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

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS ON BEHALF OF THE MAJOR LEAGUE SOCCER PLAYERS UNION

The complaint in this case alleges that the Major League Soccer Players Union ("Players Union") violated state law by demanding an investigation of former Philadelphia Union coach Piotr Nowak's ("Nowak") conduct concerning a disputed training exercise. During that training exercise, Nowak allegedly placed players' health and safety at risk. The complaint avers that the Players Union's request for an investigation, and its demand that Nowak be removed as the coach of the team, constituted tortious interference with Nowak's employment contract.

The Players Union has moved to dismiss the complaint on two grounds: (1) that the claim is preempted by the National Labor Relations Act ("NLRA") and (2) that the complaint fails to state a plausible claim under state law because it does

not allege any facts showing the absence of privilege or justification for the alleged interference by the Players Union.

In response to the Players Union's preemption argument, Nowak asserts that his claim is "only peripherally related to the NLRA," and that this Court has a greater interest in presiding over this matter than does the National Labor Relations Board ("NLRB"). Nowak reasons, therefore, that certain exceptions to NLRA preemption apply to this case and his claim is not preempted. (Nowak Memorandum of Law in Opposition to Major League Soccer Players Union's Motion to Dismiss ["Nowak Opp. Mem."] at 5-12) In response to the Players Union's argument that he has failed to state a claim under state law, Nowak merely states that he has pled that the reasons for his termination were false and pretextual and that the Players Union was not privileged to interfere with his contract. (*Id.* at 12-13) As set forth in more detail below, Nowak's arguments are without merit.

First, the exception to NLRA preemption on which Nowak relies does not apply in this case. Second, even if that exception applied, the conduct of the Players Union at issue is a fundamental concern of the NLRA, and therefore this case does not fall within the scope of the exception. Finally, even if Nowak's claim were not preempted, he has failed to plead a plausible claim for relief. The complaint does nothing more than set forth a bare bones recital of the elements of a claim for tortious interference with contract. Such a pleading cannot survive a motion to dismiss.

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

A. The Exceptions to NLRA Preemption Relied Upon by Nowak Do Not Apply to this Case

As explained in the Players Union's opening brief, the conduct Nowak asserts tortuously interfered with his employment contract is conduct that is protected by Section 7 of the NLRA. (Players Union Memorandum of Points and Authorities in Support of its Motion to Dismiss ["Players Union Mem."] at 5-7) The NLRA protects employees' right to complain about a management official, and even demand that the official be terminated. Indeed, employees have the protected right to walk off the job to express their dissatisfaction with a supervisor. *E.g.*, *Rhee Brothers.*, 343 NLRB 695 (2004). Nowak's response does not take issue with the fact that the Players Union's conduct is protected by the NLRA. Instead, Nowak argues that his claim is not preempted because it is only peripherally related to the NLRA, and thus falls within an exception to NLRA preemption.

As the Players Union explained, preemption under the NLRA is so broad that it preempts state law claims that concern conduct that is even "arguably protected." (Players Union Mem. at 6) In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Court held that even when it is not clear whether activity is protected by the NLRA, it is essential that such a question be left to the NLRB. *Id.* at 244-45. Thus, preemption of a claim that concerns "arguably protected" conduct is designed to preserve the primary jurisdiction of the NLRB. The Court in *Garmon*, however, also recognized that where "activities which a State purports to

regulate are protected by §7 of the National Labor Relations Act . . . due regard for the federal enactment requires that state jurisdiction must yield." *Id.* at 244; *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 187, n.11 (1978).

It is important, therefore, "to distinguish pre-emption based on federal protection of the conduct in question, from that based predominantly on the primary jurisdiction of the National Labor Relations Board." *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 n. 19 (1969) (citations omitted). In this case, it is not disputed that the activities at issue were protected by the NLRA, and therefore this is a case in which preemption is based on federal protection of the conduct in question.

Preemption based on federally protected conduct "stems from the Supremacy Clause of the United States Constitution." *Hayfield Northern RR Co. v. Chicago and North Western Transp. Co.*, 467 U.S. 622, 627 (1984). "If employee conduct is protected by §7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant Employees Local 54*, 468 U.S. 491, 501-02 (1984).

Preemption to protect the primary jurisdiction of the NLRB is different. It does not flow from the direct operation of the Supremacy Clause. Instead, it "avoids the potential for jurisdictional conflict between state courts or agencies and the NLRB by ensuring that primary responsibility for interpreting and applying this body of labor law remains with the NLRB." *Brown*, 468 U.S. at 502. Because

"appropriate consideration for the vitality of our federal system and for a rational allocation of functions belies any easy inference that Congress intended to deprive the States of their ability to retain jurisdiction over such matters," the Supreme Court has recognized certain exceptions to NLRA primary jurisdiction preemption. *Id.* at 503.

Thus, conduct that is only arguably protected or arguably prohibited by the NLRA creates a presumption of federal presumption that can be overcome where "the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility." *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983). In such a case, "the State's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the [NLRB's] ability to adjudicate controversies committed to it by the Act, and the risk that the State will sanction conduct that the Act protects." *Belknap*, 463 U.S. at 498-99 (citations omitted).

Relying heavily on *Belknap*, Nowak's argument in response to the Players Union's assertion of preemption is limited to his contention that the state's interest outweighs the federal interest in this case, and therefore, his claim is not preempted. (Nowak Opp. at 7-8) Nowak, however, "confuses pre-emption which is based on actual federal protection of the conduct at issue from that which is based on the primary jurisdiction of the National Labor Relations Board." *Brown*, 468 U.S. at 502. Where, as here, the conduct at issue is actually protected, there is no weighing of interests because the claim is preempted by the Supremacy Clause.

> If the state law regulates conduct that is actually protected by federal law, however, preemption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right. Where, as here, the issue is one of an asserted substantive conflict with a federal enactment, then "the relative importance to the State of its own law is not material for the Framers of our Constitution provided that the federal law must prevail."

Brown, 468 U.S. at 503 (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

Thus, where the conduct alleged to violate state law is actually protected by the NLRA, there is no presumption of preemption that can be overcome. Instead, preemption is absolute. *Brown*, 468 U.S. at 503; *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 199 (1978) ("there is a constitutional objection to state-court interference with conduct actually protected by the Act."); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 n. 9 (1985) (tort suit preempted because it would "allow the State to provide a rule of decision where Congress has mandated federal law should govern" and therefore, "[i]n this situation, the balancing of state and federal interests required by [primary jurisdiction] pre-emption is irrelevant"); *Idaho Building and Construction Trades Council v. Wasden*, 836 F. Supp. 2d 1146, 1167 (D. Idaho 2011) (NLRA preemption of state laws regulating conduct that is actually protected by the NLRA is "categorical"); *Hob Nob Hill Restaurant v. Hotel and Restaurant Employees Int'l Union*, 660 F. Supp. 1266, 1269 (S.D. Cal. 1987) ("The *Garmon* exceptions to primary jurisdiction preemption do not apply to substantive preemption"); *Cahoon v. International Brotherhood of Electrical Workers Local 261*, 175 F. Supp. 2d 220, 228-29 (D. Conn. 2001) (plaintiff's tort claim preempted because it conflicted with the NLRA, and thus, exceptions to NLRA primary

jurisdiction preemption not applicable); *J.A. Croson v. J.A. Guy*, 81 Ohio St. 3d 346, 356 (1998) (because conduct plaintiff challenged under state law was protected by the NLRA, the exceptions to NLRA primary jurisdiction preemption did not apply).

There is no dispute in this case that the conduct over which Nowak has brought his suit is conduct protected by the NLRA. Accordingly, the exception for conduct that is only a "peripheral concern" of the NLRA does not apply, and Nowak's claim is preempted.

B. Even if the "Peripheral Concern" Exception to NLRA Preemption Applied to this Case, Nowak's Claim is Nevertheless Preempted

Nowak argues that his "claim is only peripherally related to the NLRA" and therefore is not preempted. (Nowak Opp. Mem. at 7) He then relies on *Belknap* and an unreported state court decision to assert that the "peripheral concern" exception to NLRA preemption applies to this case. Nowak misunderstands the exception on which he relies. Even if it applied here, Nowak's claim would not fall within the scope of the exception.

Under *Belknap*, the issue is not whether a plaintiff's ***claim*** is peripherally related to the NLRA, but rather, "if the ***behavior*** to be regulated is behavior that is of only peripheral concern to the federal law . . . ." *Belknap*, 463 U.S. at 498 (emphasis added). It is irrelevant, therefore, that "Nowak's claim is rooted in Pennsylvania tort and contract law." (Nowak Opp. Mem. at 11) Instead, the question is whether the conduct over which Nowak has filed his state law claim is conduct that is only a peripheral concern of the NLRA. *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America v. Lockidge*, 403 U.S.

274, 292 (1971) (applying *Garmon* and recognizing that, "[i]t is the conduct being regulated, not the formal description of the governing legal standards, that is the proper focus of concern"). As set forth above, Nowak does not dispute that the conduct engaged in by the Players Union that forms the basis of his claim is conduct protected by the NLRA. By definition, therefore, such conduct is not a peripheral concern to the NLRA. Indeed, the conduct at issue strikes at the heart of the policy of the NLRA.

The conduct on which Nowak bases his claim is the Players Union (1) demanding an investigation of Nowak over a disputed training exercise that endangered the health and safety of union-represented employees, and (2) demanding that Nowak be fired. (Complaint ¶¶ 28-29) The Supreme Court has recognized that the NLRA protects employees who summarily walk off the job in protest of unsafe conditions. In doing so, the Court recognized that, "the policy of the Act [is] to protect the right of workers to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). That is exactly what Nowak has alleged was done in this case: acting through their union, the players acted together to better their working conditions. Such conduct is hardly a peripheral concern to the NLRA.[1]

[1] Section 502 of the NLRA also illustrates the Act's fundamental policy of protecting employee protests of unsafe work conditions. That section provides that, "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work" shall not be deemed a strike. 29 U.S.C. § 143. *See e.g.*, *Philadelphia Marine Trade Ass'n v. NLRB*, 330 F.2d 492 (3d Cir. 1964).

Nowak relies heavily on the decision of the Common Pleas Court of Philadelphia County in *Phillips v. Selig*, Case No. 1550 (Sept. 19, 2001). In that case, the court found that the peripheral concern exception applied because, "where the conduct at issue in the state litigation is said to be ***arguably prohibited*** by the Act," a critical inquiry "is whether the controversy presented to the state court is identical to that which could be presented to the Board." Slip op. at 2 (emphasis added). This case, however, does not involve conduct that is arguably prohibited. Instead it concerns conduct that is protected by the NLRA. In *Phillips*, the court cited *Belknap*, which in turn relied upon *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978) for the proposition that where the conduct at issue is arguably prohibited, courts look at whether the controversy is identical to that which could have been brought before the NLRB. *Phillips*, slip op. at 2. In *Sears*, the Court explained that the inquiry into whether the dispute is identical to that which could have been brought to the NLRB applies only when assessing if the "arguably ***prohibited***" aspect of *Garmon* preemption applies to a case. 436 U.S. at 196 (emphasis in original).

In *Phillips*, the court also determined that it could "consider whether the defendants' conduct was tortious without encroaching on the NLRB's jurisdiction to determine whether that conduct was an unfair labor practice," and "[w]hether the defendants' conduct also violated the NLRA will not be relevant." Slip op. at 2. In this case, whether the Players Union's conduct is protected by the NLRA will be highly relevant.

To prove that the Players Union tortuously interfered with his employment contract, Nowak must demonstrate an absence of privilege with respect to the Players Union's alleged interference. (Nowak Opp. Mem. at 12) That determination involves an inquiry into whether the Players Union acted for the purpose of 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). (Players Union Mem. at 11) If conduct has been recognized as protected by federal law, that conduct, *a fortiori*, is "sanctioned by the rules of the game which society has adopted." Thus, the conduct of the Players Union and whether it has been sanctioned by federal law would be inextricably linked to Nowak's state law claim if that claim moved forward.

Finally, in *Phillips*, the court emphasized that the plaintiff was not signatory to a collective bargaining agreement, and indicated that the NLRA does not preempt a claim by a third party plaintiff that is not subject to the NLRA. Slip op. at 2. The court was simply mistaken on that issue. For example, in *Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197 (5th Cir. 2001), a class action suit was brought by over 300,000 airline passengers who alleged that the defendant union tortuously interfered with their contract for a ticket by engaging in a sick-out – "an organized false reporting of illness." *Id.* at 200. The Fifth Circuit reversed the district court and held that the plaintiffs' claim for tortious interference with contract was preempted under the principles set forth in *Garmon*. In so holding, the court stated, "*Garmon* preemption is not confined to state claims made by parties to the

labor relationship and third-party claims may also be preempted, because they similarly threaten the balance of labor-management relations." *Id.* at 201. Accordingly, even if the exceptions to *Garmon* preemption applied here, Nowak's claim is not of peripheral concern to the NLRA. Moreover, even though Nowak is not a party to the labor relationship between the Players Union and Major League Soccer, his claim is still preempted.

II. NOWAK'S COMPLAINT FAILS TO STATE A PLAUSIBLE CLAIM

As set forth in the opening brief of the Players Union, Nowak failed to plead any facts sufficient to make a plausible showing that the alleged interference by the Players Union was not privileged. (Players Union Mem. at 10-12) In response, Nowak merely cites to cases setting forth the elements of a tortious interference claim, and declares that he has pled "the necessary elements," including "that the Players Union was not privileged to interfere with Nowak's conduct." (Nowak Opp. Mem. at 13) Nowak, however, does not address the Players Union's contention that he has merely set forth a legal conclusion with respect to the necessary element of absence of privilege. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009) (the Court must separate the factual allegations from legal conclusions, and disregard the legal conclusions).

Nowak's allegation that, "[t]he action of the [Players Union] was not privileged to interfere with the contract between Piotr Nowak and the Philadelphia Union," is a pure legal conclusion, and must be disregarded. (Complaint ¶ 34) "After *Iqbal*, it is clear that conclusory or 'bare-bones' allegations will no longer

survive a motion to dismiss: 'threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Fowler*, 578 F.3d at 210 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Without the legal conclusion set forth in paragraph 34, Nowak's complaint is completely silent on whether the Players Union was privileged to interfere with Nowak's contract.

Rather than identify any factual allegations in his complaint showing an absence of privilege, Nowak brazenly states in his response that "the Players Union's false and pretextual representations to the League" were not privileged. (Nowak Opp. Mem. at 12) His complaint, however, contains no such allegation.

Nowak cites paragraph 18 of the complaint in support of the notion that the Players Union made "false and pretextual representations to the league." (*Id.* at 13) Paragraph 18 of the complaint states: "All of the allegations in the proposed termination letter are curable and are pretextual. *See* [Termination Letter]." (Complaint ¶18) First, obviously, the termination letter is a letter from Nowak's former employer, and not the Players Union. Thus, it does not support the statement in Nowak's response that the Players Union made representations to the League, let alone support the characterization of such representations as false and pretextual. (Complaint, Ex. D) Second, Nowak's claim against the Players Union is not based on any alleged representations by the Players Union. Instead, the complaint alleges merely that his termination was precipitated by an investigation demanded by the Players Union, and that the Players Union demanded that Nowak be fired. (*Id.* ¶¶ 25, 28) Finally, Nowak does not – because he cannot – allege that

the allegations in the termination letter are false. Rather, he claims they are "pretextual," *i.e.*, not the real reasons for his termination.

Indeed, leaving aside that the Complaint does not remotely support Nowak's assertion that the Players Union made false representations, the very cases on which Nowak relies demonstrate the fatal deficiencies in his complaint. Nowak argues that a plaintiff sufficiently pleads lack of privilege if he pleads that the defendant acting improperly by making false statements. In support, Nowak relies on *Birl v. Philadelphia Elec. Co.*, 402 Pa. 297, 167 A.2d 472 (1960) and *Phillips*. (Nowak Opp. Mem. at 13-14)

In *Birl*, the Pennsylvania Supreme Court held that, if a tortious interference claim based on alleged false statements is to survive, "the substance of such statements should be set out in the complaint." 402 Pa. at 301. The plaintiff did so in that case. Here, the complaint contains no such statements and therefore fails to state a claim even under Nowak's theory.

In *Phillips*, the plaintiff alleged that the defendants defamed him, and the court held that by so alleging, the plaintiff had pled that the defendants acted improperly for the purposes of his tortious interference claim. Slip op. at 3. Nowak has not alleged any defamation, and if he did, he would have had to allege the statements he claims were defamatory. "Pennsylvania law requires a defamation complaint 'to allege with particularity the content of oral or written statements claimed to have been made, the identity of the persons making such statements, and the identity of the persons to whom the statements were made.'" *Krochalis v.*

Insurance Co. of North America, 629 F. Supp. 1360, 1368 (E.D. Pa. 1985) (quoting *Itri v. Lewis*, 281 Pa. Super. 521, 523, 422 A.2d 591, 592 (1980)). Thus, like the decision in *Birl*, the decision in *Phillips* supports the dismissal of Nowak's claim.

Accordingly, as set forth in the Players Union's opening brief, the complaint does not contain any factual allegations showing that the interference alleged was absent privilege. As such, notwithstanding that the complaint is preempted, it also fails to state a plausible claim as a matter of state law.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Memorandum of Points and Authorities in Support of the Players Union's Motion to Dismiss, the complaint against the Players Union should be dismissed.

Respectfully submitted,

s/Jonathan D. Newman

Jonathan D. Newman (pro hac vice)
newman@shermandunn.com
SHERMAN, DUNN, COHEN, LEIFER & YELLIG, P.C.
900 Seventh Street, N.W., Suite 1000
Washington, D.C. 20001
(202) 785-9300
(202) 775-1950 (fax)

William T. Josem
wtjosem@cjtlaw.com
CLEARY, JOSEM & TRIGIANI, LLP
325 Chestnut Street, Suite 200
Philadelphia, PA 19106
(215) 735-9099
(215) 640-3201

Attorneys for Defendant MLS Players Union

CERTIFICATE OF SERVICE

The foregoing Reply Memorandum of Points and Authorities in Support of Motion to Dismiss has been filed electronically and is available for viewing and downloading from the ECF system. In addition, the foregoing was also sent via first-class mail on December 5, 2014, to:

Howard Z. Robbins, Esq.,
Proskauer
11 Times Square
New York NY 10036-8299
Counsel for Defendant, Major League Soccer

s/Jonathan D. Newman
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Jonathan D. Newman