

64908-6

64908-6

NO. 64908-6-1

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

BRIEF OF RESPONDENT

Daniel M. Shanley
WSBA No. 41243
Desmond C. Lee (SBN No. 158952)
Pro Hac Vice
Attorneys for Respondent

DeCARLO, CONNOR & SHANLEY
A Professional Corporation
533 South Fremont Avenue, 9th Floor
Los Angeles, California 90071
(213) 488-4100

~~CONFIDENTIAL~~
11/2/09

TABLE OF CONTENTS

TABLE OF AUTHORITIES vi

I INTRODUCTION 1

 A. Statement of Case and Summary of Argument 1

 B. Statement of Issues 4

II ARGUMENT 5

 A. This Court Should Affirm The Trial Court’s Ruling On
 Grounds That Daignault’s Entire Action Is Preempted By
 The Labor Management Reporting and Disclosure Act ... 6

 1. The council discharged Daignault on patronage
 grounds, a basis which every court to address this
 issue has found preemption pursuant to the
 LMRDA 6

 2. LMRDA preemption applies whether or not
 Daignault could be classified as either a
 policymaking or confidential employee 13

 a. There is no exception for confidential or
 policymaking employees 13

 b. Daignault was a policymaking or
 confidential employee but LMRDA
 preemption applies regardless of whether he
 was or not 15

 i. because Daignault was a business
 agent, he qualifies as a policymaking
 or confidential employee as a matter
 of law 15

ii.	the Undisputed factual record demonstrates that Daignault was a policymaking and/or confidential employee	17
iii.	Daignault’s view that an express contract makes this case distinguishable from <i>Finnegan</i> and its progeny cannot withstand scrutiny	20
B.	The Trial Court Properly Granted Summary Judgment On Daignault’s Contract Theories	23
1.	Daignault’s wrongful termination claim should only be limited to his specific treatment in specific circumstances theory and any contention regarding breach should limited to those relating to the lack of appeal and representation he alleges	23
2.	Daignault’s sufficiently argued theories relating to the appeal process and alleged lack of union representation are meritless	25
a.	There was no promise for either theory ..	25
b.	Daignault has not shown any reliance, much less justifiable reliance on either theory he has argued	29
c.	There was no breach of any alleged “promise”, nor any violation of any good faith in connection with either theory he is pursuing	31

d.	Daignault’s attempt to engraft some “good faith” standard (and one which seeks to impose guidelines) governing the appeal to the Executive Committee is preempted by Section 301 of the Labor Management Relations Act	34
3.	While Daignault should be limited to arguing the specific circumstances theory with respect to his alleged sham appeal and lack of union representation in his brief, any other contractual claims are barred as well	35
i.	because the Employment Policy vested ample discretion in the Council on issues of termination, it could not form the basis of any contract theory against the Council	36
ii.	Daignault has failed to show that he provided any extra consideration for his promise	42
iii.	as with his theories above, Daignault cannot prove reliance	43
4.	Daignault has not advanced any argument regarding an implied contract	44
5.	Daignault was terminated for just cause	44
6.	The trial court properly ruled that the disclaimer foreclosed Daignault’s entire action	46

a.	The clear wording of the disclaimer dispenses with any contract theory Daignault can maintain against the council	46
b.	Alternatively, a prior court's ruling on the very same disclaimer at issue here should collaterally estop Daignault from maintaining this action	53
7.	Daignault's other arguments are meritless	54
a.	The disclaimers provision are not unconscionable	54
b.	The trial court properly denied Daignault's motion to continue the summary judgment proceedings	55
III.	CONCLUSION	59

TABLE OF AUTHORITIES

FEDERAL CASES

Carpenters Representative Federation,
1993 NLRB LEXIS 763 (1993) 28

Cehaich v. UAW,
710 F.2d 234 (6th Cir 1983) 13

Childs v. IBEW Local 18,
719 F.2d 1379 (9th Cir. 1983) 21

Electromation, Inc.,
309 N.L.R.B. 990 (1992) 28

Elliott v. Sperry Rand Corp.,
23 F. Rule Serv 2d 497 (D. Minn. 1976) 45

Finnegan v. Leu,
456 U.S. 431 (1982) 7, 13,14

Fox v. Bakery,
2010 U.S.Dist. LEXIS 16457 (N. D. Cal. 2010) 35

Franza v. International Brotherhood of Teamsters,
869 F.2d 41 (2nd Cir. 1989) 13, 14

Hodge v. Drivers, Salesmen, Local Union 695
707 F.2d 961 (7th Cir. 1983) 17

Knight v. Wal-Mart Stores,
2009 U.S.Dist. LEXIS 118966 (W. D. Wash. 2009) 31

Mauro v. Federal Ex,
2009 U.S.Dist. LEXIS 59954 (C. D. Cal. 2009) 54

Morrison v. Olson,
487 U.S. 654 46

<i>Newberry v. Pacific Racing Association</i> , 854 F.2d 1142 (9th Cir. 1988)	34
<i>Nixon v. United Food and Commercial Workers</i> , 751 F.Supp. 1491 (D. Colo. 1990)	13
<i>Peterson v. Airline Pilots Association</i> , 759 F.2d 1161 (9 th Cir. 1985)	28
<i>Retail Clerks Local 48 (Rose Wong)</i> , 163 N.L.R.B. 431 (1967)	43
<i>Rosen v. AT&T Mobility</i> , 2008 U.S. Dist. LEXIS 106480 (W.D. Wa. 2008)	40
<i>Sewell v. Grand Lodge</i> , 445 F.2d 545 (5th Cir. 1971)	45
<i>Smith v. Island Transit</i> , 1996 U.S.App. LEXIS 26713 (9th Cir.1996)	50
<i>Smoot v. Boise Cascade Corp.</i> , 942 F.2d 1408 (9 th Cir. 1991)	43
<i>Talano v. Bonow</i> , 2002 U.S. Dist. 17387 (N.D. Ill. 2002)	54
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, P.2d 1081 (1984)	23, 35, 46
<i>Time Oil Co. v. Cigna Property & Casualty Insurance Co.</i> , 141 F.Supp. 1400 (W.D. Wash. 1990)	6
<i>Travelers Insurance Co. v. Protemps</i> , 2001 U.S. Dist. LEXIS 23235 (D. Ne. 2001)	54

<i>Wambles v. Teamster</i> , 488 F.2d 888 (5 th Cir. 1974)	45
<i>Wooddell v. International Brotherhood of Electric Workers</i> , 502 U.S. 93, 112 S. Ct. 494, 116 L. Ed. 2d 419 (1991)	34

STATE CASES

<i>Berg v. Hudesman</i> , 115 Wn.2d 657, P.2d 222 (1990)	40
<i>Birge v. Fred Meyer</i> , 73 Wn.App.895, 872 P.2d 49 (1994)	37, 47
<i>Blinka v. Wash. State Bar Association</i> , 109 Wn.App. 575 (2001)	43
<i>Bott v. Rockwell International</i> , 80 Wn.App. 326 (1995)	23
<i>Briggs v. Nova</i> , 135 Wn.App. 955, 147 P.3d 616 (2006)	55, 57
<i>Brown v. Scott Paper Worldwide Co.</i> , 98 Wn.App. 349 (1999)	53, 54
<i>Butler v. Joy</i> , 116 Wn.App. 291, 65 P.3d 671 (2003)	55
<i>Champagne v. Thurston County</i> , 134 Wn.App. 515 (2006)	5
<i>Cogle v. Snow</i> , 56 Wn.App. 499 P.2d 554 (1990)	58
<i>Colwell v. Holy Family Hospital</i> , 104 Wn.App. 606, 15 P.3d 210 (2001)	5, 55

<i>Degel v. Majestic Mobile Manor, Inc.</i> , 129 Wn.2d 43, 914 P.2d 728 (1996)	5
<i>Drobny v. The Boeing Co.</i> , 80 Wn.App. 97 (1995)	27, 37, 40
<i>Dzwonar v. HERE Local 54</i> , 791 A.2d 1020 (2002)	8
<i>Grimes v. Allied Stores Corp.</i> , 53 Wn.App. 554, 768 P.2d 528 (1989)	51
<i>Hansen v. Aerospace Defenese Related Industry District</i> , 90 Cal.App.4th 977, 109 Cal.Rptr.2d 482	3, 12
<i>Havens v. C&D Plastics</i> , 124 Wn.2d 158, 876 P.2d 435 (1994)	26, 27
<i>Hayes v. Trulock</i> , 51 Wn.App. 795, 755 P.2d 830 (1988)	49
<i>Hill v. J.C. Penney</i> , 70 Wn.App. 225, 852 P.2d 111 (1993)	37
<i>Korlund v. DynCorp Tri-Cities Services</i> , 156 Wn.2d 168, 125 P. 3d 119 (2005)	25, 40
<i>Lawson v. Boeing Company</i> , 58 Wn.App. 261, 792 P.2d 545 (1990)	25
<i>Malarkey Asphalt Co. v. Wyborney</i> , 62 Wn.App. 495 (1991)	42
<i>Marquis v. City of Spokane</i> , 130 Wn.2d 97, 922 P.2d 43 (1996)	6
<i>Marshall v. AC&S</i> , 56 Wn.App. 181, 782 P.2d 1107 (1989)	24

<i>McCormick v. Lake Washington School District</i> , 99 Wn.App. 107, 992 P.2d 511 (1999)	24
<i>Messerly v. Asamera Minerals</i> , 55 Wn.App. 811, 780 P.2d 1327 (1989)	47
<i>Mountain Park Homeowners Association, Inc. v. Tydings</i> , 125 Wn.2d 337, 883 P.2d 1383 (1994)	5
<i>Packwoski v. United Food & Commercial Workers Local 951</i> , ____ Mich.App. ____, ____ N.W.2d ____ (slip op. July 8, 2010)	20
<i>Parker v. United Airlines</i> , 32 Wn.App. 722, 649 P.2d 181 (1982)	49
<i>Pelton v. Tri-State Mem'l Hospital, Inc.</i> , 66 Wn.App. 350, 831 P.2d 1147 (1992)	55
<i>Robbins v. Harbour Industrial</i> , 150 Vt. 604, 556 A.2d 55 (1988)	33
<i>Roberts v. Arco</i> , 88 Wn.2d 887, 568 P.2d 764 (1977)	43
<i>Rowe v. Vaagen Brothers Lumber, Inc.</i> , 100 Wn.App. 268 (2000)	42
<i>Schmidt v. Cornerstone Investments, Inc.</i> , 115 Wn.2d 148, 795 P.2d 1143 (1990)	24
<i>Screen Extras Guild v. Superior Court</i> , 51 Cal.3d 1017 (1990)	<i>passim</i>
<i>Shaw v. Housing Authority</i> , 75 Wn.App. 755, 880 P.2d 1006 (1994)	25
<i>Siekawitch v. Washington Beef Producers</i> , 58 Wn. App. 454, 462, 792 P. 2d 994)	26

<i>Smith v. International Brotherhood of Electrical Workers,</i> 109 Cal.App.4th 1637	15
<i>Stewart v. Chevron Chemical Co.,</i> 111 Wn.2d 609 (1988)	27, 39
<i>Swanson v. Liquid Air Corp.,</i> 118 Wn.2d 512, 826 P.2d 664 (1992)	<i>passim</i>
<i>Thompson v. St. Regis Paper Co.,</i> 102 Wash. 2d 219, 685 P.2d 1081 (1984)	23, 35, 46
<i>Thunderburk v. United Food & Commercial Workers' Union,</i> 92 Cal.App.4th 1332, 112 Cal.Rptr.2d 609	18
<i>Tyra v. Kearney,</i> 153 Cal.App.3d 921, 200 Cal.Rptr. 716 (1984)	9
<i>Vitullo v. IBEW Local 26,</i> 317 Mont. 142, 1250,	10
<i>Williams v. Great Northern Railway Co.,</i> 108 Wn. 344, 184 P. 340 (1919)	22
<i>Young v. Key Pharmaceuticals, Inc.,</i> 112 Wn.2d 216, 770 P.2d 182 (1989)	6

DOCKETED CASES

<i>Coaxum v. Pacific Northwest Regional Council of Carpenters,</i> King County Superior Court Case No. 09-2-05291-3 (KNT)	53
---	----

FEDERAL STATUTES

S.Rep. 86-187 at 7 (1959) 14

Labor Management Relations Act,

 29 U.S.C. §185(a) 34

 29 U.S.C. § 402(q) 15

 29 U.S.C. § 501(a) 15

I

INTRODUCTION

“Congress must have intended that elected union officials would retain unrestricted freedom to select business agents, or, conversely, to discharge business agents with whom they felt unable to work or who were not in accord with their policies.”

– *Screen Extras Guild v. Superior Court*, 51 Cal. 3d 1017, 1024 (1990).

A. Statement of Case and Summary of Argument

In 2008, appellant Roger Daignault ran against incumbent union leader, Respondent Roger Tweedy, in an election for Tweedy’s position. Tweedy is the Executive Secretary Treasurer (“EST”) of the Pacific Northwest Regional Council of Carpenters.¹ Clerks Papers (“CP”) 114, Tweedy Decl. ¶ 1. The Council, a labor organization, oversees local unions in the Northwest region of the country. CP 120, Bylaws § 3. As EST, Tweedy functions as the Council’s CEO and manages and supervises the Council’s field activities, business office(s) and its day to day business. CP 121, Bylaws § 8(A). Pursuant to the Council’s Bylaws, he can hire and fire business agents such as Daignault CP 122, Bylaws § 8(A). The EST is the sole elected position in the Council. CP 114, Tweedy Decl. ¶ 1. All other

¹Council will collectively refer to both the Council itself and the two individual respondents.

positions, such as the business agent position held by Daignault, are appointed. *Id.* As a business agent, Daignault, represented the Council in important matters such as collective bargaining, organizing, and contract enforcement. In addition, he was privy to confidential information relating to the Council, such as policy development and implementation. CP 60-61, Daignault Depo at 39:22-40:1

During his election challenge, Daignault openly campaigned on a platform that promised to change the direction that the Council was being managed under Tweedy's leadership. CP 74, Daignault Depo at 51:19-52:6. See also CP 237, Daignault Decl. ¶ 2 ("personally I felt some modification could further union goals"). Not surprisingly, had he been elected, he would have implemented those changes. CP 76, Daignault Depo at 53:10-54:5. Daignault, however, never got the opportunity to set the Council's agenda on a different path from Tweedy's as he lost the election. Shortly thereafter, Tweedy terminated Daignault because he could not faithfully and loyally carry out the goals Tweedy, the victor of the election, set for the Council. CP 116, Tweedy Decl. ¶ 11.

Daignault then sued the Council for wrongful termination. In the trial court, he abandoned his public policy wrongful termination cause of action,

and the court granted the Council summary judgment on his contract-based wrongful termination claims. Hence, those claims are solely at issue here.

This Court can and should affirm the lower court's grant of summary judgment for any one of several independently dispositive reasons. As an initial matter, Daignault's state law wrongful termination claims are preempted by the Labor Management Reporting and Disclosure Act ("LMRDA"). The LMRDA is a federal statute that empowers elected union officials like Tweedy to remove appointed employees like Daignault at their unfettered discretion. In particular, the LMRDA directs that "[a union leader] ha[s] the right to have an appointed business agent who support[s] his agenda." *Hansen v. Aerospace Defense Related Industry Dist.*, 90 Cal. App. 4th 977, 983, 109 Cal. Rptr. 2d 482. Because Daignault's state law claims encroach on Tweedy's well-settled plenary authority in selecting a staff of his own choosing, they are preempted by the LMRDA. Simply put, this case is consistent with long-standing precedent that sanctions patronage dismissals where, as here, an appointed employee is fired after unsuccessfully contesting a union leader's position and elected office.

Aside from preemption under the LMRDA, state law furnishes ample and independent ground to dispose of Daignault's claims in their entirety.

First, as the trial court determined, the disclaimer in the Council's Employment Policy forecloses any and all wrongful termination theory Daignault can raise, including the theory that he could only be terminated for just cause. Furthermore, affirmance is warranted as Daignault's termination was supported by just cause. Black letter law instructs that when an employee attempts to oust the leader of an organization and runs a very public campaign disagreeing with the policies espoused by that leader, the employer is fully entitled to exercise its managerial discretion in terminating that employee. Finally, the trial court did not abuse its discretion in denying Daignault's motion to continue the Council's motion for summary judgment. Daignault failed to cite any reason explaining why he did not obtain the discovery he was seeking at earlier date, and failed to adduce what evidence he would uncover that would create an issue for trial. For these and further reasons set forth below, the Council respectfully requests that this Court affirm the lower court's grant of summary judgment in its favor.

B. Statement of Issues

1. Are all of Daignault's state law claims wholly preempted by the LMRDA such that the trial court's grant of summary judgment was proper?
2. Did the trial court properly conclude that the disclaimer in the Council's Employment Policy

warrant entry of summary judgment against Daignault?

3. Should the trial court's grant of summary judgment be affirmed on the grounds that Daignault could not prevail by showing that the appeal of his termination was a sham or that he was denied union representation?

II ARGUMENT

Standard of Review

This Court may affirm the trial court's summary judgment ruling on any grounds supported by the record. *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994). In particular, the Court can affirm on any alternative basis supported by the record and pleadings, even if the trial court did not consider that alternative. *Champagne v. Thurston County*, 134 Wn. App. 515, 520 (2006) The Court's review is *de novo* and it conducts the same inquiry as the trial court. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996), except for the denial of the motion to continue the summary judgment, which is reviewed for abuse of discretion. *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 615, 15 P.3d 210 (2001)

The standard principles applicable to summary judgment motions are

well known. In responding to a summary judgment motion, the non-moving plaintiff, "by affidavits or as otherwise provided in this rule [CR 56], must set forth specific facts showing that there is a genuine issue for trial." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). To defeat summary judgment, a plaintiff must establish specific and material facts to support each element of his or her case. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). A dispute over non-material facts does not justify denying the motion. If the plaintiff will bear the burden of proof at trial as to an element essential to its case, as Daignault does here, and that party fails to make a showing sufficient to establish a genuine dispute of material fact as to that element, then summary judgment is appropriate. *Time Oil Co. v. Cigna Property & Cas. Ins. Co.*, 141 F. Supp. 1400, 1406 (W.D. Wash. 1990).

A. This Court Should Affirm The Trial Court's Ruling On Grounds That Daignault's Entire Action Is Preempted By The Labor Management Reporting and Disclosure Act

1. The council discharged Daignault on patronage grounds, a basis which every court to address this issue has found preemption pursuant to the lmrda

Enacted in 1959, the LMRDA represents "the product of congressional concern with widespread abuses of power by union

leadership." *Finnegan v. Leu*, (1982) 456 U.S. 431, 435. The LMRDA specifically confers union members with the right to freely express their views without the threat of (union) political reprisal (e.g. loss of union membership). *Id.* Congress deemed this protection necessary for the purpose of "ensuring that unions would be democratically governed and responsive to the will of their memberships." *Id.* at 436.

Congress made clear, however, that the LMRDA's protections extend only to union members and not union employees. In *Finnegan*, the Supreme Court carried forth this purpose by announcing a broad rule vesting in union leaders plenary authority over staff they appoint. *Id.* at 440-42. There, as in many cases, appointed union employees were terminated as a result of a political fallout they had with the union leadership. In *Finnegan*, union business agents were terminated after they supported a candidate that lost to the eventual winner of a union election. They sued under the LMRDA, claiming that their rights under the act were violated. The Court disagreed, upholding the discharges. Indeed, consistent with the LMRDA's purposes, *Finnegan* held, was an "elected union leader[']s right] to choose a staff whose views are compatible with his own." *Id.* at 441. Such a leader's ability to "select his own administrators is an integral part of ensuring a union

administration's responsiveness to the mandate of the union election." *Id.*

While *Finnegan* is not a preemption case, "it has been interpreted as requiring preemption with respect to the [patronage] discharge of union employees . . . [in *Screen Extras Guild v. Superior Court*, 51 Cal.3d 1017, 275 Cal. Rptr. 395 (1990)]." *Dzwonar v. HERE Local 54*, 791 A. 2d 1020, 1024 (2002). In *Screen Extras Guild* ("SEG"), plaintiff Barbara Smith, a member and employee of the Screen Extras Guild ("Guild"), sued the Guild for wrongful discharge in breach of an employment contract and other related torts. *Id.* at 1020-21. At trial court and on appeal, Smith succeeded in opposing the Guild's LMRDA preemption based motion for summary judgment. *Id.* at 1020. The California Supreme Court, however, reversed. *Id.* at 1021.

The Court, relying on *Finnegan*, held that wrongful discharge actions brought by former confidential or policymaking employees would substantially impair the LMRDA's purpose of fostering union democracy. *Id.* at 1024. The LMRDA, it ruled, preempted such actions. *Id.* at 1030. Turning to the question of whether Smith was a confidential or policymaking employee, the Court briefly reviewed her duties and found that she was a "policymaking" employee subject to *Finnegan's* preclusive rule. *Id.* at

1031-32. The Court was "[t]hus compelled to recognize that "the wide scope of federal regulation of labor unions does not permit [the] application [of all California wrongful discharge law] to employees of unions." *Id.* at 1033. This was because "Congress must have intended that elected union officials would retain unrestricted freedom to select business agents, or, conversely, to discharge business agents with whom they felt unable to work or who were not in accord with their policies." *SEG*, Cal. 3d at 1024.

In reaching its conclusion, *SEG* adopted the reasoning set forth in *Tyra v. Kearney*, 153 Cal. App. 3d 921, 200 Cal. Rptr. 716 (1984), an earlier case which upheld a patronage discharge on an indistinguishable set of facts to this matter. In *Tyra*, a union business agent, like Daignault, decided to challenge an incumbent elected union leader in a union election. As with Daignault, he lost the election and was then fired. The business agent sued, claiming he was wrongfully discharged. The Court upheld the termination, however, ruling that "[r]eplacement of business agents by an elected labor union official is sanctioned by the Act and allowance of a claim under state law would interfere with the effective administration of national labor policy." *Id.* at 923. More specifically, *Tyra* held that "*Finnegan* found termination in this instance sanctioned under the Act; a subsequent state

claim would allow another forum to restrict the exercise of the right to terminate which *Finnegan* found "an integral part of ensuring a union administration's responsiveness to the mandate of the union election.""

Consistent with *Tyra* is *Vitullo v. IBEW Local 26*, 317 Mont. 142, 75 P.3d 1250, where the Montana Supreme Court relied on *Finnegan* to dismiss a suit challenging a patronage discharge. In *Vitullo*, plaintiff brought a state law action for wrongful termination. Vitullo was terminated from his position as assistant business manager and organizer under the union's constitution and by-laws after he chose to run against the current business manager. The Court granted the union's motion for summary judgment, reasoning that, among other things, Congress, in passing the LMRDA, was interested in preserving union democracy and the ability to be responsive to union membership: "It follows therefrom, that to the extent that the Montana Wrongful Discharge From Employment Act interferes with the constitutional appointment authority of duly elected union officers, it is in direct conflict with the LMRDA, and is preempted accordingly." *Vitullo*, 317 Mont. at 152.

The facts giving rise to Daignault's suit conclusively demonstrates that it is precisely the type of patronage claim that *Finnegan* and *SEG* held cannot stand under the LMRDA. Here, an elected union leader, CP 236-37,

Daignault Decl. ¶ 2, removed an appointed union business agent, CP 31 Daignault Depo at 8:16-18, after an election where the latter ran against the former. Indeed, Daignault not only openly opposed the vision the incumbent elected union leader had for the Council, he attempted to unseat him to substitute his competing agenda for the Council. In particular, Daignault felt that the Council was “going in a bad direction,” CP 74, Daignault Depo at 51:16-18, and expressed a wholesale disapproval of how the Council was being operated under Tweedy’s stewardship.

Q. Now, leading up to the election, did you think the union was headed in the right direction?

A. Yes and no.

Q. Under Tweedy’s leadership?

A. For the council I thought we were going in a **bad direction**.

Q. So in what way were you not going in a bad direction? I mean, you said yes and no, so ...

A. Well, I mean, at the time the organizing was fine. We were pulling away from representing our members and I thought that we needed to continue to support our members and represent our members when they needed representation or help. And I thought that we had to take a look at where we didn’t want to go before, which was the light commercial, the big box stores, residential, and go about trying to build relationships and get better training and bringing in more apprentices and bringing in more qualified people.

That would help save money in the long run and help our contractors,

rather than having to bring – bringing in everybody not knowing where any of their skills were, because it takes time and money, you know, if we could offset some of that up front, we'd be money ahead.

Because from working out in the field, I thought, you know, there was an awful lot of workers out there that had skills in the carpenters, you know, in their background that could really help us when we were in a pinch and when we needed people.

CP 74, Daignault Depo at 51:19-52:6. See also CP 237, Daignault Decl. ¶ 2 (“personally I felt some modification could further union goals”). Daignault was convinced his approach would “save money in the long run and help our contractors.” CP 74, Daignault Depo at 52:7-17. In sum, he had decided that “**Tweedy’s administration was going in the wrong direction** with regard to those issues.” CP 74, Daignault Depo at 52:18-22.

As with any campaign, Daignault distributed literature to the electorate outlining his reform agenda. CP 80, Daignault Depo at 57:4-21. Daignault would have implemented his competing policies and supplanted Tweedy’s had he been elected. CP 76, Daignault Depo at 53:10-54:5. Instead, Daignault did not prevail, and, as with many other similarly situated individuals in body politics like a union, he was removed. In this case, as precedent instructs, termination was more than appropriate and foreseeable as it is indisputable that “[a union leader] ha[s] the right to have an appointed business agent who support[s] his agenda.” *Hansen v. Aerospace Defenese*

Related Industry Dist., 90 Cal. App. 4th 977, 983, 109 Cal. Rptr. 2d 482. See also *Franza v. International Brotherhood of Teamsters* 869 F.2d 41, 49 (2nd Cir. 1989) (“It is that political activity – not his union activities – that caused Franza’s discharge from Plan employment”); *Nixon v. United Food and Commercial Workers*, 751 F.Supp. 1491, 1493-94 (D. Colo. 1990); *Cehaich v. UAW*, 710 F. 2d 234, 240 (6th Cir 1983).

2. LMRDA preemption applies whether or not Daignault could be classified as either a policymaking or confidential employee

a. There is no exception for confidential or policymaking employees

Finnegan and *SEG* expressly declined to consider whether their holdings contained an exception limiting the LMRDA's preemptive scope to confidential or policymaking employees. (*Finnegan*, 456 U.S. at 441 n.11 and *SEG*, 51 Cal.3d at 1032 n.11.) Although the United States Supreme Court has not addressed this issue since, two federal courts have squarely rejected arguments seeking to limit the reach of LMRDA’s preemption power. *Franza*, 869 F.2d at 47 and *Nixon*, 751 F.Supp. at 1494.

Principally supporting the application of the LMRDA to all employees is *Finnegan*’s teaching "that it is not a member's employment by the union that is protected by the [LMRDA]; rather, it is [] membership in

the union that is safeguarded." (*Franza*, 869 F.2d at 47.) Congress, as a result, was concerned in protecting "union members rights qua member" and sought to eschew transforming the LMRDA "into a genie offering lifetime job security." (*Id.*) This intent is manifested in the language of the act itself which only protects "members" and its legislative history which, though originally extending protection to both officers and members in § 101(a)(4), ultimately only covered the latter. (*Finnegan*, 456 U.S. at 437 n.7.) Also significant is the conspicuous absence in the LMRDA's comprehensive regulatory scheme of any allusion to "job security" protection for union employees.

Congress thus was not concerned with the manner in which labor organizations conducted their internal affairs, so long as membership rights remained intact: "Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs." (S.Rep. 86-187 at 7 (1959), I NLRB Leg. Hist. 403.) For these reasons, it is irrelevant whether Daignault was a confidential or policymaking employee since his very employment by the Council was, through the LMRDA, at-will. As such, his termination gives rise to absolutely no basis upon which he can maintain his suit.

- b. **Daignault was a policymaking or confidential employee but lmrda preemption applies regardless of whether he was or not**
 - i. **because Daignault was a business agent, he qualifies as a policymaking or confidential employee as a matter of law**

While employed at the Council, Daignault held the position of Business Agent. CP 31, Daignault Depo at 8:1-2. This position, as a matter of law, qualifies as a policymaking or confidential one under the LMRDA. (*Smith v. International Brotherhood of Electrical Workers*, 109 Cal. App. 4th 1637, 1647 & n. 15 (holding that “business agents and business representatives are policymaking personnel as a matter of law”) (citing *SEG*, 51 Cal. 3d at 1031).) As *SEG* explained,

Union business agents "have significant responsibility for the day-to-day conduct of union affairs." [citations] Business representatives are expressly recognized in the LMRDA to be "key administrative personnel" (29 U.S.C. § 402(q)) who "occupy positions of trust in relation to [labor] organization[s] and [their] members as a group." (29 U.S.C. § 501(a).)

Functionally, the business agent is at the forefront of implementing union policy, linking the union member and the upper echelons of the union bureaucracy. It is the business agent who responds to workers' grievances and who often selects which ones to pursue. The business agent makes strategic decisions regarding pursuit of collective bargaining and is frequently the chief organizer of strikes. The business

agent is charged with seeing that the union contract is enforced and makes a number of discretionary decisions in that regard. (See Kennedy et al., *The Business Agent and His Union* (U.C. Berkeley Institute of Industrial Relations, 2d ed. 1964) pp. 35-51.) Smith, for example, could decide to waive certain union rules in the case of some employers. In short, for many union members, the business agent is the union, the chief representative of union policies. (Ibid.)

Consistent with *SEG*'s description of a business agent's duties are those that Daignault was charged with and actually performed.

Q. Okay. So is fair to say that at least once a month upper management, the council, sits all the business reps down and says here is our game plan, sends you guys out to kind of implement that?

A. Yes.

(CP 60-61 (37:22-38:1).) In particular, Daignault was not only responsible for obtaining employer signatures on collective bargaining agreements, CP 66, Daignault Depo at 43:2-24, but also for interpreting those agreements, CP 64, Daignault Depo at 41:17-19, and enforcing them under the grievance-arbitration procedures prescribed by them. CP 63, Daignault Depo at 40:3-41:13. Moreover, he was responsible for organizing new employees, CP 57-58, Daignault Depo at 34:16-35:7, and building relationships with contractors to establish the Council's market share in the area. CP 66, Daignault Depo at 43:17-18. Like the business agent in *SEG*, Daignault was indisputably "at

the forefront of implementing union policy.” *Id.* Because Daignault was a business agent or business representative of the Council, he was, as a matter of law, a confidential or policymaking employee.² *SEG*, 51 Cal. 3d at 1031 (“Smith, as a union business agent with significant decision making responsibility for the implementation of SEG policies and their application to individual cases, was among that group of *policymaking or confidential* employees the selection of which federal labor policy leaves to the unfettered discretion of elected union officials”) (emphasis supplied).) Indeed, he, like Smith in Screen Extras Guild, was the union itself. *Id.* at 1021.

ii. the Undisputed factual record demonstrates that Daignault was a policymaking and/or confidential employee

Apart from the reasons involving the context of Daignault’s dismissal and the duties he performed, each of which alone would trigger preemption under the LMRDA, Daignault’s access to confidential information is yet another basis upon which to affirm dismissal of his suit. In *Hodge v. Drivers, Salesmen, Local Union 695*, (7th Cir. 1983) 707 F.2d 961, 961, a union

²In the proceedings below, Daignault describes his position with the Council as either a Business Agent CP 265, Daignault Decl. ¶ 3, or as a Business Representative. CP 3, Complaint, ¶ 10. For purposes of this matter, there is no distinction between the two as SEG uses those terms interchangeably as well. *SEG*, 51 Cal. 3d at 1031.

discharged a secretary "who had wide-ranging responsibility and access to confidential union information" on the basis of "her perceived lack of loyalty." *Id.* Plaintiff there had access to internal union complaints, unfair labor practice charges, union activist and steward lists, and other information "whose nondisclosure [she] acknowledged was crucial." *Id.* at 964. Insignificant in its analysis, the court stated, was the "unadorned title of secretary" plaintiff carried since "*Finnegan* by its very terms is not limited to powerful decision makers but includes administrators and staff." *Id.* (internal quotes omitted). As such, due to her extensive "access to confidential and sensitive union information," summary judgment was entered in favor of defendant. *Id.* at 965.

Similarly, in *Thunderburk v. United Food & Commercial Workers' Union*, 92 Cal. App. 4th 1332, 112 Cal. Rptr. 2d 609, a union secretary that could access confidential information was deemed to be a confidential employee subject to *Finnegan's* patronage rule, despite the fact that she performed no confidential or policymaking duties:

While in the instant case plaintiff did not have policymaking or management responsibilities and many of plaintiff's job responsibilities were of a clerical, nonconfidential nature, it is undisputed that she nevertheless had access to confidential union information, which if disclosed, could have thwarted union policies and objectives. It was for this reason the courts

in *Finnegan* and Hodge concluded that the union was unrestricted in terminating the plaintiff union employees.

Id. at 1343. In particular, the confidential information she had access to included::

[P]laintiff had access to confidential information, such as the union's communications with its attorneys; union representatives' mail; members' disciplinary notices; grievance files; names and addresses of union officers and executive board members; scholarship files which contained students' grade point averages and school transcripts; death benefit files which contained information regarding the cause of death and autopsy results; union membership records containing members' names, Social Security numbers, home addresses, work location, compensation, and dues payment records; and information regarding Local 324's political propaganda.

Id. at 1342. Setting aside the fact that Daignault did in fact perform policymaking and confidential duties, he, like *Thunderburk*, also had access to confidential information. This included, but certainly was not limited to, information relating to organizing new employees, CP 57-58, Daignault Depo at 34:16-35:7, contact with non-signatory employers, CP 58-59, Daignault Depo at 35:8-36:20, knowledge and formulation of a union "pitch" to non-signatory contractors, CP 59-60, Daignault Depo at 36:21-37:5, attending monthly meetings where union policy and its implementation was discussed, CP 60-61, Daignault Depo at 39:22-40:1, collective bargaining meetings, CP

61-63, Daignault Depo at 38:11-40:2, contract enforcement and grievances CP 63, Daignault Depo at 40:3-5 & 40:19-21 & CP 105, Daignault Depo at 82:13-23, participation in contract negotiations, CP 100-101, Daignault Depo at 77:19-78:7, servicing 60-65 contractors, CP 65, Daignault Depo at 42:16-17, and cultivating relationships with contractors to build market share. CP 66, Daignault Depo at 43: 2-18. As such, this conclusively shows that Daignault had access to confidential information and was a confidential employee.

iii. Daignault's view that an express contract makes this case distinguishable from *Finnegan* and its progeny cannot withstand scrutiny

In the court below, Daignault submitted a late-filed opposition with respect to the LMRDA preemption issue. In it, he only argued that, because there was an alleged express contract in this case, that alleged contract barred application of LMRDA preemption to him. Not only does he fail to cite any authority for that proposition, authority holds to the contrary. In *Packwoski v. United Food & Commercial Workers Local 951*, ___ Mich. App. ___, ___ N.W. 2d ___, (slip op. July 8, 2010), a union business agent and organizer sued his union for wrongful discharge. (A copy of this opinion is attached as

part of the Appendix.) The Michigan Court of Appeals affirmed a grant of summary judgment on LMRDA preemption grounds, reasoning that cases such as *Finnegan* and *SEG* provided persuasive guidance on this issue. *Packowski*, Slip op., p. 9. On the strength of those decisions, summary judgment was appropriately granted against the business agent in that case. Of significance in that case is the fact that the union defendant there “admitted that it has an employment policy that employees, including plaintiff, can only be terminated for just cause.” *Id.* at p. 2. Despite the existence of that explicit just-cause policy and the business agent’s contention that the defendant lacked just cause for his termination, the court still found preemption on grounds that the agent’s theory there would thwart the pro-democratic purposes under the LMRDA.³ This result should come as little

³The dissent in *Packowski* argued that the “just cause” provision in the union’s employment policy warranted a different result from other cases finding preemption under the LMRDA. In its view, this should have provided a distinction from the other cases such as *SEG* which did not involve a just cause policy. In fact, *SEG* considered this very issue and rejected it. There, it disagreed with the Court of Appeals view that “[u]nion officials are not elected to breach contracts or commit torts and, if they do so, the fact they are ‘democratically elected’ is beside the point.” *SEG*, 51 Cal. 3d at 1027. Were it otherwise, it would, among other things, enmesh courts into deciding whether or not certain state claims were “garden variety” state causes of action that would elude the preemptive reach of the LMRDA. In addition, this case, unlike *Packowski*, puts directly at issue the union democratic process, where two candidates campaign on platforms seeking very different visions for the Council. In view of these facts, it strikes to the very pro-democratic purposes upon which the LMRDA was enacted and clearly warrants preemption in this case.

surprise in view of cases such as *Vitullo*, which is discussed above, which held that the LMRDA preempted a state *statute*. Thus, in view of *Packowski*, the existence of a written or express contract is no bar to the application of cases such as *SEG*.⁴

///

(“According to Ramirez, the existence of an express employment contract removes her case from the purview of [SEG]. The argument is meritless.”)

⁴This state’s high court has reached the same result on an analogous set of facts in the corporations context. In *Williams v. Great Northern Ry. Co.*, 108 Wn. 344, 184 P. 340 (1919), an employee sued a corporation for breach of contract for permanent employment. The court rejected the employee’s argument, explaining that the statute governing corporations at that time authorized a corporation to terminate employees at will. *Id.* at 346. To accept the employee’s argument in that case would “deprive the corporate authorities of the statutory power to ‘remove’ at any time . . . an employee.” *Id.* at 346-47. It thus held that “this contract, in so far as it was a contract for permanent employment, was wholly void and unenforceable in this action, if the law of this state is controlling.” *Id.* at 347. In doing so, Williams held that the dictates of a statute’s provisions authorizing at-will removal of employees would prevail over inconsistent express contractual arrangements (e.g., permanent employment contracts). Like *Williams*, the statute at issue here, the LMRDA, has its own at-will provisions. The fact that a union may enter into some contractual agreement otherwise does not alter the fact that LMRDA preemption would still be applicable to that claim.

B. The Trial Court Properly Granted Summary Judgment On Daignault's Contract Theories

- 1. Daignault's wrongful termination claim should only be limited to his specific treatment in specific circumstances theory and any contention regarding breach should be limited to those relating to the lack of appeal and representation he alleges.**

In *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984), the Washington Supreme Court announced three exceptions to the at-will employment doctrine in this state. One was for a wrongful termination in violation of public policy claim, which is not at issue here, and the others were for specific treatment in specific circumstances and express contract. *Id.* at 233.

In Sections I and II of his brief, Daignault purports to raise arguments relating to theories of contract and specific treatment in specific circumstances. However, in the portion devoted to his argument (Section V), he limits his legal contentions to his specific circumstances theory. Brief at § V.2.a., pp. 13-17. This theory, of course, is analytically distinct from an express or implied contract theory, *Bott v. Rockwell Int'l*, 80 Wn. App. 326, 331 n.1 (1995) (discussing distinctions between theories), and by limiting his argument to the specific circumstances theory, he has abandoned reliance on any other theory such as one based on contract.

As to Daignault's specific circumstances theory, he should only be able to argue two bases for breach: the alleged lack of an appeal he received and lack of union representation. These were the only two allegations of any contract based recovery he testified to in his deposition, CP 92 & 94 (Daignault Depo at 69:7-24 & 71:14-18), and adding any more would conflict with the clear testimony he gave at the deposition regarding the bases of the theory he was pursuing. *Marshall v. AC&S*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989); *McCormick v. Lake Washington School District*, 99 Wn. App. 107, 112, 992 P.2d 511 (1999) (adding new information not provided for in deposition testimony to oppose summary judgment is improper).⁵ For this simple reason, reliance on any other grounds such as progressive discipline is improper.⁶

⁵The *Marshall* rule applies to affidavits or declarations that conflict with deposition testimony by a nonmoving party to resist a motion for summary judgment. In this case, it is not Daignault's affidavits but his oppositions. Inasmuch as it is Daignault's own opposition that conflicts with his deposition testimony, this rule should apply with greater force.

⁶At the end of Section V.2.a., on page 16 of his Brief, Daignault makes a vague reference to both progressive discipline and what appears to be an express contract theory. The Court should refuse to consider these theories, apart from the reasons expressed previously, because his brief lacks "[t]he argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). "Without adequate, cogent argument and briefing, this court should not consider an issue on appeal." *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn. 2d 148, 160, 795 P.2d 1143 (1990) (citing *Saunders v. Lloyd's of London*, 113 Wn.2d 330,

2. Daignault's sufficiently argued theories relating to the appeal process and alleged lack of union representation are meritless

a. There was no promise for either theory

The "promise for specific treatment in specific situations" theory is a species of common law promissory estoppel, which requires a showing of the following elements:

Promissory estoppel requires five elements: (1) a promise (2) which the promisor should reasonably expect will cause the promisee to change position and (3) which actually causes the promisee to change position (4) in justifiable reliance on the promise, so that (5) injustice can be avoided only by enforcement of the promise.

Shaw v. Housing Authority, 75 Wn. App. 755, 761, 880 P. 2d 1006 (1994).

Where, as here, reasonable minds cannot differ on whether Daignault could establish this claim, each of these elements can be decided as a matter of law.

Korlund v. DynCorp Tri-Cities Servs., 156 Wn. 2d 168, 184-85, 125 P. 3d 119 (2005). See also *Lawson v. Boeing Company*, 58 Wn App. 261, 264, 792

345, 779 P.2d 249 (1989)). To the extent that Daignault is relying on an implied contract theory, this should be rejected out of hand since he fails to even advance any point on that argument whatsoever. In all, because Daignault has miserably failed to cogently argue and brief these issues, this Court should not address the merits of these, at best, poorly developed points.

P.2d 545 (1990) (the issue of “whether a written policy is a promise of specific treatment is one for the court”).

Under the first prong of this test, “the promise for promissory estoppel must be a ‘clear and definite promise.’” *Havens v. C&D Plastics*, 124 Wn. 2d 158,173, 876 P. 2d 435 (1994). This exception, like others to the at-will doctrine are “carefully drawn,” *id.* at 173, and only applies where the parties “specifically bargain for security.” *Id.* at 172 (quoting *Siekawitch v. Washington Beef Producers*, 58 Wn. App. 454, 462, 792 P. 2d 994).

In his deposition, Daignault contended that the only basis for any of his contractual theories were “the appeal process and lack of representation, lack of guidelines and lack of representation.” (CP 92, 69:7-13.) He explained that these were violated as follows:

Q. And in what manner were they violated?

A. Well, number one, being new to that appeal process, I had asked if there was any guidelines and there were no guidelines to this appeal or for this process.

(CP 92, 69:20-24.) His “lack of representation” theory is apparently based on the fact that he was not provided any union representation during this appeal process. As will follow, both of these theories are meritless.

As to the first, the only “promise” made to Daignault is that he may

“appeal” to the Council’s Executive Board. There are no other terms or promises attached to this “promise,” much less one for the guidelines that Daignault has invented in his reading of the Employment Policy. In particular, this does not qualify as a promise since it is not “a manifestation of intention to act or refrain from acting *in a specified way*, so made as to justify a promisee in understanding that a commitment has been made.” *Stewart v. Chevron Chem. Co.*, 111 Wn.2d 609, 613 (1988) (quoting Restatement (Second) of Contracts § 2 (1981) (emphasis in original)). Indeed, “promises” such as these are too indefinite for enforcement so as to be illusory. *Id.* In addition, this is not a promise where the parties “specifically bargain for security.” *Havens*, 124 Wn. 2d at 172. For this simple reason, no promise was made to Daignault.

Daignault cannot also establish a promise regarding union representation. In the first place, he produces no document ever setting forth such a promise. This, as a matter of law, disposes of his claim since “in the absence of a written policy providing promises of specific treatment in specific situations, oral representations . . . are insufficient to establish an enforceable promise.” *Drobny v. The Boeing Co.*, 80 Wn. App. 97, 107 (1995). In fact, Daignault signed a dues check off authorization card wherein

he allowed for dues to be deducted from his paycheck but also acknowledged the fact that he would not receive any union representation: “As you know the [Council] is your employer.⁷ *It does not act, and will not act, as a representative on your behalf* for the negotiation of wages, hours, and conditions of employment *or the adjustment of grievances.*” CP 141 (emphasis supplied). In light of this clear language disclaiming any interest in representing Daignault, Daignault’s subjective belief to the contrary cannot withstand scrutiny. *Hill v. J.C. Penney*, 70 Wn. App. 225, 236, 852 P. 2d 1111 (1993)⁸

///

⁷Were the Council both his employer and his bargaining agent, that would violate Section 8(a)(2) of the Act, which prohibits employer domination of a union. *Electromation, Inc.*, 309 NLRB 990, 995 (1992) (“a labor organization that is the creation of management, whose structure and function are essentially determined by management . . . and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under Section 8(a)(2)”). Of course, Daignault and his co-workers could have attempted to organize themselves to form a union such as occurred in *Carpenters Representative Federation*, 1993 NLRB LEXIS 763 (1993). However, because they did not, they do not have any representational rights under any agreement, much less by their employment.

⁸Even assuming that Daignault could proceed on his theory of union representation, that would be preempted by federal labor law’s duty of fair representation that a union owes to its members. *Peterson v. Airline Pilots Association*, 759 F 2d 1161, 1170 (9th Cir. 1985).

b. Daignault has not shown any reliance, much less justifiable reliance on either theory he has argued

In the employment context, “[w]hen an employer makes promises of specific treatment in specific situations and the employee is induced by those promises to remain on the job and not seek other employment, the promises likewise become ‘enforceable components of the employment relationship.’” *Id* (quoting *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 230, 685 P.2d 1081 (1984)). Daignault has made no such showing.

The only part of the record bearing on this issue is Daignault’s deposition testimony that he was “aware” that he was entitled to an appeal. This is insufficient to establish reliance as a matter of law. In *Shaw*, the Court held that the plaintiff

“must therefore not only be aware of a promise of specific treatment in specific situations, she must have relied on that promise before it is enforceable.” Because the plaintiff there had drafted the policy she claims to have relied on, she “was certainly aware of the policy; as we have noted, she drafted it. She presents no evidence, however, of reliance and the cause of action therefore fails.” *Id*.

In light of this deficiency, the court in *Shaw*, rather than holding that this was an issue for the trier of fact, affirmed a grant of summary judgment on that issue. Likewise, because Daignault presented no evidence other than the fact

of reliance on the appeal policy, this court should also affirm the summary judgment granted in favor of the Council.

Daignault's "lack of representation" theory fares no better. As noted previously, the only specific promise that the Council made to Daignault was that it "will not act as a representative on your behalf." Hence, even if Daignault presented evidence as to reliance, which he has not, any such reliance would be fatal to his claim – proving as it does that he relied on *not* being represented. As such, summary judgment was appropriate on this theory as well.

Indeed, as a matter of fundamental contract law, Daignault has made no argument or presented any evidence that he actually was aware of or relied on any of the policies that form the basis of any theories he advances on appeal. In such a case, Daignault cannot establish the basic elements of any contract theory since he was "not aware of the provisions, and the employee consequently does not rely on the provisions." " *Hill*, 70 Wn. App. at 235. In view of this lack of awareness, Daignault cannot be found to have relied on any policy much less justifiably so. The grant of summary judgment should therefore be affirmed.

c. There was no breach of any alleged “promise”, nor any violation of any good faith in connection with either theory he is pursuing

In his Brief, Daignault himself admits that he in fact did appeal his termination and presented arguments in support of his appeal. Daignault Declaration, ¶¶ 6,7. (One of these arguments was that he did not violate any personnel policies, an argument which, as noted above, is wrong.) In addition to presenting his arguments in this “sham” appeal, he also concedes that he spoke with “several members of the Executive board who heard my appeal,” (¶ 8), and actually convinced two of those members to vote for him. (¶ 10, 11.) Thus, while Daignault claims the appeal was a “sham,” his counter-factual admissions in his declaration showing quite the opposite forecloses his wayward view of the “sham” appeal process he claims to have received.

In *Knight v. Wal-Mart Stores*, 2009 U.S. Dist. LEXIS 118966, *1, *51-*52 (W. D. Wash. 2009), the Court rejected an identical argument by an employee who claims that his former employer promised but did not provide him an investigation of the basis for his discharge:

While the actual facts of the investigation may be disputed, there is no doubt that an investigation occurred and no doubt that Plaintiff's side of the story was given to either Ms.

Lindsay or Mr. Johnston. Dkt. 36-4 at 6; Dkt. 36-5 at 6. In fact, both Ms. Lindsay and Mr. Johnston stated that they spoke with Plaintiff and obtained his side of the story. *Id.* Plaintiff did get an opportunity to tell his side of the story and to try to convince management that he was not violent, did not swear, and did not threaten another associate. Dkt. 25-2 at 50. . . . But Defendant conducted an investigation, which was all, even if flawed, that was guaranteed to Plaintiff under Wal-Mart policies. Mr. Johnston was convinced that physical contact had occurred based on the facts that he had and made the decision to terminate Plaintiff because of Gross Misconduct. Dkt. 25-2 at 14. It appears that Defendant made this decision because it needed to ensure the safety of its customers and other associates and Defendant had the right to decide that it did not have to put up with violence in the workplace.

As in *Knight*, Daignault had his “day in court” to offer his side of the story and did in fact persuade two board members to vote in his favor. The fact that there were no “guidelines” governing the appeal is immaterial since the Policy never defined or provided for any such guidelines. Therefore, however Daignault may view the process for his appeal (like the “flawed” investigation in *Knight*), he received exactly what was promised to him in the Policy.

As to Daignault’s union representation theory, he was, as discussed above, never promised any such representation, which was in fact expressly disclaimed. As such, there was no breach in connection therewith.

Finally, Daignault appears to argue that his appeal to the Executive

Board was in effect some type of alternative dispute resolution mechanism subject to this state's Uniform Arbitration Act ("UAA"). RCW §§ 7.04A.010 - 7.04A.903. Under the UAA, which applies to awards issued after its effective date in 2006, § 7.04A.030, vacation of any type of an award must be brought within 90 days of the issuance of the award. § 7.04A.230(2). Setting aside the arguments he raises in connection with this "award" rendered by the Executive Board, it is not only improperly raised in a wrongful termination proceeding such as this, but it is also clearly untimely as the 90 day limitations period, which lapsed some time in April 2009 (as he was terminated three months before), has long since past.⁹

⁹Daignault makes the amorphous claim that he was terminated for his "union activities." Brief, p. 32. To the extent that he is alleging that he was exercising rights under the National Labor Relations Act, that claim is preempted by the Act. *Robbins v. Harbour Indus.*, 150 Vt. 604, 608-09, 556 A.2d 55 (1988). Daignault also asserts the seriously flawed proposition that he is "subject to a labor agreement" and is therefore presumably covered by a collective bargaining agreement's just-cause provision. Brief, p. 26, n. 5. As noted above, he signed a dues checkoff authorization acknowledging that the Council was his employer and not his bargaining representative and would therefore not adjust any grievances on his behalf. CP 141.

d. Daignault's attempt to engraft some "good faith" standard (and one which seeks to impose guidelines) governing the appeal to the Executive Committee is preempted by Section 301 of the Labor Management Relations Act

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), governs contracts arising between a union and employer or between labor organization. While the most common contracts covered by this section are collective bargaining agreements, bylaws of a union are considered a contract governed by § 301(a). *Wooddell v. International Bhd. of Elec. Workers*, 502 U.S. 93, 112 S. Ct. 494, 116 L. Ed. 2d 419 (1991). It is well-established that any attempts to interpret Section 301-covered contracts by a state law theory such as breach of contract will be preempted by the LMRA. See *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142, 1147 (9th Cir. 1988) (holding implied covenant of good faith and fair dealing claim preempted by § 301 because plaintiff was employed under CBA and cause of action required interpretation of specific language of the agreement's terms). Here, Section 8(A) of the Bylaws authorizes the Tweedy to terminate Daignault, "subject to the approval of the Executive Committee of the Council." CP 122. As noted above, there are no guidelines whatsoever attached to this provision of the Bylaws. Any attempt to define this through a state law

theory should accordingly be preempted by Section 301. *Fox v. Bakery*, 2010 U.S. Dist. LEXIS 16457, *1, *24-*25 (N. D. Cal. 2010).

3. While Daignault should be limited to arguing the specific circumstances theory with respect to his alleged sham appeal and lack of union representation in his brief, any other contractual claims are barred as well

As noted previously, this state's high court has recognized three contract based theories – express, implied, and specific circumstances – that modify the at-will employment relationship that is presumed to exist between an employer and employee.

An express contract theory is based on the “requisites of contract formation, offer, acceptance and consideration.” *Thompson*, 102 Wn. 2d 219, 228, 685 P. 2d at 1081. Daignault's “argument” on this theory is simply a fleeting reference to the theory at the end of his specific treatment section. He supports this fleeting reference with no legal authority or citation to the record and this should thus not be considered by the Court. The Council can only assume that he is referring to a progressive discipline theory and based on that assumption addresses such an argument. As will follow, this “argument” fails because the language Daignault relies on is non-mandatory and clearly vests discretion in the Council on issues of termination and

discipline. In addition, as will be discussed in subsections (ii) and (iii), Daigmault cannot demonstrate that he provided any additional consideration or, reliance for any promise he alleges. Finally, as set forth in Section 5, Daigmault was terminated for just cause thus dispensing with any contract theory he may assert. As such, whatever contract theory he is pursuing – including a specific treatment in specific circumstances claim – was properly dismissed below.

- i. because the Employment Policy vested ample discretion in the Council on issues of termination, it could not form the basis of any contract theory against the Council**

Section 4.3 (A) of the Policy provides that “Termination of employment by the Regional Council shall be at the discretion of the Executive Secretary Treasurer for acts which are severe in nature or harmful to the interest of the Regional Council.” In addition, in the section where Daigmault signed Acknowledging his receipt of the policy, it also provides that the Council “has the discretion to terminate my employment.” These broad reaching clauses amply demonstrate that the Council intended to reserve discretion on termination issues and retain the at-will status of employees such as Daigmault. Where such discretion is reserved, case law is

uniform in upholding an employer's right to terminate an employee at-will. *Drobny v. Boeing Co*, 80 Wn. App. 97, 103, 907 P. 2d 299 (1995) ("where the employment manual gives the employer discretion in applying the discipline procedures, courts have held as a matter of law that the manual does not provide a promise of specific treatment in a specific circumstance") (specific circumstance); *Hill v. J.C. Penney*, 70 Wn. App. 225, 236, 852 P. 2d 111 (1993) ("a 'promise' in a manual is not binding if its performance is option or discretionary on part of the promisor) (express contract).

The fact that Section 4.2 of the Manual may refer to other circumstances that may lead to progressive discipline does not warrant a different result. In *Hill*, for instance, the employer's manual there required automatic discharge for certain offenses but allowed for progressive discipline for others. The court reasoned that "violation of any other rule may result in discharge; discharge is optional. A "promise" in a manual is not binding if its performance is optional or discretionary on the part of the promiser." Similarly, in *Birge v. Fred Meyer*, 73 Wn. App. 895, 872 P. 2d. 49 (1994) the manual there, like the Council's in this case, "promised immediate discharge for certain defined misconduct [and] reserved the right to fire without warning for other reasons "which [are] determined by the

company to be of an equally serious nature.” *Id.* At 900. In particular, the policy in Birge contained numerous specific instances of conduct which would lead to “immediate termination” and others which would result in disciplinary action short of discharge. *Id.* In addition, it also contained an acknowledgment that clearly set forth the fact that the employee did “understand this summary does not constitute an employment contract.” In the Council’s manual, it too specifies certain conduct which *could* result in discipline but others which would lead to discharge. In addition, the acknowledgment signed by Daignault contained a clear statement that he understood that the “Employment Policy does not create a contract of employment or right to employment.”

The Employment Policy also contains other discretionary, non-mandatory language that further bolsters the conclusion that no contractual obligations exist here. In Section 4.1, the Policy states that “It is the Policy of the Regional Council that principles of corrective and reasonable discipline *should* apply to employees covered by the Policy (emphasis supplied).” Continuing, it uses further discretionary language when it counsels that “*Consideration* therefore *should* be given in instances of less severe employee misconduct to the policies set forth below, with the understanding

that specific *may* lead to less or more severe discipline that is set forth below (emphasis supplied).” In addition, Section 4.2 provides that “As noted in Section 4.1, *consideration* should be given to the following . . . (emphasis supplied)” As the emphasized portions of these excerpts clearly reflect, the Council retained discretion in connection with issues relating to termination. In stark contrast, the Council uses mandatory language in other parts of Policy, (e.g., 3.1 (“All [full time employees] shall earn paid vacation time”)), clearly demonstrating that the Council knew how to and did use these words when they wanted to.

This mandatory - discretionary language dichotomy was the basis for dismissing an employee’s contract based claim in *Stewart v. Chevron Chemical Co.*, 111 Wn. 2d 609, 762 P. 2d 1143. In *Stewart*, the Court considered whether a layoff policy could form the basis of a contract theory against an employer. In that policy, like this one here, the Court noted that “Chevron’s layoff policy states only that management “should” consider performance, experience and length of service in determining the sequence of layoffs.” *Stewart*, 11 Wn.2d at 613. In holding that the use of the word “should” was discretionary rather than mandatory, it noted the contrasting language used in other parts of the manual where “Chevron used the terms

“shall,” “will,” and “must” but in the layoff provision used “should,” indicating Chevron intended that the provision be advisory.” *Id.* at 613-14.¹⁰ Further adding to its analysis was the fact that “Chevron was only required to “consider” these factors; no relative weight or value is assigned to any of the criteria.” *Id.* at 614. In view of the lack of any precise restrictions the policy placed on managerial discretion, the Court concluded that the employee could not state a claim for wrongful termination. See also *Rosen v. AT&T Mobility*, 2008 U.S. Dist. LEXIS 106480 *1, *15 (W.D. Wa. 2008) (“Generally, where courts have found a promise of progressive discipline prior to termination, that promise has been explicit”).

Further underscoring this point is *Drobny*, where the employer there maintained a nearly identical two-track progressive discipline policy to the one the Council established. In *Drobny*, AP 580, the employer’s policy, provided for progressive discipline as a general rule in addressing employee misconduct. *Drobny*, 80 Wn. App. at 104 However, the policy also provided

¹⁰The Council is aware of the Supreme Court’s decision in *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 523, 826 P. 2d 664 (1992). In *Swanson*, the Court suggested that *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) may have been authority distinguishing *Stewart’s* rule regarding mandatory and discretionary language. Whatever the merits of *Swanson’s* view on this issue may have been, a later Supreme Court case, *Korlund v. DynCorp.*, 156 Wn. 2d 168, 190, 125 P. 3d 119 (2005), cited *Stewart’s* approach with approval.

that immediate dismissal was allowed for other, more serious offenses.

In assessing whether AP 580 constituted a binding, contractual promise on Boeing, the court demarcated two distinct lines of cases governing progressive discipline policies. On the one hand were those policies that contained mandatory language requiring imposition of certain discipline or ones that contained a finite list of offenses that would lead to termination. *Id.* At 105. In such cases, a triable issue of fact was raised as to whether the employer owed a contractual duty to the employee. On the other hand, as here, were policies that “give[] the employer discretion in applying the discipline procedures.” *Id.* In those instances, “courts have held as a matter of law that the manual does not provide a promise of specific treatment in a specific circumstance.” In *Drobny*, the court held that Boeing, in AP 580, “retained discretion to determine on a case-by-case basis whether conduct would be deemed serious enough to merit dismissal without recourse to progressive discipline.” *Id.* At 104. Accordingly, due to the discretion Boeing retained, the employee could not maintain a specific treatment in specific circumstances claim.

Like Boeing, the Council retained at least the amount of discretion Boeing did in the Council’s Employment Policy. As noted above, Section 4.3

and the Acknowledgment section of the Employment Policy each actually explicitly mention the word “discretion” and refer to the fact that the Council has such “discretion” in terms of termination issues in general, and in determining what constitutes cause for immediate dismissal, in particular. Buttredding the view that the Employment Policy cannot form the basis of a contract action against the Council is its matter-of-fact statement that the Policy does not confer any rights against it in a court of law. For these very simple reasons alone, the Employment Policy is squarely identical to the policy held to be discretionary in *Drobny* and should, as a matter of law, warrant affirmance of the judgment below.

ii. Diagnault has failed to show that he provided any extra consideration for his promise

As with any contract, consideration is a requirement to modify the at-will presumption applicable here: “As was stated by the Washington Supreme Court in *Roberts v. ARCO* [] consideration sufficient to prevent termination of the employment at the employer’s will must be in addition to the required service and must result in a detriment to the employee and a benefit to the employer.” *Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 505 (1991). See also *Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wn. App. 268, 275

(2000) (“A true contract is created if, in exchange for the handbook promises, the worker provides consideration in addition to required service”). While this issue can be disposed of via a motion for summary judgment, *Blinka v. Wash. State Bar Ass’n*, 109 Wn. App. 575, 590 (2001), this Court need not go that far since Daignault makes no argument at all regarding this issue. For this simple reason alone, his contract theory should fail.¹¹

**iii. as with his theories above,
Daignault cannot prove reliance**

The sections relating to reliance above are incorporate by reference as fully set forth herein.

¹¹Below, Daignault argued that his payment of union dues was sufficient consideration for an express contract to be formed. CP 182. This argument fails as a matter of fact in light of his admission that those dues were “one of the requirements of my job.” CP 238, Daignault Decl. ¶ 12. Indeed, as noted previously, he executed a dues checkoff form where in he acknowledged that he was “required to pay [dues] as a condition of [his] employment.” CP 141. In addition, Daignault cannot show that his dues payments are consideration as a matter of law. This is because, as held by the National Labor Relations Board itself, dues such as the ones Daignault paid are permissible as a condition of employment under the National Labor Relations Act. *Retail Clerks Local 48 (Rose Wong)*, 163 NLRB 431, 433-34 (1967). As a result, Daignault cannot demonstrate his dues payments satisfied the consideration element for contract formation. Finally, to the extent that Daignault seeks to argue that he would not have taken this job had he known that union politics could have lead to his dismissal, that too is insufficient since foregoing other job opportunities is not sufficient consideration as a matter of law. *Roberts*, 88 Wn. 2d at 894-896. In addition there is no allegation that this somehow provided a benefit to the Council. *Smoot v. Boise Cascade Corp.*, 942 F. 2d 1408, 1411 (9th Cir. 1991). Accordingly, even Daignault’s arguments below with respect to consideration lack merit.

4. Daignault has not advanced any argument regarding an implied contract

An employee can state an implied contract claim by examining the “alleged “understanding,” the intent of the parties, business custom and usage, the nature of the employment, the situation of the parties, and the circumstance of the case to ascertain the terms of the claimed agreement.” *Roberts v. Arco*, 88 Wn. 2d 887, 894, 568 P. 2d 764 (1977). In *Roberts*, the Court reviewed the record in that case and found “no evidence of an implied agreement.” In particular, it explained that the employee there “At best . . . points only to his own personal understanding that he would be employed as long as he did his job in a satisfactory manner.” *Id.* at 895. Here, Daignault fails to make even that showing. For this simple reason alone, any implied contract theory he assigns as error should be dismissed.¹²

5. Daignault was terminated for just cause

As alluded to previously, Daignault makes no argument as to a breach of any other agreement.¹³ It does bear noting that even if a just cause standard were to apply, the Council could demonstrate ample cause for

¹²To the extent they apply, the arguments made in connection with the other contract-based theories are incorporated by reference here.

¹³Daignault made certain arguments below which were responded to in CP 303-305 in the Council’s reply.

Daignault's termination. Apart from the reasons discussed in the section above, the fact there was cause for his dismissal on grounds that he ran against Tweedy and openly opposed his agenda is borne of common sense. This is fully explained in *Wambles v. Teamster*, 488 F. 2d 888, 889-90 (5th Cir. 1974), an excerpt of which is set forth in CP 309-310. While that discussion does touch on the reason why good cause should not be required of union officials removing their appointees, the substantive discussion provides an eminently rational basis for showing why such officials would be justified in taking action against rogue appointees like Daignault.

To permit an individual to accept union employment, to receive union pay, and to enjoy the prestige of a union position, while spending his employer's time opposing the plans and policies he was employed to execute, would in our judgment, be unreasonable. All employees, whether they work for a union or a large commercial company, may be required at times to subordinate personal expression to the responsibilities of their employment. An essential and elemental ingredient of all employment is basic loyalty by employees to the employer in performing the duties of the job for which they were hired. If a conflict of interest arises between an individual's desire to oppose the plans and policies of his employer and the discharge of the duties of the position in which he is employed, fundamental considerations of fair play would require him to remove himself from such a position

Sewell v. Grand Lodge, 445 F.2d 545, 551 (5th Cir. 1971). Indeed, “[u]nions are by nature political entities.” *Elliott v. Sperry Rand Corp.*, 23 F. Rule

Serv. 2d 497 (D. Minn. 1976). And, as with any political entity, elected officials have a right to demand loyalty and compliance of their appointees in carrying out their agendas. Where, as here, an appointee not only openly resists but runs against an incumbent, he or she should not be heard to complain that there was no cause for his or her removal. See *Morrison v. Olson*, 487 U.S. 654, 689-90 (President has power to remove “purely executive” officials at-will in order to accomplish constitutional role)

6. The trial court properly ruled that the disclaimer foreclosed daignault’s entire action

a. The clear wording of the disclaimer dispenses with any contract theory daignault can maintain against the council

In *Thompson*, the Court held that, irrespective of whether an employee can state contract-based employment causes of action against an employer, the employer can disclaim them by “stat[ing] in a conspicuous manner that nothing contained therein is intended to be part of the employment relationship.” *Thompson*, 102 Wn. 2d at 230. A properly worded disclaimer, such as the one set forth in the Council’s Employment Policy, can disclaim any claim based on contract. *Swanson v. Liquid Air Corp.*, 118 Wn. 2d 512, 526, 826 P.2d 664 (1992) (“It is generally recognized that an employer can disclaim what might otherwise appear to be enforceable

promises in handbooks or manuals or similar documents"). Construction of a disclaimer is a question of law for the court. *Messerly v. Asamera Minerals*, 55 Wn. App. 811, 816, 780 P. 2d 1327 (1989).

In *Birge v. Fred Meyer*, the court upheld dismissal of an employee's wrongful discharge claim on an indistinguishable set of facts to the facts at issue here. The black-letter holding in *Birge*, the Council submits, completely disposes of Daignault's claims and can serve as the singular basis for easily foreclosing all of the arguments offered by Daignault in this appeal. In *Birge*, an employee sued her former employer for wrongful discharge after she was fired for violating company policies. During her employment, she signed a one-page policy manual captioned "Employee Responsibilities. In the employer's Acknowledgment section of its "Employee Responsibilities" document, it set forth the following language consisting of its disclaimer:

EMPLOYEE ACKNOWLEDGMENT

I acknowledge that I have read and understand the above principal causes for discharge, disciplinary action and resignation. I have clarified any questions with my immediate supervisor, Trainer or the Personnel Department and *understand this summary does not constitute an employment contract.*

Birge, 73 Wn. App. at 898 (emphasis in original). Despite the brevity of the "Employee Responsibilities" form, *Birge* dismissed the employee's claims

based on the disclaimer set forth in the Employee Acknowledgment section of the form. It explained that the employee could not justifiably rely on any alleged promise of employment for just cause because it “provided reasonable notice to Ms. Birge not to rely to her detriment on anything contained in the form.” *Id.* at 901. In doing so, Birge distinguished *Swanson v. Liquid Air Corp.*, 118 Wn. 2d 512 (1992), which held that a form there which contained a representation that it did not constitute an employment contract was “manifestly unclear, because . . . the terminable at will employee *has* an employment contract – it is simply one that may be ended at any time for any reason.” *Id.* at 901. Swanson was distinguishable because the putative disclaimer was “unsigned and appeared in a benefits manual; the company argued it applied to the subsequent ‘Memorandum of Working Conditions.’” In contrast, in *Birge* (and as with the Council),

Fred Meyer seeks to enforce a disclaimer which is signed by Ms. Birge and is on the same page as the language upon which she now relies. In these circumstances, "employment contract" is manifestly clear.

The same “circumstances” lay here with the Council. The Council’s acknowledgment is also signed and contains the clear representation that the “Employment Policy does not create a contract of employment.” In view of this clear disclaimer, this “acknowledgment provided reasonable notice to

[Mr. Daignault] *not* to rely to her detriment on anything contained in the form.” *Id* (emphasis in original). Given this sweeping holding based on facts which are indistinguishable to those in this matter, *Birge*, in and of itself, serves as the basis to affirm the trial court’s grant of summary judgment.

Setting aside the dispositive nature of *Birge*, Daignault’s other arguments also lack merit. In his brief, Daignault suggests that the lack of “at-will” language in the Employment Policy are a requirement to preserve at-will status of an employee. This view is flawed for several reasons. In the first place, the disclaimer in *Birge* contained no such language was still sufficient in justifying the at-will discharge of the employee there. Second, Washington law erects a presumption of at-will employment that can be rebutted by a showing of one of the exceptions to the at-will doctrine recognized in *Thompson*. Where, as here, Daignault cannot avail himself of any of those exceptions, that presumption permits the Council to terminate his employment at-will. Indeed, “the lack of the words “termination at will” in [an] employment manual does not imply employment termination requires just cause.” *Parker v. United Airlines*, 32 Wn. App. 722, 727, 649 P. 2d 181 (1982), disapproved on other grounds in *Hayes v. Trulock*, 51 Wn. App. 795, 799-800, 755 P. 2d 830 (1988).

Similarly, in *Smith v. Island Transit*, 1996 U.S. App. LEXIS 26713 (9th Cir.1996), the Ninth Circuit held that a one-sentence disclaimer, containing no at-will language was more than sufficient to disclaim any contractual claim asserted by the employee: "the personnel policies ... do not in any way constitute a contractual agreement between the employees of ISLAND TRANSIT and ISLAND TRANSIT." It reasoned, by quoting Thompson that "it may be that employers will not always be bound by statements in employment manuals. They can specifically state in a conspicuous manner that nothing contained therein is intended to be part of the employment relationship and are simply general statements of company policy." For this very simple reason, irrespective of the contract based theory being asserted by the employee there, no such claim could be maintained because the manual "contained a specific disclaimer indicating that it was not intended to represent a contract between Island Transit and its employees."

Like that disclaimer, the Council's disclaimer contains stronger language evidencing the fact that no contractual relations existed between it and Daignault. As the acknowledgment section of the Policy clearly states, "the Employment Policy does not create a contract of employment or a right to employment." This language clearly evinces an intent to jettison any and

all putative contract rights between the parties.

Daignault rounds out his flawed attempts to thwart application of the disclaimer by arguing that its language is somehow internally inconsistent. In particular, he claims that because there is an appeal process, the disclaimer “in essence confirms that the employer will provide due process prior to termination.” Brief at p. 25. This argument fails for at least one of two independent reasons. First, in *Grimes v. Allied Stores Corp.*, 53 Wn. App. 554, 557, 768 P.2d 528 (1989), the court addressed conflicting provisions between an application executed by an employee containing at-will language and a disclaimer, on the one hand, and a subsequent policy manual with for-cause language on the other hand. *Grimes* held that, despite the inconsistency, “the effect of such a contract is to prevent the employee from justifiably relying on language in the policy manual which may be contrary to the contract [i.e., the application executed by the employee].” *Id.* Here, even if there was an inconsistency in the provisions in the Policy (which there is not), the clear terms of the disclaimer dispensed with any reliance Daignault could have placed on any other terms of the Policy he claims that form the basis of his for-cause termination theory.

Second, the fact that he was entitled to an appeal is not inconsistent

with the any provisions of the Policy disclaiming contractual relations. This is because the appeal simply relates to a difference in *who* makes a final decision on his termination as opposed to *what* standards are applied governing his separation from service. While the Executive Board became the final arbiter of his employment at the Council, the terms of the Policy make clear that, as noted previously, the Council retains discretion in determining what constitutes a serious offense and whether Daignault would ultimately be discharged. The fact that Daignault was given due process – indeed he was able to present his arguments with respect to his termination and in fact persuaded two board members to vote in his favor – does not somehow transform an otherwise at-will termination status into a for-cause employment. As such, there is no inconsistency in the provisions of the Policy.¹⁴

¹⁴Daignault alludes, without making any specific argument, to the rule that a disclaimer cannot serve as an "eternal escape hatch" for the employer and can be negated by an employer's inconsistent representations or practices after making the disclaimer. *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 532, 826 P.2d 664 (1992). In order to successfully raise this point, however, the employee must provide examples that overcome the disclaimer, such as statements "espousing job security, permanent, continuous, or future employment, and statements speaking of salary in specific periodic terms," or "contradictory employment practices." *Swanson*, 118 Wn.2d at 532. Because Daignault has failed to raise any such examples, this point lacks merit.

b. Alternatively, a prior court's ruling on the very same disclaimer at issue here should collaterally estop Daignault from maintaining this action

In order to establish collateral estoppel, it must be shown that (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice. *Brown v. Scott Paper Worldwide Co.*, 98 Wn. App. 349, 364 (1999). In *Coaxum v. Pacific Northwest Regional Council of Carpenters*, King County Superior Court Case No. 09-2-05291-3 (KNT), a co-worker of Daignault's sued the Council for, among other things, contract based theories of wrongful discharge. See CP 320 (indicating resolution based on Section 5 of the Employment Policy). In fact, both parties had the same counsel representing them until current counsel for Daignault substituted in for him. CP 316. Further, Daignault agreed to designate the deposition taken of the Council's Executive Secretary Treasurer in the *Coaxum* matter as the deposition to be taken in this case. CP 293-294, Black Decl. ¶ 3. The court granted the Council's motion for summary judgment based on the same disclaimer as the one in this case. CP 320-21.

As co-workers of the Council, both Coaxum and Daignault were in privity with one another for collateral estoppel purposes, thus fulfilling the third prong of this test. *Brown*, 98 Wn. App. at 364. See also *Mauro v. Fed Ex*, 2009 U.S. Dist. LEXIS 59954 *1, *7 & *9 (C. D. Cal. 2009) (ruling in favor of defendant and finding privity between Couriers in prior action and Swing Drivers in present action); *Talano v. Bonow*, 2002 U.S. Dist. 17387, *1, *11*-12 (N.D. Ill. 2002) (same); and *Travelers Insurance Co. v. Protemps*, 2001 U.S. Dist. LEXIS 23235 (D. Ne. 2001) (applying identity of relationship test). In view of the parallel nature of the proceedings, parties, and even counsel, there is no unfairness in applying this doctrine to the facts of this case. For this very simple reason alone, Daignault's suit is barred by the doctrine of collateral estoppel.

7. Daignault's other arguments are meritless

a. The disclaimers provision are not unconscionable

Daignault argues that the provisions of the disclaimer allowing one party to decide issues where there is a disagreement is unconscionable. The two cases he cites simply restate general rules on unconscionability and, quite significantly, do not relate to wrongful termination claims. The only "argument" he makes appears in the last paragraph of Section 2.e and, not

surprisingly, is not supported by any legal authority for the proposition it sets forth. For this simple reason alone, it should be rejected out of hand.

b. The trial court properly denied Daignault's motion to continue the summary judgment proceedings

A trial court's denial of a motion for continuance is reviewed for abuse of discretion. *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 615, 15 P.3d 210 (2001). A trial court may deny a motion for continuance when: (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact. *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003). Any motion for a continuance must be supported by an affidavit explaining these factors. *Briggs v. Nova*, 135 Wn. App. 955, 961, 147 P.3d 616 (2006). Denial of a continuance can be based on any one of the above three prongs. *Pelton v. Tri-State Mem'l Hosp., Inc.*, 66 Wn. App. 350, 356, 831 P.2d 1147 (1992).

Daignault fails on all three of these prongs. First, in his motion for continuance, Daignault concedes that he had the "opportunity to take discovery prior to the summary judgment being heard." CP 187 (note 5). In

none of his trial court submissions on this issue is there any explanation for the delay in obtaining the evidence he seeks. In particular, the Council alerted Daignault to the filing of a motion for summary judgment in July 2009. CP 202, Black Decl. ¶ 7. He responded by giving his availability for response to the motion. CP 204, Exh. A. As the motion was ultimately filed in October, Daignault had three months in which to, but did not, take depositions. During that time, the Council provided Daignault with names of persons, including the 20 Executive Board members of the Council, in response to discovery he propounded. CP 201, Black Decl. ¶ 4. In fact, his counsel had taken four depositions in another wrongful termination matter filed against the Council in June 2009. CP 202, Black Decl. ¶ 6. Because Daignault did nothing to explain why he failed to seek depositions or other discovery during this time, this reason alone warrants affirmance of the trial court's denial of his motion to continue the Council's motion for summary judgment.

Second, Daignault does not explain what evidence he expects to uncover, much less how any such evidence will create a genuine issue for trial. His counsel explained that it would be "advisable" to take more depositions to determine whether Daignault's appeal was conducted in good

faith. CP 194-195, Bean Decl. ¶ 3. Daignault echoes this desperate quest for a continuance by noting that he would pursue depositions for the purpose of finding out what the Executive Board had done with respect to his appeal. Apart from the fact that this is irrelevant for the reasons discussed in Section [] above, it “does not show what *specific* evidence [Daignault] would be able to locate or how the evidence would raise a material issue of fact.” *Briggs*., 135 Wn. App. at 961 (emphasis supplied).

In *Briggs*, several employees sued for wrongful discharge after being terminated for insubordination. Like Daignault, they sought a continuance of a motion for summary judgment on identical grounds to that which Daignault seeks here:

I want to depose the board of directors. I want to know what the board of directors knew about the organization, knew about the mission of the organization, heard or didn't hear from the executive director about what these employees were complaining about, whether they made any effort at all to find out if any of these things that these people said were true, if in fact they simply gave the executive director the authority to fire two managers without clear logic for doing so, whether in fact those were retaliations against any of these people after they did what they did.

Id. at 961-62. *Briggs* affirmed a denial of the motion for continuance, reasoning that this explanation neither presented any specific bases for the relief sought nor offered how it would present a genuine issue of material

fact. *Id.* In doing so, *Briggs* distinguished *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990) and *Butler*, two cases that Daignault is relying on. In both of those cases, which involved counsel for plaintiff substituting in just prior to responding to a motion for summary judgment, was distinguishable because “the issue is not whether the [Plaintiffs] had adequate time to respond to the motion [but] the court's focus was the Plaintiff's failure to specify what evidence was desired and how that evidence would raise a material issue of fact.” *Id.* at 962 Like *Briggs*, this Court can dispose of the substitution of counsel issue and simply hold that Daignault has failed to adduce any “specific evidence” indicating what he thinks he will discover and why that will result in a denial of the motion for summary judgment. In addition, *Briggs* is further distinguishable since, as noted above, Daignault was given ample notice in advance of the filing for a motion for summary judgment. Substituting counsel in such circumstances, especially after a motion has been filed, would simply countenance a party and/or attorney from acting as the architect of their own predicament. Moreover, it prejudices parties such as the Council by allowing a party like Daignault to conduct discovery after the Council has laid out all of its strategy and cards in a dispositive motion such as one for summary judgment. Short of forcing

it to disclose work product and privileged information, permitting Daignault a continuance – much less 90 days – to prepare a response after being fully informed of the Council’s legal theories and evidence it relies on is extremely prejudicial to its interests.

III. CONCLUSION

For all the foregoing reasons the Respondents request that this Court affirm the trial court’s grant of summary judgment against Roger Daignault.

RESPECTFULLY SUBMITTED this 3rd Day of August, 2010

DeCARLO, CONNOR & SHANLEY
A Professional Corporation



Daniel M. Shanley, WSBA#41243
Desmond C. Lee, Pro Hac Vice
Attorneys for Respondent

Appendix

STATE OF MICHIGAN
COURT OF APPEALS

MARK PACKOWSKI,

Plaintiff-Appellant,

v

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 951,

Defendant-Appellee.

FOR PUBLICATION

July 8, 2010

9:00 a.m.

No. 282419

Kent Circuit Court

LC No. 03-007476-CZ

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

WILDER, J.

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

I

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

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

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

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

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

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

II

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

Defendant also argued that plaintiff claimed that he was terminated because he cooperated with the Department of Labor's investigation of defendant's election activities, and that this contention directly implicated the LMRDA's regulatory scheme, because 29 USC 521(a)¹ addresses this specific conduct, and authorizes an investigation, and 29 USC 412² provides for a civil action in federal court if there is retaliation based on giving truthful testimony to the Department of Labor. Thus, defendant argued, plaintiff's exclusive remedy was to file a retaliation claim under the LMRDA in federal court, and his state law claim interferes with and is preempted by federal law. In response, plaintiff argued that his claim was not preempted by the LMRDA; that the LMRDA did not prohibit defendant from adopting a policy prohibiting termination without just cause, and that he was not a management-level employee to which the LMRDA and interpreting case law would apply.

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

III

¹ 29 USC 521(a) provides:

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

² 29 USC 412 provides:

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

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

A

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

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

B

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

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [US Const, art VI, cl 2 (emphasis added).]

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

Whether a federal statute preempts a state-law claim is a question of federal law. *Allis-Chalmers Corp v Lueck*, 471 US 202, 214; 105 S Ct 1904; 85 L Ed 2d 206 (1985). Where such questions of federal law are involved, courts are bound to follow the prevailing opinions of the United States Supreme Court. *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994). Where a state-law proceeding is preempted by federal law, the state court lacks subject matter jurisdiction to hear the state law cause of action. *Ryan v Brunswick Corp*, 454 Mich 20,

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

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

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

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

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

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

We conclude that the reasoning in *Screen Extras, Tyra, Vitullo, Smith and Dzwonar* is persuasive, and we adopt the reasoning and apply it here. Conflict preemption applies to preclude plaintiff's state law action. The democratic purposes of the LMRDA would be contravened by allowing a demoted or discharged business agent or organizer to sue for wrongful discharge.

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

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

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

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

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

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

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

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

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

³ We note that, to the extent that plaintiff has a claim of being demoted or fired in retaliation for participating in a Department of Labor investigation, he has an action for such a claim in federal court. 29 USC 412 provides for a civil action in federal court if there is retaliation based on giving truthful testimony to the Department of Labor.

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

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

IV

In sum, the cases finding preemption under similar circumstances are more numerous, more analogous on their facts, and more persuasive than the cases finding no preemption by the LMRDA of similar wrongful discharge claims. The cases finding preemption of state common-law claims by the LMRDA illustrate that wrongful discharge claims by discharged or demoted union employees, who were in policymaking or policy-implementing positions, would counteract one of the purposes and goals of the LMRDA, namely, the purpose and goal of protecting democratic processes in union leadership. If union members cannot choose their leaders, or if the chosen leaders cannot then implement the policies they were elected to implement, then the rights of union members (as represented by their elected leaders) would be thwarted, or at least diminished. Accordingly, the circuit court correctly held that the LMRDA preempts plaintiff's claim of wrongful discharge in violation of the union's just cause policy and, because of federal preemption, the circuit court correctly held that it lacked subject matter jurisdiction to hear that claim. *Ryan*, 454 Mich at 28.⁵

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

/s/ Kurtis T. Wilder

/s/ Alton T. Davis

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

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*, *Malden 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 *Sprletsma 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

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

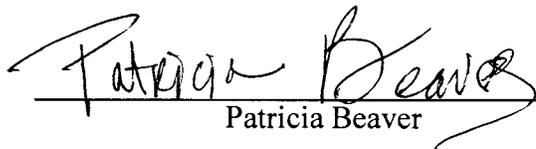
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is DeCARLO, CONNOR & SHANLEY, a Professional Corporation, 533 South Fremont Avenue, Ninth Floor, Los Angeles, California 90071-1706.

On August 3, 2010, I served the foregoing document described as BRIEF OF RESPONDENT on the interested parties in this action by placing a true copy thereof enclosed in a sealed FEDEX envelope addressed as follows:

Matthew J. Bean
LAW OFFICES OF MATTHEW J. BEAN
Northgate Office Building, Suite 303
9750 3rd Avenue, NE
Seattle, WA 98115

- (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at Los Angeles, California.
- (BY FEDERAL EXPRESS) by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to an agent for delivery
- (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- (FEDERAL) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on August 3, 2010, at Los Angeles, California.



Patricia Beaver

2010 JUL 19 AM 11:31

COURT OF APPEALS DIVISION 1 OF THE STATE OF WASHINGTON

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

COURT OF APPEALS DIVISION 1 OF THE STATE OF WASHINGTON

ROGER DAIGNAULT,

Plaintiffs,

v.

PACIFIC NORTHWEST REGIONAL COUNCIL
OF THE CARPENTERS, et al.

Defendants.

No. 64908-6

RESPONDENTS' NOTICE OF
ERRATA TO RESPONDENTS'
BRIEF

Respondents Pacific Northwest Regional Council of Carpenters, Doug Tweedy, and Cass Prindle hereby submit this errata to their Respondents' brief, which was filed on July 16, 2010. The following was inadvertently omitted and should appear at the end of Section 5, which relates to why Daignault was terminated for just cause.

In his Brief, Daignault argues that the Council breached an alleged contract on grounds that there was not sufficient cause for his termination. This argument fails for one of several reasons. First, even taking into account Daignault's crabbed reading of Section 4.3 of the Policy (relating to terminations) which, in his view, would limit the reasons for termination to those expressly set forth in Section 4.3, there was no breach. In that Section, the Policy grants the Executive Secretary broad discretion to terminate an employee like Daignault for "acts which are

1 severe in nature or harmful to the interests of the Regional Council.” Both parties agree that the
2 basis for Daignault’s discharge was the result of a patronage dismissal. In particular, as noted by
3 Daignault himself in ¶ 7 of his declaration, CP 238, he was terminated for running against
4 Tweedy, something which, as Tweedy himself explained, led him not to believe that “Daignault
5 would faithfully and loyally support the policies that I set out for the Council.” Tweedy
6 Declaration, ¶ 11. CP 116. Given this broad grant of discretion the section contemplates for
7 discharges, the stated reason underlying Daignault’s termination clearly shows that there is no
8 breach. The fact that this would constitute an act which would be severe or harmful to the
9 interests of the Council is amply explained by *Wambles v. International Brotherhood of*
10 *Teamsters*, 488 F.2d 888, 889-890 (5th Cir. 1974).

11 Second, Section 4.3 of the Policy enumerates an illustrative and not, as Daignault would
12 have it, an exhaustive list of reasons justifying his discharge. Daignault’s errant view on this
13 point is contradicted by the very language of the Policy itself, which as noted above, grants the
14 Executive Secretary broad discretion to terminate an employee like Daignault for “acts which are
15 severe in nature or harmful to the interests of the Regional Council” or “for other reasons
16 including the following . . .” (Emphasis supplied.) The word “including” is one that denotes a
17 non-exhaustive, illustrative list of factors rather than a self-contained universe of options that an
18 Executive Secretary could exercise when deciding to terminate an employee. *Save Columbia CU*
19 *Comm. v. Columbia Cmty. Credit Union*, 150 Wn. App. 176, 185-186 (2009). This would then
20 encompass reasons other than those specifically set forth in the policy. This is critically
21 significant here since Section 4.3 notes that termination decisions shall be “at the discretion” of

22 ///

23

24

25

26

27

28

1 Tweedy, something which clearly envisions terminations for the reasons that both Daignault and
2 Tweedy set forth in their declarations.

3 Dated: July 19, 2010

DeCARLO, CONNOR & SHANLEY
A Professional Corporation

4
5
6 

By: Daniel M. Shanley, Esq. WASB #41243
E-Mail: dshanley@deconsel.com

8 Desmond C. Lee, Esq., (*Pro hac vice*)
9 E-Mail: dlee@deconsel.com
10 Attorneys for Defendants PACIFIC NORTHWEST
11 REGIONAL COUNCIL OF CARPENTERS,
12 DOUGLAS TWEEDY AND CASS PRINDLES
13 DeCARLO, CONNOR & SHANLEY
14 A Professional Corporation
15 533 South Fremont Avenue
16 Los Angeles, California 90071-1706
17 Phone: 213.488.4100
18 Fax: 213.488.4180
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is DeCARLO, CONNOR & SHANLEY, a Professional Corporation, 533 South Fremont Avenue, Ninth Floor, Los Angeles, California 90071-1706.

On July 19, 2010, I served the foregoing document described as RESPONDENTS' NOTICE OF ERRATA TO RESPONDENTS' BRIEF on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Matthew J. Bean
LAW OFFICES OF MATTHEW J. BEAN
Northgate Office Building, Suite 303
9750 3rd Avenue, NE
Seattle, WA 98115
(206) 522-0618
(206) 522-4751

(OVERNIGHT MAIL) I caused such envelope to be picked up from our office by a FedEx carrier at Los Angeles, California

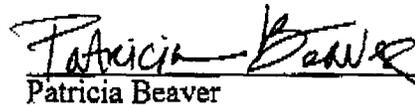
Facsimile - 206-522-4751

(BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at Los Angeles, California.

Executed on July 19, 2010, at Los Angeles, California.

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(FEDERAL) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.


Patricia Beaver

