

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2007 Term

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No. 33243

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**FILED**

**June 13, 2007**

released at 3:00 p.m.

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

GRACE LONTZ and BEVERLY PETTIT,  
Plaintiffs Below, Appellants

v.

JOYCE THARP; ELIZABETH DOAK; JAMES BAISH;  
SANDEEP THAKRAR; and MONICAL, LLC,  
d/b/a HOLIDAY INN EXPRESS,  
Defendants Below, Appellees

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Appeal from the Circuit Court of Ohio County  
Honorable Martin J. Gaughan, Judge  
Civil Action No. 3-C-557

**AFFIRMED**

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Submitted: April 18, 2007

Filed: June 13, 2007

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.

## SYLLABUS BY THE COURT

1. “Appellate review of a circuit court’s order granting a motion to dismiss a complaint is *de novo*.” Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516 (1995).

2. “Preemption is a question of law reviewed *de novo*.” *Hartley Marine Corp. v. Mierke*, 196 W. Va. 669, 673, 474 S.E.2d 599, 603 (1996), citing *Kollar v. United Transportation Union*, 83 F.3d 124, 125 (5<sup>th</sup> Cir. 1996).

3. “Where a labor dispute is subject to National Labor Relations Board jurisdiction, a state is preempted from acting to enforce private or public rights.” Syl. pt. 5, *United Maintenance and Manufacturing v. United Steelworkers of America*, 157 W. Va. 788, 204 S.E.2d 76 (1974).

Per Curiam:

This action is before this Court upon the appeal of Grace Lontz and Beverly Pettit from the May 11, 2006, order of the Circuit Court of Ohio County, West Virginia, dismissing their action for wrongful discharge filed against their employer, Monical, LLC, d/b/a Holiday Inn Express.<sup>1</sup> The Circuit Court concluded that the action should be dismissed because it is preempted from State adjudication by the National Labor Relations Act. 29 U.S.C. § 151 (1947), *et seq.* The appellants contend that the action should remain in the Circuit Court because they assert that their discharge from employment violated the West Virginia Labor-Management Relations Act for the Private Sector. *W. Va. Code*, 21-1A-1 (1971).

This Court has before it the petition for appeal, all matters of record and the briefs and argument of counsel. Upon the applicable *de novo* standard of review and for the reasons expressed below, this Court is of the opinion that the Circuit Court was correct in

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<sup>1</sup> In addition to wrongful discharge, appellant Lontz alleges that her employer violated the West Virginia Wage Payment and Collection Act. *W. Va. Code*, 21-5-1 (1987), *et seq.* As reflected in the May 11, 2006, order, the Circuit Court ruled that, although the wrongful discharge action of Lontz and Pettit is preempted, the Wage Payment and Collection claim would remain before the Court. The parties do not contest that ruling, and the ruling was later confirmed by the federal Court of Appeals. As a result, this appeal falls within the context of Rule 54(b) of the West Virginia Rules of Civil Procedure which provides that, when more than one claim for relief is presented in an action, the circuit court may direct the entry of a “final judgment” as to one or more of the claims for purposes of appeal.

concluding that the action is preempted by the National Labor Relations Act. Thus, appellants Lontz and Pettit may pursue their claims before the National Labor Relations Board. Accordingly, the May 11, 2006, order of the Circuit Court of Ohio County is affirmed.

## I.

### Factual and Procedural Background

Appellants Lontz and Pettit worked at the Holiday Inn Express located in the Dallas Pike area of Ohio County, West Virginia. The controversy resulted when various employees at the Inn sought to unionize in 2003. Soon after, the employment of Lontz and Pettit ceased. Lontz and Pettit then filed an action in the Circuit Court of Ohio County alleging wrongful discharge. In addition to Monical, the named defendants included the following individuals who held management positions connected with the Holiday Inn Express: Joyce Tharp, Elizabeth Doak, James Baish and Sandeep Thakrar.

An amended complaint, filed in November 2003, alleged that the management at the Holiday Inn Express was “adamantly opposed to any union organizing activities and used legal and illegal means in an attempt to defeat the employees’ efforts to unionize.” Specifically, Lontz alleged that she was constructively discharged because she “refused to engage in unlawful conduct to have a union organizer arrested.” Pettit alleged that she was wrongfully discharged because her employer blamed her for “commencing the union

activity.” According to Pettit, the defendants (the appellees in this appeal) engaged in a conspiracy to discharge her based on their belief that she assisted, cooperated and encouraged “certain employees to engage in union organizing activities.” The amended complaint concluded by asserting that the conduct of the defendants violated the public policy of West Virginia.<sup>2</sup>

The appellees filed a motion to dismiss asserting that the action is preempted by the National Labor Relations Act. 29 U.S.C. § 151 (1947), *et seq.* However, prior to a ruling thereon, the appellees filed a notice that the action had been removed to the United States District Court for the Northern District of West Virginia. 28 U.S.C. § 1446 (1996). On July 1, 2004, the District Court dismissed the appellants’ wrongful discharge action, concluding that it is subject to the National Labor Relations Act and, therefore, should be pursued before the National Labor Relations Board.<sup>3</sup>

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<sup>2</sup> The West Virginia Labor-Management Relations Act for the Private Sector, *W. Va. Code*, 21-1A-1 (1971), *et seq.*, is not cited in the complaint or the amended complaint filed by the appellants. However, the appellants equate the public policy they refer to with *W. Va. Code*, 21-1A-1(a) (1971), of the Act which states in part: “It is hereby declared to be the public policy of this State . . . to encourage the practice and procedure of collective bargaining.”

<sup>3</sup> The notice of removal filed in the District Court stated that appellants Lontz and Pettit had previously filed charges with the National Labor Relations Board “alleging that the same matters complained of before the Circuit Court of Ohio County, West Virginia, are violations of federal law, specifically the NLRA.” The record indicates, however, that the charges, case no. 6-CA-33788 (Lontz) and case no. 6-CA-33789 (Pettit), were withdrawn by the appellants prior to a decision by the Board on the merits.

Upon appeal, the United States Court of Appeals for the Fourth Circuit vacated the ruling of the District Court and held that the question of preemption was for the Circuit Court of Ohio County, West Virginia, to decide, rather than the District Court. *Lontz v. Tharp*, 413 F.3d 436 (4<sup>th</sup> Cir. 2005). In so ruling, the Court of Appeals observed that removal to District Court is appropriate: (1) where there is diversity of citizenship, (2) where the complaint reveals a federal question essential to the plaintiff's cause of action or (3) where the "complete preemption" doctrine displaces state-law claims in a federally regulated area, such as in matters of federal concern under the Employee Retirement Income Security Act and the National Bank Act. 413 F.3d at 441. Focusing on complete preemption, the Court of Appeals stated that the *sine qua non* of the doctrine "is a pre-existing federal cause of action that can be brought in the district courts." 413 F.3d at 442.

Applying those principles herein, the Court of Appeals in *Lontz* determined that, although the wrongful discharge action involves ostensible violations of sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. § 157 (1947) and 29 U.S.C. § 158 (1974), those sections do not, in themselves, create jurisdiction in the federal courts.<sup>4</sup> Thus, removal to the

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<sup>4</sup> Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1947), concerns the right of employees to form, join or assist labor organizations and "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining[.]" Section 8 of the Act, 29 U.S.C. § 158 (1974), concerns unfair labor practices and provides, for example, that it shall be an unfair labor practice for an employer to interfere with employees in the exercise of their rights under section 7.

District Court under the complete preemption doctrine was error, and the proper forum to decide the question of preemption was the Circuit Court of Ohio County. *See State ex rel. Orlofske v. City of Wheeling*, 212 W. Va. 538, 543, 575 S.E.2d 148, 153 (2002) (indicating that when a state proceeding presents a preemption issue the proper course is to seek resolution of that issue by the state court). As the Court of Appeals made clear: “Even though their ordinary preemptive power is great, sections 7 and 8 do not on their own terms confer federal jurisdiction and therefore cannot be the basis of removal through complete preemption.” 413 F.3d at 444. Consequently, the Court of Appeals, in *Lontz*, acknowledged that, even though a defendant might ultimately prove that the action is preempted under the National Labor Relations Act, that does not establish that the action is removable to a federal district court. 413 F.3d at 443.

Upon remand, the Circuit Court conducted a hearing and, pursuant to the order of May 11, 2006, dismissed the appellants’ action.<sup>5</sup> The Circuit Court concluded that the National Labor Relations Act “preempts the plaintiffs’ allegations in this case of wrongful and/or constructive discharge because of union activity” as set forth in the amended complaint. The dismissal did not include the claim alleged by Lontz under the West Virginia

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<sup>5</sup> According to the May 11, 2006, order, the hearing conducted by the Circuit Court took place on April 28, 2006. A transcript of that hearing is not included in the record before this Court.



Wage Payment and Collection Act. *See*, n. 1, *supra*. This appeal is from the May 11, 2006, order.

## II.

### Standards of Review

The issue before this Court is whether the Circuit Court committed error in granting the appellees' motion to dismiss upon the ground that the wrongful discharge action is preempted by the National Labor Relations Act. As the motion states, the appellees rely on two provisions of Rule 12(b) of the West Virginia Rules of Civil Procedure: subsection (1), lack of jurisdiction over the subject matter, and subsection (6), failure to state a claim upon which relief can be granted. *See* Lugar & Silverstein, *West Virginia Rules of Civil Procedure* p. 100-03 (Michie 1960), discussing the history of Rule 12(b).

In syllabus point 2 of *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516 (1995), this Court observed: "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. pt. 1, *Rhododendron Furniture & Design v. Marshall*, 214 W. Va. 463, 590 S.E.2d 656 (2003); syl. pt. 1, *Bowers v. Wurzburg*, 205 W. Va. 450, 519 S.E.2d 148 (1999). Moreover, citing *Kollar v. United Transportation Union*, 83 F.3d 124, 125 (5<sup>th</sup> Cir. 1996), this Court confirmed, in *Hartley Marine Corp. v. Mierke*, 196 W. Va. 669, 673, 474 S.E.2d 599, 603 (1996), that "preemption

is a question of law reviewed *de novo*.” *State v. Quintero Morelos*, 133 Wash.App. 591, 137 P.3d 114, 118 (2006); *Galvez v. Kuhn*, 933 F.2d 773, 776 (9<sup>th</sup> Cir. 1991).

### III.

#### Discussion

In remanding the appellants’ action to the Circuit Court, the Court of Appeals in *Lontz* emphasized that the question of preemption under sections 7 and 8 of the National Labor Relations Act should be viewed under the “*Garmon* preemption” as set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). In *Garmon*, the Supreme Court of the United States held that a California action brought by an employer for damages caused by union picketing was preempted because the action fell within the purview of sections 7 and 8 of the Act. As the Supreme Court stated: “When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.” 359 U.S. at 245, 79 S.Ct. at 780, 3 L.Ed.2d at 783.

Although the Supreme Court indicated in *Garmon* that not all cases touching on sections 7 and 8 of the Act are preempted, the Court suggested that any doubt should be

resolved in favor of the authority of the National Labor Relations Board. Thus, the Court explained:

At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board.

359 U.S. at 244-45, 79 S.Ct. at 779, 3 L.Ed.2d at 783.

Citing *Garmon*, this Court, in syllabus point 5 of *United Maintenance and Manufacturing v. United Steelworkers of America*, 157 W. Va. 788, 204 S.E.2d 76 (1974), held: “Where a labor dispute is subject to National Labor Relations Board jurisdiction, a state is preempted from acting to enforce private or public rights.”

Accordingly, this matter differs from *Greenfield v. Schmidt Baking Company*, 199 W. Va. 447, 485 S.E.2d 391 (1997), wherein this Court held in syllabus point 4 that the application of State law is preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1947), “only if such application requires the interpretation of a collective bargaining agreement.” Subsection (a) of § 301 concerns “[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce[,]” and the issue in *Greenfield* was whether the action of the employee against his

employer for defamation, invasion of privacy and the intentional infliction of emotional distress were preempted by that federal statute. In contrast, the action now before us involves a consideration of sections 7 and 8 , 29 U.S.C. § 157 (1947), and 29 U.S.C. § 158 (1974), as to which the “*Garmon* preemption” specifically applies. Nevertheless, the implication found in *Greenfield*, that the preemptive effect of federal law should be examined on a case-by-case basis, is helpful in this matter. *Greenfield*, 199 W. Va at 453, 485 S.E.2d at 397. *See also*, *General Motors Corporation v. Smith*, 216 W. Va. 78, 85, 602 S.E.2d 521, 528 (2004).

Here, the appellants allege in their amended complaint that the management at the Holiday Inn Express used both legal and illegal means in an attempt to defeat the employees’ efforts to unionize. Lontz alleges that she was constructively discharged because she refused to engage in unlawful conduct to have a union organizer arrested. Pettit alleges that she was wrongfully discharged because she was blamed for commencing union activity. Specifically, Pettit asserts that the appellees engaged in a conspiracy to discharge her based on their belief that she assisted, cooperated and encouraged various employees to participate in union organizing activities. Plainly, those allegations implicate the scope and reach of sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. § 157 (1947), and 29 U.S.C. § 158 (1974), in that they suggest both a violation of the right to form, join or assist labor organizations as protected under section 7 and a violation of section 8 concerning unfair labor practices. Consequently, the allegations of transgressions of State public policy notwithstanding, this Court is of the opinion that the Circuit Court was correct in concluding

that the appellants' wrongful discharge action is preempted by the National Labor Relations Act.

Nor is this result altered by the appellants' assertion that they were supervisors at the Holiday Inn Express and, as such, cannot pursue charges before the National Labor Relations Board. Using comparable statutory language, supervisors are excluded from the term "employee" under both the National Labor Relations Act, 29 U.S.C. § 152(3) (1978), and the West Virginia Labor-Management Relations Act for the Private Sector, *W. Va. Code*, 21-1A-2(a)(3) (1971).<sup>6</sup> It should be noted, however, that the original and amended complaints filed in the Circuit Court do not describe the appellants as supervisors. Rather, those pleadings allege that the appellants "were employed at the Holiday Inn Express." Nor did the

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<sup>6</sup> In *National Labor Relations Board v. Broyhill Company*, 514 F.2d 655, 658 (8<sup>th</sup> Cir. 1975), the Court of Appeals noted that the determination of who is authorized to act as a supervisor in the interest of the employer is a fact question and a matter of practical application by the National Labor Relations Board to the infinite gradations of authority within a particular industry. *See also, Goldies, Inc., v. National Labor Relations Board*, 628 F.2d 706, 710 (1<sup>st</sup> Cir. 1980). In *National Labor Relations Board v. Whittin Machine Works*, 204 F.2d 883 (1<sup>st</sup> Cir. 1953), for example, an assistant supervisor in his employer's accounting department was, upon a consideration of the nature of his work, determined not to be a supervisor for purposes of litigating his discharge from employment, and, therefore, he was entitled to the protections of the National Labor Relations Act. 204 F.2d at 886.

An exception to the exclusion of supervisors, however, was recognized in *National Labor Relations Board v. Oakes Machine Corporation*, 897 F.2d 84 (2<sup>nd</sup> Cir. 1990). In *Oakes Machine*, the Court indicated that an exception to the statutorily imposed exclusion of supervisors from the protection of the National Labor Relations Act is that an employer may not discharge a supervisor in retaliation for his testimony or his threat to testify in NLRB proceedings. 897 F.2d at 92.

appellants describe themselves as supervisors in their response in opposition to the motion to dismiss. The response was filed in the Circuit Court following the decision of the Court of Appeals to remand the action to State court.

In the *Lontz* opinion, however, the Court of Appeals referred to the appellants as “hotel supervisors,” and they were so described in the earlier charges before the National Labor Relations Board, which charges the appellants withdrew. *See*, n. 3, *supra*. Nevertheless, the issue of whether the appellants were supervisors has never been resolved.

In view of the nexus between the appellants’ allegations concerning their discharge and sections 7 and 8 of the National Labor Relations Act, this Court concludes that the National Labor Relations Board is the appropriate forum to determine the supervisor issue “in the first instance.” *Garmon, supra*. As stated by the appellees: “It is for the NLRB to look at the provisions of the NLRA, to perform a factual inquiry into the nature of [the appellants’] responsibilities and then come to a conclusion as to whether they are entitled to the protection of the NLRA.”

#### IV.

#### Conclusion

For the reasons expressed above, the Circuit Court correctly determined that the appellants' action for wrongful discharge is preempted by the National Labor Relations Act. Thus, appellants Lontz and Pettit may pursue their claims before the National Labor Relations Board. Accordingly, the May 11, 2006, order of the Circuit Court of Ohio County, West Virginia, is affirmed.

Affirmed