I caused to be filed via U.S. First Class mail in the above-entitled Court: APPELLANT'S REPLY BRIEF and APPELLANT'S SUPPLEMENTAL APPENDIX. I further caused the same to be delivered via U.S. First Class mail and addressed to the following opposing counsel:

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