UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

PIOTR NOWAK, Plaintiff, v. MAJOR LEAGUE SOCCER, LLC and MAJOR LEAGUE SOCCER PLAYERS UNION, Defendants.	)	Case No. 2:14-cv-03503-MAM

MAJOR LEAGUE SOCCER PLAYERS UNION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS

Piotr Nowak, the former head coach of the Philadelphia Union professional soccer team, has filed a state common law tort suit against the MLS Players Union ("Players Union") alleging that the Players Union violated state law by demanding an investigation of Nowak's conduct, and by requesting that he be removed as the coach of the Philadelphia Union. The Players Union's actions were protected by the National Labor Relations Act. As a result, Nowak's claim is preempted by federal law and must be dismissed because this Court lacks subject matter jurisdiction over that claim. Alternatively, even if his claim was not preempted, Nowak has failed to state a claim under state law.

As set forth below, the Players Union is the labor organization representing all of the players in Major League Soccer, including those that played for Nowak

when he was the coach of the Philadelphia Union. Nowak claims that the Players Union demanded an investigation into his conduct of a training exercise, during which players' health and safety was allegedly put at risk. He also alleges that the Players Union demanded his termination. These actions by the Players Union, Nowak claims, constitute a violation of state common law because they tortuously interfered with Nowak's contract with the team.

It is well-settled that federal labor law preempts state law claims when they concern conduct that is even arguably protected or prohibited by the National Labor Relations Act. Where, as here, a management official puts the health and safety of union members at risk, the National Labor Relations Act protects that union's right to complain about that conduct, and demand the official's removal. In addition, to assert a claim for tortious interference with contract, Nowak must allege facts showing that the Players Union's conduct was not privileged or justified. The complaint alleges no such facts. Accordingly, not only is Nowak's claim preempted by federal law, but it also fails as a matter of state law.

ALLEGED FACTS

On June 13, 2012, the Philadelphia Union soccer team announced the firing of its coach and Team Manager, Piotr Nowak. (Complaint ¶6) Nowak had been under contract with the team. (*Id.* ¶ 6) Nowak subsequently filed suit against the Philadelphia Union for breach of contract, but that lawsuit was remanded for arbitration. (*Id.* ¶¶ 23-24)

During discovery relating to his arbitration case against the team, Nowak learned that his termination was precipitated by an investigation demanded by the Players Union. (*Id.* ¶ 25) At Nowak's arbitration hearing, the Players Union's Executive Director testified that the Players Union demanded the investigation in May of 2012 over a disputed training exercise. (*Id.* ¶ 28) That disputed training exercise was described by the team as "putting the health and safety of Team players at risk by requiring injured players to participate in strenuous training activities, [and] not allowing players to have water during such activities despite temperatures in excess of 80 degrees." (*Id.*, Exhibit E) The Players Union also demanded that Nowak be fired. (*Id.* ¶ 29)

Nowak claims that the Players Union's actions constitute tortious interference of contract in violation of Pennsylvania common law. He alleges that the Players Union intended to harm him by interfering with his contractual relationship, and was not privileged to do so. Thus, he alleges a claim "brought pursuant to § 766 of the Restatement of Torts as adopted in Pennsylvania in *Adler, Barish, Daniels, Levin and Creskoff v. Daniels*, 393 A.2d 1175 (1973)." (Complaint, Intro and ¶¶ 33-36)

ARGUMENT

A motion to dismiss tests the sufficiency of the complaint. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570

(2007)). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Iqbal*, 556 U.S. at 678. The Supreme Court has described the task of "[d]etermining whether a complaint states a plausible claim for relief" as "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

Thus, "[f]actual allegations must be enough to raise a right to relief above the speculative level," and "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Accordingly, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Twombly*, 550 U.S. at 558 (citations omitted).

I. NOWAK'S STATE-LAW CLAIM IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act, 29 U.S.C. §§ 151-69 ("NLRA") is a "complex and interrelated federal scheme of law, remedy, and administration." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959). A critical element of that complex federal scheme is the National Labor Relations Board's ("NLRB") primary jurisdiction in administering the NLRA. *Id.* at 242-43. To avoid state interference with the NLRA, and to protect the exclusive jurisdiction of the NLRB, "[i]t is well established that state-law claims are presumptively preempted by the NLRA when they concern conduct that is actually or arguably either protected or prohibited by the NLRA." *Pennsylvania Nurses Assoc. v. Pennsylvania*

State Educ. Assoc., 90 F.3d 797, 801 (3d Cir. 1996); *Garmon*, 359 U.S. at 245 ("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 labor policy can be averted."). Preemption under *Garmon* displaces a court's subject matter jurisdiction to adjudicate the preempted claim. *International Longshoremen's Assoc. v. Davis*, 476 U.S. 380, 391-93, 399 (1986).

When determining if a claim concerns conduct that is arguably protected or prohibited by the NLRA, "it is the conduct being regulated, not the formal description of the governing legal standards, that is the proper focus of concern." *Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197, 203-04 (5th Cir. 2001). To demonstrate that a claim is "arguably" protected or prohibited, "a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." *Voilas v. General Motors Corp.*, 170 F.3d 367, 379 (3d Cir. 1999) (quoting *Davis*, 476 U.S. at 395 (1986)). As set forth below, in complaining about Nowak's conduct, and demanding that he be separated from players, the Players Union engaged in conducted protected by Section 7 of the NLRA, and thus, Nowak's state-law claim is preempted.

Section 7 of the NLRA protects the rights of employees "to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . other mutual aid or protection." 29 U.S.C. § 158.

The NLRB has long found that, "[i[t is well established that the identity, capabilities, and quality of supervision, at least where . . . the quality of that supervision has an impact upon the employees' job interest and their ability to perform the task for which they were hired, are the legitimate concern of employees." *Dreis & Krump Mfg., Inc.*, 221 NLRB 309, 310 (1975). Thus, for example, the NLRB has found that an employer violates the NLRA when it terminates employees because they composed, signed and sent a letter threatening a strike if the employer did not replace a supervisor who had a direct impact on the employees' own job interests. *Senior Citizens Coordinating Council of Co-Op City*, 330 NLRB 1100, 1102-03 (2000). In so holding, the NLRB found that such activity is protected by Section 7 of the NLRA. *Id.* at 1102. Indeed, the NLRB has found that employees engaged in Section 7 protected activity when they walked off the job to express their dissatisfaction with a supervisor. *E.g.*, *Trompler, Inc.*, 335 NLRB 478, 479 (2001). Finally, it makes no difference whether employees act on their own, or through their collective bargaining representative. Either activity is protected by Section 7 of the NLRA. *See Brad Snodgrass, Inc.*, 338 NLRB 917, 923 (2003) (union representative engaged in protected activity when he acted on behalf of employees represented by the union).

Given that actions alleging conduct that is arguably prohibited or protected by the NLRA are pre-empted, it is not surprising that the Supreme Court has rejected the very claim made here, *i.e.*, a claim for interference by a union with a management official's contractual relationship with his employer. In *Local 926,*

Int'l Union of Operating Engineers v. Jones, 460 U.S. 669 (1983), the Court framed the question before it as, "whether a state-court action brought by one who is a 'supervisor' within the meaning of the [NLRA] for interference by a union with his contractual relationships with his employer is pre-empted by the [NLRA]." *Id.* at 671.

The plaintiff in that case, Robert Jones, had been terminated by his employer. He believed that his employer "had been persuaded to discharge him by the union bargaining agent," and filed a state court action against the union alleging that the union had tortuously caused his employer to breach his employment contract. *Id.* at 673-74. The Supreme Court held that Jones' state court action was preempted. *Id.* at 678.

First, the Court held that because Jones was a supervisor and representative for purposes of collective bargaining or the adjustment of grievances, the union had arguably violated §8(b)(1)(B) of the NLRA in seeking his discharge. Therefore, the conduct on which his complaint was based was arguably prohibited by the NLRA.[1] Second, and more importantly for this case, the Court recognized that employees have the right to exert noncoercive influence on the employer's choice of supervision. "Thus, had Jones' complaint come before the Board, his complaint would arguably have been rejected on the ground that the Union's conduct in this case was protected activity." *Id.* at 684. The same holds true here. In demanding

[1] Section 8(b)(1)(B) makes it an unfair labor practice for a union to restrain or coerce "an employer in the selection of his representatives for purposes of collective bargaining or the adjustment of grievances." 29 U.S.C. § 158(b)(1)(B).

an investigation of Nowak, and urging that he be fired, "the Union's conduct in this case was protected activity." *Id.*

Several federal appellate courts have also dismissed claims for tortious interference with contract after concluding that those claims fell within the exclusive primary jurisdiction of the NLRB. *Richardson v. Kruchko & Fries*, 966 F.2d 153 (4th Cir. 1992) (claim for intentional interference with business relations by discharged employee against law firm that had advised his employer); *Satterfield v. Western Electric Co.*, 758 F.2d 1252 (8th Cir. 1985) (suit by employee for tortious interference with his employment contract alleging that he had been discharged at the direction of his employer's customer); *Mobile Mechanical Contractors Assoc. v. Carlough*, 664 F.2d 481 (5th Cir. 1981); *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 90 F.3d 238 (7th Cir. 1996) (claim against unions for interference with contract between a contractor and its customer);; *Lumber Production Workers Local 1054 v. West Coast Industrial Relations Assoc.,* 775 F.2d 1042 (9th Cir. 1985) (suit by labor organizations against two labor consultants alleging that they had tortuously interfered with the union's prospective contractual relations); *Falls Stamping and Welding Co. v. Automobile Workers*, 744 F.2d 521 (6th Cir. 1984) (suit against union for tortious interference arising from a 'wildcat" strike and the union's bargaining tactics); *Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197 (5th Cir. 2001) (suit by airline passengers against union for tortious interference with contract arising from a union-organized "sick-out").

The call for an investigation of Nowak in light of the "disputed training exercise," and even the alleged demand that he be fired, were activities protected by Section 7 of the NLRA. Therefore, because Nowak's state-law claim is based on conduct that is arguably protected by the NLRA, this Court lacks subject matter jurisdiction over the claim, and it must be dismissed.

II. NOWAK FAILS TO ALLEGE FACTS SUFFICIENT TO SHOW A PLAUSIBLE CLAIM FOR RELIEF UNDER STATE LAW

The pleading standard under Federal Rule of Civil Procedure Rule 8, "demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Id.* (citations omitted) Therefore, courts conduct a two-step analysis when ruling on a motion to dismiss. "First, the factual and legal elements of a claim should be separated." The court accepts well-pleaded facts as true, but disregards legal conclusions. Second, the court "must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). "[A] complaint has to do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." *Id.* at 211.

Nowak's allegations that he "learned that his termination was precipitated by an investigation demanded by the [Players Union] and conducted by the Major League Soccer [sic]"; that "an investigation of Piotr Nowak was demanded by the

Player's Union [sic] in May of 2012 over a disputed training exercise;" and that "[t]he Players Union also demanded that Piotr be fired," are factual allegations and should be accepted as true. (Complaint ¶¶ 25, 28 and 29) Nowak's allegations, however, that, "the [Players Union] intended to harm Piotr Nowak by interfering with his contractual relationship between Nowak and the Philadelphia Union Football Club;" that "[t]he action of the [Players Union] was not privileged to interfere with the contract between Piotr Nowak and the Philadelphia Union;" and that "[a]s a direct and proximate result of the Players Union's intentional acts," Nowak was harmed, are pure legal conclusions and must be disregarded. (*Id.* ¶¶ 33-36)

To state a plausible claim under Pennsylvania law for tortious interference with contractual relations, Nowak is required to plead facts showing: (1) the existence of a contractual relationship; (2) an intent on the part of the Players Union to harm Nowak by interfering with those contractual relations; (3) absence of privilege or justification for the interference; and (4) damages. *Neish v. Beaver Newspapers, Inc.*, 398 Pa. Super 588, 599, 581 A.2d 619 (1990).

Facts demonstrating the absence of a privilege must be plead to state a claim. *E.g., Bahleda v. Hankinson Corp.*, 288 Pa. Super. 153, 156, 323 A.2d 121 (1974); *MFS Inc. v. DiLazaro*, 771 F. Supp. 2d 382, 460 (E.D. Pa. 2011). Nowak has not – because he cannot – alleged facts sufficient to show that the Players Union was acting without privilege or justification when it allegedly demanded an investigation of Nowak, and Nowak's termination.

The absence of privilege or justification is determined by looking to whether the defendant acted for the purpose of protecting a legitimate interest, and whether its interference was "sanctioned by the 'rules of the game' which society has adopted." *Glenn v. Point Park College*, 441 Pa. 474, 272 A.2d 895, 899 (1971). As the complaint alleges, the Players Union demanded an investigation and Nowak's removal over a disputed training exercise at which Nowak allegedly placed the health and safety of players at risk. As the exclusive bargaining representative of the players whose health and safety was jeopardized, the Players Union's conduct as alleged was certainly well within the "rules of the game." Indeed, as set forth above, it was protected by federal labor law. Leaving aside the preemption issue, Pennsylvania state courts have recognized that conduct such as that taken by the Players Union in this case is proper and cannot form the basis of a claim for tortious interference with contract.

In *Small v. Juniata College*, 452 Pa. Super. 410, 682 A.2d 350 (1996), a college football coach brought an action against some of his former players alleging that they had tortuously interfered with his employment contract. The players had complained about the coach to the college administration, and an investigation ensued. As a result, the coach's contract was not renewed. In addressing the tort claim brought against the coach's former players, the court held that, "student criticism of a college employee with whom the students must interact, when expressed to the administration, does not constitute intentional interference with an employment relationship." *Id.* at 419.

In this case, acting through their bargaining representative, players complained about conduct that put their health and safety, and indeed, their livelihoods, at risk. Raising concerns with MLS, demanding an investigation, and demanding that Nowak be fired, was conduct that was privileged and justified on the part of the Players Union. Even if Nowak's claims were not preempted, because he fails to allege any facts showing that the Players Union acted without privilege or justification, he has failed to state a plausible claim for relief under Pennsylvania state law.

CONCLUSION

For the foregoing reasons, the claim brought against the Players Union should be dismissed.

Respectfully submitted,

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