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Labor Arbitration and State Wrongful Discharge Actions: Due Process or Remedial Double Dipping - Lingle v. Norge Division of Magic Chef, Inc.

John Porter Hoel

NOTES

LABOR ARBITRATION AND STATE WRONGFUL DISCHARGE ACTIONS: DUE PROCESS OR REMEDIAL DOUBLE DIPPING?

Lingle v. Norge Division of Magic Chef, Inc.[1]

I. INTRODUCTION

The filing of a wrongful discharge action in state court by an employee covered under a collective bargaining agreement creates a conflict between two well-established legal principles. One principle is the concept of federal preemption. Under the constitutional doctrine of federal preemption, if a state law and a federal statute come into conflict, federal law prevails.[2] On the other side is the constitutional concept of "Our Federalism." Under the federalism doctrine, each state should be allowed to govern itself according to the desire of the majority of its citizens. Doctrinal tension develops when a union employee covered by a collective bargaining agreement submits a grievance for unjust discharge to an arbitration board and additionally files suit in state court pursuant to a state statute for wrongful discharge. Which policy should prevail? Should federal law preempt state law or should the state be allowed to adopt legislation which provides remedies for workers discharged in contravention of state public policy?

The entire judicial system has wrestled with this classic constitutional conflict for nearly three decades. What was originally a consistent line of cases holding state claims were preempted by federal law has gradually been transformed into a patchwork of federal court decisions holding state court actions to be valid.[3] The United States Supreme Court recently reconciled this disparity in interpretation with its decision in *Lingle v. Norge Division of Magic Chef, Inc.*[4] The Supreme Court held that a union employee's claim for wrongful discharge will not be preempted as long as the state action does not require the interpretation of the collective bargaining agreement.[5]

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1. 108 S. Ct. 1877 (1988).
2. *See infra* text accompanying notes 20-24.
3. *See infra* notes 41 through 128 and accompanying text.
4. 108 S. Ct. at 1877.
5. *Id.* at 1878.

This note will explore the history of Section 301 of the Labor Management Relations Act[6] (LMRA) and the preemption doctrine, the development of the wrongful discharge action, the case history involving union employees filing state actions for wrongful discharge, and the effect the *Lingle* decision will have on business, the judicial system and, most importantly, the bodypolitic of the individual states. Emphasis will be placed on the important role the state legislature will play in determining the exact ramifications of the Supreme Court's decision. Finally, the note will outline and discuss four main options state legislatures have when considering whether to expand upon the Supreme Court's decision or to circumvent the potential for remedial "double dipping."

II. THE DECISION

The plaintiff, Lingle, an employee of the defendant corporation, was covered by a collective bargaining agreement negotiated by her union. The agreement contained a "just cause" provision.[7] In December of 1984, Lingle was discharged from her duties on the grounds that she had filed a false workers compensation claim under the Illinois Workers' Compensation Act.[8] Lingle's union filed a grievance which was finally submitted to arbitration pursuant to the collective bargaining agreement.[9] The arbitration board ruled in favor of Lingle and ordered reinstatement with back pay.[10]

In the summer of 1985, Lingle filed a wrongful discharge action in the Williamson County, Illinois, circuit court.[11] Magic Chef removed the case to the Federal District Court for the Southern District of Illinois on diversity of citizenship. Magic Chef further moved to dismiss the action for lack of jurisdiction, arguing the claim was preempted by Section 301 of the LMRA.[12] The district court granted Magic Chef's motion to dismiss and stated that, "[a]llowing an independent tort action for retaliatory discharge

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6. 29 U.S.C. § 185 (1982).

7. Lingle v. Norge Division of Magic Chef, Inc., 823 F.2d 1031, 1033 n.2 (7th Cir. 1987), *aff'd*, 108 S. Ct. 1877 (1988). Article 26.2 of plaintiff's collective bargaining agreement read in part as follows: "[T]he right of the employer to discharge or suspend an employee for just cause is recognized." *Id.* at 1033.

8. *Id.*

9. *Id.* at 1034. Article 8.5 required mandatory arbitration and included grievance procedures which were included to be the exclusive remedy for all disputes. *Id.*

10. *Lingle*, 108 S. Ct. at 1879.

11. *Id.*

12. Lingle v. Norge Division of Magic Chef, Inc., 618 F. Supp. 1448, 1449 (S.D. Ill. 1985), *aff'd*, 823 F.2d 1031 (7th Cir.), *aff'd*, 108 S. Ct. 1877 (1988); *see* 29 U.S.C. § 185.

would undermine the mutually agreed upon procedures provided for in that [collective bargaining] agreement."[13]

The Court of Appeals for the Seventh Circuit, while addressing like cases in tandem, affirmed the district court decision. After an extensive discussion, the court held that "[a]ll of the plaintiff's claims are claims for breaches of the just cause provisions of the collective bargaining agreements and thus are preempted . . . [W]e note that federal labor law favors the use of the grievance and arbitration mechanisms that are contained in a collective bargaining agreement."[14] In order to clear up conflicts between the circuits, the United States Supreme Court granted certiorari.[15]

In a relatively brief, unanimous opinion, the Supreme Court reversed the Seventh Circuit's decision. The Court held that state court actions for wrongful discharge are preempted only to the extent they interpret the collective bargaining agreement and that such interpretation did not occur in the case at bar.[16] The Court's discussion focused specifically on the common law tort of retaliatory discharge as recognized by Illinois courts.[17] The Court reasoned that each of the elements of the plaintiff's case involved factual inquiries, and that neither inquiry required the interpretation of the collective bargaining agreement.[18] It is important to note, however, the Court's statement to the effect that state legislatures could create a wrongful discharge remedy that would turn on the interpretation of the collective bargaining agreement which would be preempted by Section 301.[19]

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13. *Lingle*, 618 F.Supp. at 1449.

14. *Lingle*, 823 F.2d at 1051.

15. *Lingle*, 108 S. Ct. at 1879-80.

16. *Id.* at 1878. The Supreme Court initially introduced this principle of law in Allis-Chalmers v. Lueck, 471 U.S. 202 (1985).

17. *Id.* at 1881-82. Under Illinois common law, the plaintiff must show:

> to show retaliatory discharge, the plaintiff must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge and (2) the employer's motivation in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with the exercise of those rights.

Id. at 1882 (quoting Horton v. Miller Chemical Co., 776 F.2d 1351, 1356 (7th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986) (summarizing Illinois state court decisions)).

18. *Id.*

19. *See id.* at 1882 n.7.

III. FEDERAL PREEMPTION AND THE TORT OF WRONGFUL DISCHARGE

The Supreme Court has interpreted the Supremacy Clause of Article VI of the United States Constitution[20] as giving Congress power to supersede the policies of federalism and preempt state law.[21] However, Congress has never attempted to exercise total dominion and control in the field of labor legislation.[22] The Ninth Circuit recently noted that, "[l]abor preemption is a complex and confused area of the law. Preemption is a matter of congressional intent, but the labor statutes provide little or no guidance as to what aspects of state law Congress intended to preempt."[23]

The scope of Congressional power to preempt is determined through legislative intent and judicial interpretation. Since Congress failed to detail to what extent it intended Section 301[24] of the LMRA to preempt state law, its scope has been left to judicial interpretation.

A. *Judicial Interpretation of Section 301.*

In *Textile Workers v. Lincoln Mills*,[25] the Supreme Court, in its initial consideration of Section 301 of the LMRA, held that substantive law dealing with Section 301 litigation "[i]s federal law, which the courts must fashion from the policy of our national labor laws."[26] Recently, the Court has interpreted Section 301 to be a "congressional mandate to federal courts to [develop] a body of federal common law to be used to address disputes arising out of labor contracts."[27]

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20. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . . " U.S. CONST. art. VI § 2.

21. Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 16-17 (1824).

22. *See* Allis-Chalmers v. Lueck, 471 U.S. 202, 208 (1985). To elaborate further on this concept, "[w]e cannot declare preempted all concerns . . . between employees, employers and unions; obviously, much is left to the state." Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971).

23. *See* Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1473 (9th Cir. 1984).

24. Section 301 of the LABOR MANAGEMENT RELATIONS ACT (LMRA) provides in relevant part:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1982).

25. 353 U.S. 448 (1957).

26. *Id.* at 456.

27. *Lueck*, 471 U.S. at 209.

The premier analysis of the preemptive effect of Section 301 came in the landmark decision of *Local 174, International Brotherhood of Teamsters v. Lucas Flour Co.*[28] In an effort to prevent the inevitable patchwork of state court interpretations of Section 301 which would, "strike at the very core of federal labor policy,"[29] the Court held:

> the dimensions of Section 301 require the conclusion that . . . [c]omprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.[30]

In holding that a state court action alleging a violation of a collective bargaining agreement is preempted, the Court stated:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon the negotiation and administration of collective bargaining agreements . . . Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.[31]

The rule of law set out in *Lucas Flour*, that federal law shall always prevail when contract interpretation is at issue, has remained well entrenched over the years.[32] Recently, however, a question of federal preemption by Section 301 has arisen when a state tort action for wrongful discharge is filed by an employee covered by a collective bargaining agreement.

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28. 369 U.S. 95 (1962).

29. *Id.* at 104.

30. *Id.* at 103.

31. *Id.* at 103-104.

32. The Court in *Lueck* reiterated this point and stated: "[w]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim. . . . or dismissed as preempted by federal labor-contract law." *Lueck*, 471 U.S. at 220 (citations omitted).

B. *The Tort of Wrongful Discharge*

The emergence of the cause of action for wrongful or unjust discharge found its genesis with the at-will employee who was discharged contrary to proclaimed public policy. Under American common law, the employer-employee relationship could be severed by either party, absent a contractual arrangement providing otherwise.[33] In the late 19th century, the New York Court of Appeals noted that an at-will employee hired for an indefinite period of time could be discharged for "good cause, no cause, or even bad cause."[34] Even today, it has been estimated that nearly two-thirds of the American work force is under the employment at-will doctrine.[35]

The question of federal preemption does not even enter the picture until the plaintiff, who is protected by a collective bargaining agreement and has exhausted her arbitration remedies, seeks remedial relief in state court. The fundamental question in determining whether a claim is preempted is how far removed the state claim is from the interests of the NLRA. While the general rule that federal law prevails over state law when the two conflict still remains a bastion of constitutional law, courts have recognized several exceptions, thus allowing state claims to be adjudicated.

The most obvious and least debated exception is the "Congressional intent" exception.[36] In certain circumstances, Congress did not intend federal law to overrun the policies of federalism.[37] For example, in *Malone v. White Motor Corp.*,[38] the Supreme Court held that Congress did not intend state laws regarding employee pension plans to be preempted by federal law.[39] Moreover, other legislative acts specifically state in their enabling language or legislative history that state law shall not be preempted. The Occupational Safety and Health Act[40] and state Worker's Compensation laws are prime examples.

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33. Coopage v. Kansas, 236 U.S. 1 (1915). *See also* Heinsz, *Judicial Review of Labor Arbitration Awards: The Enterprise Wheel Goes Around and Around*, 52 MO. L. REV. 243, 288 (1987).

34. *See* Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895).

35. *See* Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8 (1979). Out of the total U.S. labor force, only 12% to 13% are estimated to be organized workers and covered by a collective bargaining agreement. Blocklyn, *Labor Relations: Toward an Uncertain Future*, PERSONNEL, Oct. 1988, at 18.

36. *See* Comment, *NLRA Preemption of State Wrongful Discharge Claims*, 34 HASTINGS L.J. 635, 650 (1982-83).

37. *See, e.g.*, Malone v. White Motor Corp., 435 U.S. 497 (1978).

38. *Id.*

39. *Id.* at 512.

40. 29 U.S.C. §§ 651-75 (1976).

While the courts have developed other exceptions,[41] the most dynamic exception and the focus of this note is the "public policy" exception. It should be noted that courts traditionally had difficulty in defining exactly what was the state's proclaimed public policy. The court's job can be made less difficult when state legislatures specifically enunciate their intent when adopting or amending state wrongful discharge statutes.

1. The Public Policy Exception

Until the landmark and trendsetting decision of *Petermann v. Local 396 International Brotherhood of Teamsters*,[42] an employee could be terminated for any reason, even if he chose not to carry out a certain task because it was unsafe or illegal. In *Petermann*, the plaintiff was under a union employment contract with no specific duration except as long as his work was satisfactory. Petermann was subpoenaed to testify before a California State Legislature Committee.[43] An agent of the defendant union allegedly instructed Petermann to make false and untrue statements to the committee.[44] Petermann chose to testify truthfully and was discharged the following day.[45] In the subsequent wrongful discharge action, the court held that while employment contracts with no specific duration are terminable at will, such terminations are subject to "considerations of public policy."[46]

The California Court of Appeals struggled with a problem which has troubled courts since this decision: what is "public policy?" The court in an earlier decision noted that "[t]he term 'public policy' is inherently not subject to a precise definition . . . [public policy is] that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against public good. . . ."[47] The *Petermann* decision is continually cited as recognizing a cause of action for unjust discharge for reasons contrary to public policy.[48]

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41. *See infra* notes 51 to 56 and accompanying text.

42. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

43. *Id.* at 187, 344 P.2d at 26.

44. *Id.*

45. *Id.*

46. *Id.* at 188, 344 P.2d at 27.

47. Safeway Stores, Inc. v. Retail Clerks Int'l Ass'n, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953).

48. *See* Weeks, *NLRA Preemption of State Common Law Wrongful Discharge Claims: The Bhopal Brigade Goes Home*, 13 PEPPERDINE L. REV. 607, 615 (1986).

Over one hundred years of this country's jurisprudence is marked by the universal principle that an employee can be discharged or quit at will.[49] However, when the public policy of the state is involved, courts follow the *Petermann* doctrine and allow an independent cause of action for wrongful discharge. The controversy this note will now explore pertains to those individuals who are allegedly wrongfully discharged and covered by a collective bargaining agreement which includes just cause provisions and mandatory grievance and arbitration procedures.

IV. CASE HISTORY OF THE CONTROVERSY

At least twenty-nine states have judicially recognized some form of wrongful discharge.[50] Generally, courts have allowed wrongful discharge actions under five theories:[51] (1) violation of a statute;[52] (2) denial of due process to a public employee;[53] (3) violation of an expressed or implied-in-fact contract;[54] (4) an independent action for racial discrimination;[55] and (5) employee's termination violates the public policy of the state.[56]

By far the most dynamic category of wrongful discharge is the last of the five aforementioned categories, a violation of public policy. Employment terminations contrary to public policy where courts have allowed recoveries include practices in violation of federal anti-trust laws,[57] illegal price fixing of gasoline,[58] refusing to alter pollution control reports,[59]

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49. *Id.* at 620.

50. *See* Heinsz, *supra* note 33, at 288 n.2.

51. *See generally* Comment, *supra* note 36, at 635 n.1.

52. *See, e.g.*, Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 450-451, 168 Cal. Rptr. 722, 726 (1980); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

53. *See, e.g.*, Wilkerson v. City of Placentia, 118 Cal. App. 3d 435, 173 Cal. Rptr. 294 (1981).

54. *See, e.g.*, Pine River State Bank v. Mettille, 333 N.W. 2d 622 (Minn. 1983); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal Rptr. 917 (1981).

55. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

56. *See, e.g., Petermann*, 174 Cal. App. 2d at 184, 344 P. 2d at 25; Tammeny v. Atlantic Richfield Co., 27 Cal. App. 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

57. *See, e.g.*, Perry v. Hartz Mountain Corp., 537 F. Supp. 1387 (S.D. Ind. 1982).

58. *See, e.g., Tammeny*, 27 Cal. App. 2d at 167, 610 P.2d at 1330, 164 Cal. Rptr. at 839; McNulty v. Borden, Inc., 474 F. Supp. 1111 (E.D. Pa. 1979).

59. *See, e.g.*, Trombetta v. Detroit, Toledo & Ironton R.R., 81 Mich. App. 489, 265 N.W.2d 385 (1978).

reporting health department infractions to health authorities,[60] reporting to jury duty,[61] or acting as an election poll official.[62]

The United States Supreme Court correctly observed in *Lingle* that a conflict between the circuits existed regarding the issue of federal preemption of state wrongful discharge actions.[63] Nearly every federal circuit addressing a Section 301 preemption question cites the 1984 Supreme Court decision of *Allis-Chalmers v. Lueck*,[64] which stands for the modern day preemption doctrine. In *Lueck*, the plaintiff was entitled to disability benefits under an insurance policy provided for in the collective bargaining agreement.[65] The agreement also provided for a mandatory four-step grievance procedure.[66] Lueck alleged his employer harassed him about a disability claim he had submitted and hindered his receipt of benefits.[67] Instead of complying with the mandated grievance procedures, Lueck filed suit in state court claiming bad faith handling of his insurance claim.[68] The district court held that the state claim was preempted under Section 301.

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60. *See, e.g.*, Garibaldi v. Lucky Foods Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985).

61. *See, e.g.*, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

62. *See, e.g.*, Kouff v. Bethleham Alameda Shipyard, 90 Cal. App. 2d 322, 202 P.2d 1059 (1949).

63. *Lingle*, 108 S. Ct. at 1879-80.

64. 471 U.S. 202 (1985). *See, e.g.*, Malia v. RCA Corp., 794 F.2d 909 (3rd Cir. 1986), *cert. denied*, 107 S. Ct. 3210 (1987) (held preempted plaintiff's action alleging breach of contract after plaintiff was promoted and promised his old job back if he desired and when he requested such move he was denied the position); Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987) (former employee's invasion of privacy claim against his employer was held to be in lieu of a wrongful discharge claim and thus preempted); Bache v. American Tel. & Tel. Co., 840 F.2d 283 (5th Cir. 1988) (former employee's failure to exhaust grievance process and make sufficient showing of unfair representation claim held preempted); Dougherty v. Parsec, Inc., 824 F.2d 1477 (6th Cir. 1987) (plaintiff's claims alleging wrongful discharge because he filed complaint with OSHA against railroad was held preempted); Leu v. Norfolk & Western Ry. Co., 820 F.2d 825 (7th Cir. 1987) (former employee's suit alleging fraud and misrepresentation in connection with failure to pay medical expenses held preempted); Hillard v. Dobelman, 774 F.2d 886 (8th Cir. 1985) (ex-employee's claim of tortious interference of contract held preempted); Vincent v. Trend W. Technical Corp., 828 F.2d 563 (9th Cir. 1987) (former employee's claim for wrongful discharge held preempted); Edwards v. Western Mfg, 641 F. Supp. 616 (D. Kan. 1986) (former employee's action for retaliatory discharge preempted); Darden v. United States Steel Co., 830 F.2d 1116 (11th Cir. 1987) (employees filed separate action seeking damages for breach of contract, false representation, conspiracy and conversion held preempted).

65. *Lueck*, 471 U.S. at 204.

66. *Id.*

67. *Id.* at 205.

68. *Id.* at 206.

The Wisconsin Court of Appeals affirmed, but the Wisconsin Supreme Court reversed.[69]

The United States Supreme Court reversed and held the state claim was not an independent tort claim "[b]ecause the right asserted not only derived from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation."[70] The Court further expressed concern that the most destructive aspect of the Wisconsin Supreme Court's decision was that essentially the same suit would be brought in state court without first exhausting the grievance procedures set out in the collective bargaining agreement.[71] Thus, the doctrine of *Lueck* holds that under Section 301 claims, the arbitrator, not the state court, has the responsibility of interpreting the labor contract.[72]

A. *Contract Based Wrongful Discharge Actions*

The courts regularly deny a wrongful discharge action which requires the court to interpret the collective bargaining agreement. In *Bale v. General Telephone Co.*,[73] the Ninth Circuit held that an action brought by former employees for tortious misrepresentation made at the time of hiring was preempted by Section 301.[74] The plaintiffs alleged they were hired with the understanding that they would be "temporary" employees for six months and at the end of that period would be promoted to "regular" employee status.[75] Plaintiffs were held as temporary employees past the six month period which directly conflicted with terms of the collective bargaining agreement.[76] Citing *Lueck*, the court expanded upon that doctrine by noting that not only contract claims but tort claims which would "frustrate the federal labor-contract scheme established by § 301" should be preempted.[77] Moreover,

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69. *Id.* at 206-7.

70. *Id.* at 218.

71. *Id.* at 219.

72. *Id.* at 220.

73. 795 F.2d 775 (9th Cir. 1986).

74. *Id.* at 779.

75. *Id.* at 777.

76. *Id.* The provision of the collective bargain agreement which plaintiff claimed was violated held a temporary employee as "a person who is employed for a continuous work period, not to exceed six months, when additional work of any nature requires a temporary augmented force or where replacements are required for regular employees who are absent." *Id.* (quoting Agreement Art. VI § 14).

77. *Lueck*, 471 U.S. at 212.

the court noted that the full scope of Section 301 preemption purview was to be determined on a case-by-case basis.[78]

The Ninth Circuit again applied the *Lueck* doctrine in *Scott v. Machinists Automotive Trades District Lodge No. 190.*[79] The plaintiff in this case was discharged after fourteen years of service for using profanity toward his foreman.[80] The union filed a grievance on his behalf.[81] The day before the arbitration hearing, Scott's employer, Safeway, offered reinstatement and back pay.[82] Scott refused the offer. Arbitration was rescheduled, and a settlement was reached on Scott's behalf by the union which included reinstatement and back pay.[83] Settlement checks were sent, but Scott refused to accept them.[84] Instead, Scott filed suits in state and federal court alleging wrongful discharge and intentional infliction of emotional distress.[85] Reiterating the *Lueck* doctrine that "[w]hen [the] resolution of a state law claim is substantially dependant upon analysis of the terms of an agreement between the parties to a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as preempted by federal labor-contract law," the court held preemption was proper.[86]

The Supreme Court reaffirmed the *Lueck* doctrine in *International Brotherhood of Electrical Workers v. Hechler.*[87] Hechler, the plaintiff, was employed by Florida Power and Light Company as an electrical apprentice.[88] Hechler was later assigned to a job which she claimed required skills beyond her training.[89] Thereafter, Hechler was injured when she came in contact with some highly energized components.[90] Two years after the accident, Hechler brought suit against her representative union in state court for failure to provide a safe workplace pursuant to her union contract.[91] The union removed the case to federal district court and argued that the duties

78. *Bale*, 795 F.2d at 779 (citing *Lueck*, 471 U.S. at 212).
79. 815 F.2d 1281 (9th Cir. 1987).
80. *Id.* at 1283.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 1282.
86. *Id.* at 1283 (citing *Lueck*, 471 U.S. at 220).
87. 481 U.S. 851 (1987).
88. *Id.* at 853.
89. *Id.*
90. *Id.*
91. *Id.*

which the plaintiff spoke of were part of the collective bargaining agreement, thus subject to Section 301 preemption.[92]

In holding that the plaintiff's claim was preempted, the Court noted that in order to determine the union's tort liability, a court would have to determine whether the collective bargaining agreement imposed a duty of care on the union to provide the plaintiff with a safe workplace, and also would need to look to the agreement to determine the scope of such duty if it existed.[93] As a result, the court concluded that a determination of the claim for liability would require outright interpretation of the contract and was, therefore, preempted.

B. *Public Policy Based Wrongful Discharge Action*

Courts are more open to granting a cause of action for wrongful discharge based on a violation of state public policy. The Ninth Circuit, in its influential decision in *Garibaldi v. Lucky Food Stores, Inc.*,[94] recognized the difference between contract based and public policy based wrongful discharge actions. In *Garibaldi*, a teamster truck driver for Lucky Food Stores was allegedly wrongfully discharged.[95] Garibaldi noticed that a shipment of milk he was scheduled to deliver was spoiled and reported this fact to his supervisor who instructed him to disregard it and deliver the milk as scheduled.[96] Instead, Garibaldi notified the California public health authorities who in turn condemned the milk.[97] Thereafter, Garibaldi's employment was terminated.[98]

Garibaldi filed a grievance pursuant to the collective bargaining agreement.[99] The arbitrator found he was discharged for just cause.[100] A year after filing his grievance, Garibaldi filed suit in the California Superior Court for wrongful discharge and intentional infliction of emotional distress.[101] He based his wrongful discharge count on the theory that his termination was in direct conflict with California public health policy.[102]

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92. *Id.* at 854.
93. *Id.* at 859.
94. 726 F.2d 1367 (9th Cir. 1984) *cert. denied*, 471 U.S. 1099 (1985).
95. *Id.* at 1368.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 1369.

Lucky Food removed to federal district court pursuant to Section 301, and the district court maintained jurisdiction over both claims.[103] The district court granted Lucky Food's motion to dismiss the first count for wrongful discharge and remanded the intentional infliction of emotional distress to the state court.[104]

In reaching the decision that Garibaldi's "whistle blowing" actions were commendable and his wrongful discharge claim was worthy of state court consideration, the Ninth Circuit, like the Supreme Court in *Lingle*, looked specifically to the state wrongful discharge statute which states, "[a]n action for wrongful discharge in California exists if the termination violates (1) public policy. . . ."[105] The statute is to be applied across the board to all workers.[106]

In making the distinction that Garibaldi's claim did not allege a violation of the collective bargain agreement, but rather, public policy, the court held:

> A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does not alter the economic relationship between employer and employee. The remedy is in tort, distinct from any contractual remedy an employee might have under the collective bargaining contract. It furthers the state's interest in protecting the general public--an interest which transcends the employment relationship.[107]

Immediately after its decision in *Garibaldi*, the Ninth Circuit was faced with a similar legal question in *Olguin v. Inspiration Consolidated Coal Co.*[108] However, on this occasion, the court came to a different conclusion. In this case, the plaintiff was employed as a welder for seven and one half years by the defendant and was covered by a collective bargaining agreement with a "just cause" provision.[109] After being disciplined by his employer on four

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103. *Id.* at 1369.

104. *Id.*

105. *Id.* at 1373; *see also Tammeny*, 27 Cal. 3d at 167, 610 P.2d at 1330, 164 Cal. Rptr. at 839 (the court established a public policy exception for an employee who was discharged after he refused to fix gas prices in violation of federal law).

106. *Garibaldi*, 726 F.2d at 1373. The Ninth Circuit also discredited Lucky Foods' argument that the California wrongful discharge law does not apply to union employees. The court said in dictum, "[w]e see nothing in the cases addressing wrongful termination in violation of public policy that suggests [this] distinction." *Id.* at 1373 n.9.

107. *Id.* at 1375.

108. 740 F.2d 1468 (9th Cir. 1986).

109. *Id.* at 1470.

separate occasions, the plaintiff was discharged. The plaintiff filed actions with the Mine Safety and Health Administration (MSHA) and the National Labor Relations Board (NLRB) alleging that he was discharged for filing a safety complaint, and that his discharge was an unfair labor practice.[110] Both claims were denied.[111] The plaintiff filed yet another complaint with the Federal Mine Safety and Health Review Commission which eventually awarded him $1000.[112] Not satisfied, the plaintiff filed suit in Arizona state court, claiming wrongful discharge.[113] The defendant removed to federal court where the district court granted summary judgment in its favor and ruled the claims were subject to federal law.[114] Because the plaintiff failed to follow grievance procedures provided for in the collective bargaining agreement, the court dismissed his complaint.[115]

In distinguishing *Olguin* from *Garibaldi*, the Ninth Circuit noted that Olguin's complaint alleged a violation of the Federal Mine and Safety Act, a federal law, and made no mention of any state statutes.[116] In holding that Olguin specifically invoked federal law, thus preempting his state claim, the court noted, "Arizona has little interest in enforcing federal law, even if that federal law is incorporated . . . in the state's general public policy."[117] The Ninth Circuit essentially stated what the Supreme Court said in *Lingle*: In order for a state tort claim to withstand preemption, the claimant must cite and rely on a state statute which allows a cause of action independent of the collective bargaining agreement.

Statutory interpretation was the Third Circuit's basis for holding that the plaintiff's action for wrongful discharge was not preempted in *Herring v. Price Macaroni*.[118] The plaintiff in this case was allegedly discharged for filing a workers' compensation claim in violation of a New Jersey statute.[119]

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110. *Id.* at 1471.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1475.

117. *Id.*

118. 799 F.2d 120 (3rd Cir. 1986); *see also* Judson Steel Corp. v. Workers' Comp. Appeals Bd., 22 Cal. 3d 658, 568 P.2d 564, 150 Cal. Rptr. 250 (1978); Vaughn v. Pacific Northwest Bell Tel. Co., 289 Or. 73, 611 P.2d 281 (1980).

119. *Herring*, 799 F.2d at 121 (construing N.J. STAT. ANN. § 34:15-39.1 (Supp. 1986)). The statute provides in relevant part: "It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed workmen's compensation benefits from such employer . . . ." N.J. STAT. ANN. § 34:15-39.1.

The plaintiff was covered by a collective bargaining agreement. Because the statute did not create a private cause of action, the plaintiff additionally relied on a recent New Jersey state court decision which recognized a common law action for wrongful discharge which was contrary to public policy.[120]

The district court held the claim was preempted on two grounds. First, the district court predicted that the New Jersey Supreme Court would hold that employees covered by collective bargaining agreements with "just cause" provisions would not "enjoy a common law right of action."[121] Second, the court held that Herring was additionally precluded because he failed to exhaust his extra-judicial remedies.[122] In reversing, the Third Circuit held that since state workers' compensation laws are rooted in state law, the New Jersey Supreme Court would extend the right to a private cause of action for individuals covered by a collective bargaining agreement.[123]

In considering a similar action dealing with a worker's compensation claim, the Second Circuit in *Baldracchi v. Pratt & Whitney Aircraft Division*[124] ruled that not every question regarding a collective bargaining agreement is preempted by Section 301.[125] Prior to her discharge, Baldracchi was employed by defendant and was covered by a collective bargaining agreement.[126] Baldracchi filed suit in the Superior Court for the State of Connecticut alleging wrongful discharge for filing a workers' compensation claim. Baldracchi argued the discharge was in violation of Connecticut which prohibits such actions and authorizes civil remedies for violations.[127]

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120. *Herring*, 799 F.2d at 122; (interpreting Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980).

121. *Id.*

122. *Id.*

123. *Id.* at 124. The court argues that a worker's compensation rights are based in state law through the state legislature, as opposed to being rooted in the collective bargaining agreement, and as such the claim for wrongful discharge for filing a workers compensation claims is not preempted by federal law. *Id.* at 124 n.2.

124. 814 F.2d 102 (2d Cir. 1987).

125. *Id.* at 106; *see also Lueck*, 471 U.S. at 211.

126. *Baldracchi*, 814 F.2d at 103.

127. *Id.* (construing CONN. GEN. STAT. § 31-290a (1986)). The statute provides:

(a) No employee who is subject to the provisions of [the Connecticut Workers' Compensation law] shall discharge, or cause to be discharged, or in any manner discriminate against an employee because the employee has filed a claim for workers' compensation benefits or otherwise exercised the rights afforded him pursuant to the provisions of this chapter.

(b) Any employee who is so discharged or discriminated against may either: (1) Bring a civil action in the Superior Court . . . for the reinstatement of his previous job, payment of back wages and reestablishment of employee benefits to which he would have otherwise

In reversing the district court, the Second Circuit contrasted the tort in *Lueck* with the tort in *Baldracchi*, concluding that Baldracchi's claim did not turn on the interpretation of the collective bargaining agreement.[128] Pratt & Whitney argued that reference to the labor contract was necessary for Baldracchi to make a prima facie case, thus subjecting her claim to preemption.[129] The Second Circuit disagreed and pointed out that the Connecticut legislature has addressed this problem and specifically prohibits such a defense.[130] Furthermore, the statute provides that such rights cannot be bargained away. In concluding Baldracchi's claim was not preempted, the court made the observation that state statutes such as the Connecticut law are directed at all employees, not only to those who are not subject to a labor contract.[131]

V. DISCUSSION AND ANALYSIS

The past thirty years have witnessed rather dramatic changes in the area of federal labor and employment law. The long standing, well-entrenched rule that federal law preempts similar state statutes when the two are in conflict has arguably seen its structural base threatened through judicial activism. The full repercussions have yet to be determined. As a result, the number of state law claims asserting damages under a theory of wrongful discharge have increased dramatically.[132] What was for so many years a life without legal recourse for the at-will employee has turned into an area of law which recognizes an ever expanding network of "public policy" exceptions. Some commentators have noted that the judicial activism responsible for this change has "[n]arrow[ed] the traditional gulf of benefits

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been entitled if he had not been discriminated against or discharged and any other damages caused by such discrimination or discharge. The court may also award ***punitive damages*** . . . or; (2) file a complaint with the chairman of the workers' compensation commission alleging violations of the provision of subsection (a) of this section. . . The commissioner may award the employee reinstatement of his previous job, payment of back wages and reestablishment of employee benefits to which he otherwise would have been eligible is he had not been . . . discharged.

CONN. GEN. STAT. § 31-290a (emphasis added).

128. *Baldracchi*, 814 F.2d at 105.

129. *Id.*

130. *Id.* (construing CONN. GEN. STAT. § 31-290). This statute provides that "[n]o contract, expressed or implied, no rule, regulation of other device shall in any manner relieve any employer, in whole or in part, of any obligation created by this chapter, except as herein set forth."

131. *Baldracchi*, 814 F.2d at 107.

132. *See* Comment, *supra* note 36, at 635; *see also* Peck, *supra* note 35, at 1.

and protections. . . ." which exists between union and non-union workers,[133] producing a seeming socio-economic balancing of the scales. However, difficult questions arise now that the Supreme Court has so emphatically spoken. Has the Court allowed the scales to once again hang unbalanced by allowing an employee who is already afforded employment protections through a collective bargaining agreement to seek damages in state court? What will be the practical effects on business, on the negotiation of collective bargaining agreements, and on state legislatures across the country?

Under the Supreme Court's decision in *Lingle*, a union employee who was wrongfully discharged could receive back pay and reinstatement from an industrial arbitration board and could feasibly recover a second time on the same set of facts in a state wrongful discharge action.[134] However, it is important to note the Court's efforts to preserve the sanctity of arbitration in the grievance process. The Court notes that the interpretation of the collective bargaining agreement remains the sole responsibility of the labor arbitrator.[135]

The relative impact of the Supreme Court's decision can either be accentuated or nullified by state legislatures. The sole power of drafting, amending and enabling wrongful discharge statutes lies with the governing bodies of the states.

State governments are faced with four main possibilities. First, a statute could be adopted completely in line with the Supreme Court's decision in *Lingle*. Such a statute would permit an employee who has exhausted her arbitration remedies, successfully or otherwise, to file a separate wrongful discharge action in state court, provided the lawsuit does not require interpretation of the employment contract.[136] A statute of this nature would subject an employer to double damages. The employer could be liable for back pay and reinstatement pursuant to the arbitration hearing and also be liable in state court. Conversely, an employee, having lost in arbitration is

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133. *See* Comment, *supra* note 36, at 636.

134. *See Lingle*, 108 S. Ct. at 1883.

135. *Id.* at 1884. The Court further notes, a state claim can remain independent while referring to the employment contract for adjudication purposes.

> [A]s a general proposition, a state law claim may depend for its resolution upon both the interpretation of a collective bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby preempted.

Id. at 1885 n.12.

136. The Court noted that referring to the collective bargaining agreement for rate of pay and benefits for purposes of determining damages would not be considered contract interpretation. *Id.* at 1885 n.12.

afforded another opportunity to be compensated for her alleged wrongful discharge. The costs of this option to business are obvious. However, should a state legislature be concerned about costs to business when the owner is being punished for a wrongful act? This issue will undoubtedly be discussed in full during state legislative committee hearings and floor debates.

Second, a state could nullify the effects of *Lingle* by drafting legislation or amending an existing statute to require any state wrongful discharge action to fall under a collective bargaining agreement. Adopting a statute of this nature would preempt all state actions for union members covered by a collective bargaining agreement and work to narrow the gap between union and non-union workers. The rights of those workers employed without the benefit of an employment contract would not be affected. Those workers covered by a collective bargaining agreement would be allowed a single remedy; arbitration in accordance with the collective bargaining agreement's grievance procedure.

Third, a state could take a more moderate approach. Should an employee covered by a union contract exhaust her arbitration remedies fully and not be compensated, a state wrongful discharge action could be allowed. However, should the employee be victorious in the arbitration proceedings, she would be precluded from filing an independent state action. This approach would prevent remedial "double dipping" while not totally excluding union employees from state remedies. It is important to note that under this option the state legislature has the ability to define certain types of actions or events which the legislature has determined are so contrary to the state's public policy that an action would stand even though the employee was successful in arbitration. Thus, a state legislature could specifically allow for remedial "double dipping" to prevent certain types of terminations which contradict enunciated state public policies.

Fourth, states can preserve and enhance the sanctity of arbitration and mediation. Those states which have adopted a state Uniform Arbitration Act have the option to allow an independent state claim to stand, but stipulate the claim must be submitted to arbitration, not the judicial system. The practical effects of this type of statute are twofold. First, the state would be expanding upon its already proclaimed policy favoring arbitration proceedings. Second, by diverting lawsuits to a mediation arena, less strain is put on an already over burdened judicial calendar.

The political landscape of each individual state's bodypolitic will determine which, if any, of the aforementioned alternatives should be or will be adopted. Unions have traditionally supported the Democratic Party. In return, the Democratic Party has ushered through Congress and numerous state legislative bodies organized labor's legislative agenda. Presently, a majority of the state legislatures and state executives are in democratic

hands.[137] Under such a political analysis, one could conclude that wrongful discharge statutes favorable to the union employee will be drafted. However, the strength of unions in the collective bargaining process has been challenged.[138] If the percentage of eligible workers actually covered by a collective bargaining agreement continues, the bargaining power of unions will continue to wane.[139]

If the latter trend holds true, not only will there be a higher probability that state wrongful discharge legislation will be pro-business--that is, anti-remedial "double dipping"--but the content of collective bargaining agreements could begin to change. If management is placed in a position where a statute allows a worker to collect twice, the opportunity exists to negotiate an agreement which would allow for an arbitration hearing with appropriate remedies, yet preclude that employee from bringing a second action in state court. In drafting a contract in such a manner, state courts would be compelled to interpret the collective bargaining agreement which, under *Lingle*, would preclude a state action.

VI. CONCLUSION

The Supreme Court's decision in *Lingle v. Norge Division of Magic Chef, Inc.* may not have been a landmark; however, the ramifications are potentially complex and important. The Court accomplished what it set out to do: articulate a rule of law which would shore up the disparity of judicial interpretations existing in the various federal circuits. The rule is simple and succinct, but the implications are yet to be determined. Both organized labor and business will play an important role in determining the exact ramifications. In states where wrongful discharge statutes do not exist, advocates on both sides of this issue have their work cut out for them. Efforts to get the legislative process rolling require influence, preparation, and money. The same holds true for preventing legislation from being enacted. Moreover, there will undoubtedly be efforts from both labor and business to amend existing statutes to benefit each group's respective

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137. After the 1988 elections, 28 state executive offices were held by Democrats and 22 by Republicans; 69 state chambers were controlled by Democrats and 28 by Republicans. Fourteen states have Democrats controlling both the state legislature and governor's mansion and the Republicans control both branches of government in four states. NATIONAL JOURNAL, Nov. 22, 1988, at 2883.

138. *See generally* Blocklyn, *supra* note 35, at 18; Cullen, INTERNATIONAL LABOR REVIEW, Vol. 24, No. 3, May-June 1985, at 229.

139. Brocklyn notes, "[o]ut of a total U.S. labor force between 122 and 127 million workers, between 15 and 17 million are unionized, a mere 12% to 13% of that estimated total. If the AFL-CIO's failure to organize the unorganized continues, unions will themselves continue to lose credibility in the public eye." Blocklyn, *supra* note 35, at 18.

interests. While there is no significant difference between lobbying efforts required for legislative enactment and legislative amendment, legislative rules allow those attempting to amend legislation more room to operate.

It is important to note that legislation which punishes employers for terminating an employee who acted in a responsible manner contrary to her employer's desires or acted according to her rights could be politically difficult to oppose, especially in an election year. Conversely, a valid argument exists for not allowing an employee to collect twice for the same wrong; an act which is precluded in civil litigation by the doctrines of res judicata and collateral estoppel and by double jeopardy in criminal trials. Under any analysis, the final answer will be a product of the democratic process.

JOHN PORTER HOEL