IN THE

Supreme Court of Virginia

RECORD NO. 130681

RICHARD ANTHONY, et al.,

Appellants,

v.

VERIZON VIRGINIA, INC., and
COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO DISTRICT 2,

Appellees.

OPENING BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

I. Material Proceedings Below

This is a tort case in which the Appellants, Richard Anthony and the other Plaintiffs (hereinafter "the Plaintiffs"), alleged that Appellee Verizon Virginia, Inc. ("Verizon"), the Plaintiffs' employer at the time of the events set forth in the Plaintiffs' Complaints, misrepresented facts regarding the Plaintiffs' job security in the context of an Enhanced Income Security Plan ("EISP") that Verizon presented to the Plaintiffs. Verizon and Appellee Communications Workers of America, AFL-CIO District 2 ("CWA"), removed the case from the Circuit Court for the City of Portsmouth to the U.S. District Court for the Eastern District of Virginia, Norfolk Division, asserting that the Plaintiffs' state law claims were preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. The Plaintiffs filed a motion to remand on grounds that their claims were not preempted by federal law and that the district court, therefore, lacked jurisdiction over the cases. The district court granted the Plaintiffs' motions to remand.

Following remand, Verizon and CWA filed demurrers and pleas in bar, arguing that the Plaintiffs' claims were preempted by the LMRA. On December 27, 2012, Judge Cales granted Verizon's and CWA's demurrers

and pleas in bar. Judge Cales was in the process of retiring, and, on February 1, 2013, Judge Morrison took under advisement Verizon's and CWA's demurrers and pleas in bar. On February 8, 2013, Judge Hawks, acting for Judge Cales, granted Verizon's and CWA's demurrers and pleas in bar on the issue of preemption and dismissed the Plaintiffs' Complaints. The Plaintiffs moved for reconsideration, and, on February 13, 2013, Judge Hawks granted the Plaintiffs' motions. On March 22, 2013, Judge Cales returned to the case and conducted a hearing on the Plaintiffs' motions to reconsider. At the close of the hearing, Judge Cales reaffirmed his December 27, 2012 decision. On March 26, 2013, Judge Hawks, acting for Judge Cales, signed an order granting Verizon's and CWA's demurrers and pleas in bar and dismissing the Plaintiffs' Complaints with prejudice.

The Plaintiffs' filed a Petition for Appeal in this Court. On December 12, 2013, the Court granted the Plaintiffs' Petition for Appeal.

II. Statement Of Facts

The Plaintiffs were employed by Verizon as Outside Plant Technicians. (*See* App. 2.) On or about May 18, 2010, they received an Enhanced Security Income Plan ("EISP") from Verizon. (App. 2; Tr. 3.) The defendant told the Plaintiffs that Verizon had a surplus of 12,000 employees, and would be terminating those positions. (App. 2.) However,

Verizon and CWA stated to the Plaintiffs that, given their seniority, the Plaintiffs' jobs would not be in jeopardy. (App. 2; Tr. 3.)

Notwithstanding these representations, on June 15, 2010, the Plaintiffs were told by Verizon and CWA that their jobs were in serious jeopardy, and that they would have to make a decision by the next day as to whether they would accept the EISP or be terminated in August 2010. (App. 2; Tr. 3.) The Plaintiffs accepted the EISP in reliance on Verizon's and CWA's statement that, if they did not do so, they would receive significantly fewer or no benefits after their termination. (App. 2; Tr. 3.) Under the circumstances, the Plaintiffs believed that they had no choice but to accept the EISP. (App. 3; Tr. 3.) On July 3, 2010, the Plaintiffs' employment with Verizon was terminated pursuant to the EISP. (App. 3.) After the Plaintiffs' termination, Verizon represented to the Virginia Employment Commission that the Plaintiffs' jobs had not been in jeopardy and that their termination was voluntary. (App. 3.) Shortly after the Plaintiffs' termination, Verizon recalled 84 technicians who had been removed and also brought in technicians from outside the area to meet the company's requirements. (App. 3; Tr. 4.) By early October 2010, Verizon contacted CWA and informed the union that too many technicians had left

Verizon. (App. 3.) Shortly after the Plaintiffs were terminated, Verizon advertised for 200 technicians to transfer to the region where the Plaintiffs had been employed. (App. 3.)

On the basis of these facts, the Plaintiffs brought tort claims against Verizon and CWA for fraud and negligent misrepresentation. (App. 4; Tr. 5.) The Plaintiffs alleged that they were misled by Verizon in order to induce their acceptance of the EISP, so that Verizon could remove workers with more seniority, higher salaries, and more fringe benefits. (App. 3-4; Tr. 5.) The Plaintiffs based their claims upon Virginia tort law and did not refer to the collective bargaining agreement ("CBA") in their Complaints. (App. 1-4; Tr. 5-6.) The Plaintiffs' claims were based on allegations that Verizon and CWA deceived them as to the status of their jobs and the necessity of agreeing to accept an EISP, with consequent termination, in order to preserve most of the benefits they had earned at Verizon. (App. 5; Tr. 6.)

Despite the fact that the U.S. district court had remanded the case to the circuit court on grounds that the Plaintiffs' state law claims were not preempted by the LMRA and thus did not present a federal question, after remand Verizon and CWA filed demurrers and pleas in bar in the circuit court seeking dismissal of the Plaintiffs' Complaints on the basis of federal preemption. The circuit court granted Verizon's and CWA's demurrers and

pleas in bar, finding that the LMRA preempted the Plaintiffs' state tort causes of action. (App. 6-8, 10.) The court found that the Plaintiffs' claims required interpretation of the CBA between Verizon and CWA, specifically on the ground that Verizon had declared a surplus of employees and the word "surplus" was used in the CBA. (App. 6-7.) This was so, according to the court, despite the fact that the Plaintiffs based their claims on allegations that Verizon and CWA misrepresented to them that their jobs were in jeopardy in order to get them to sign the EISP and to agree to termination, and that such conduct was part of a plan by Verizon to rid itself of more senior, higher paid employees. (App. 3-4.) Verizon's purported *support* for its misrepresentation, a surplus of employees, is not an essential element of the Plaintiffs' claims for fraud and negligent misrepresentation. (App. 2.) Rather, the Plaintiffs' claims are based on Verizon's and CWA's statement to them, *irrespective of the reason*, that they would be fired and lose their benefits if they did not accept the EISP within 24 hours after it was presented to them. (App. 2.) Verizon made that statement in order to get the Plaintiffs to quit so that Verizon would not have to fire them and pay unemployment benefits, and in order to rid itself of higher-compensated employees. (App. 3-4.)

ASSIGNMENT OF ERROR

The circuit court erred in dismissing the Plaintiffs' Complaints on the basis that section 301 of the LMRA, 29 U.S.C. § 185, preempts the Plaintiffs' claims. (Error preserved: App. 9; Tr. 2-21, 51-53.)

AUTHORITIES AND ARGUMENT

THE CIRCUIT COURT ERRED IN DISMISSING THE PLAINTIFFS' COMPLAINTS ON THE BASIS THAT SECTION 301 OF THE LMRA PREEMPTS THE PLAINTIFFS' CLAIMS, WHEN THE PLAINTIFFS' CLAIMS ARE INDEPENDENT OF THE CBA AND DO NOT REQUIRE THE COURT TO INTERPRET THE CBA.

A. Standard Of Review.

On appeal, the granting of a demurrer is reviewed de novo because it is a question of law. *Sales v. Kecoughtan Hous. Co.* 279 Va. 475, 690 S.E.2d 91 (2010).

The function of a demurrer is to test whether a complaint states a cause of action upon which relief can be granted. *E.g.*, *Penick v. Dekker*, 228 Va. 161, 319 S.E.2d 760 (1984); *Penick*, 228 Va. at 166, 319 S.E.2d at 763; *Sales*, 279 Va. at 479, 690 S.E.2d at 93 (a demurrer admits the truth of all properly pleaded material facts). Upon a demurrer, all reasonable factual inferences fairly and justly drawn from the facts alleged must be considered in aid of the pleading. *Sales*, 279 Va. at 479, 690 S.E.2d at 93.

As discussed below, under these standards, the circuit court erred in granting Verizon's and CWA's demurrers. The Plaintiffs' state tort claims are independent of the CBA between Verizon and CWA and do not require the court to interpret the CBA. Accordingly, the Plaintiffs' claims are not preempted by the LMRA.

B. The Plaintiffs' Claims Are Not Preempted By The LMRA.

29 U.S.C. § 185, provides in relevant part:

> § 185. Suits by and against labor organizations
>
> (a) Venue, amount, and citizenship
>
> Suits for violation 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).

1. United States Supreme Court Precedent.

The U.S. Supreme Court has decided a number of cases on the issue of whether state law claims are preempted by section 301. In *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), former employees brought an action in state court against their former employer for breach of individual employment contracts. The action was removed to federal court on the ground that the court would be required to interpret the CBA between the employer and the union in resolving the plaintiffs' claims. The Supreme Court held that the action was not preempted by federal law and, therefore, that it was not removable. In reaching that conclusion, the Court applied the well-pleaded complaint rule, under which a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint. *Id.* at 393. According to the Court, section 301 did not preempt the plaintiffs' claims, the Court also addressed the "complete preemption" doctrine. The Court explained that the complete preemption doctrine is a corollary to the well-pleaded complaint rule, and that the complete preemption doctrine allows a state law claim to be considered a federal claim from its inception once an area of state law has been completely preempted. *Id.* Nevertheless, an employee covered by a CBA is permitted

to assert legal rights independent of that agreement, including state law contract rights, so long as the contract relied upon is not the CBA. *Id.* at 396. The Court held that the terminated employees' allegations that the employer had entered into and breached individual employment contracts with them were not completely preempted federal labor law claims under section 301. *Id.* at 395. The Court noted that the plaintiffs' complaint was not substantially dependent upon interpretation of the CBA, did not rely upon that agreement indirectly, and did not address the relationship between the individual contracts and the CBA. *Id.*

In *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), the Supreme Court reiterated the principle that if resolution of a state law claim depends upon the meaning of a CBA, the application of state law is preempted by *Lingle* brought a state law action alleging that she was terminated for exercising her rights under the state workers' compensation act. The Supreme Court held that the factual inquiry regarding whether the employer had a nonretaliatory reason for discharging the plaintiff did not turn on the meaning of any provision of the CBA and, therefore, that the state law claim was independent of the CBA and was not preempted by section 301 of the LMRA. *Id.* at 406.

Verizon and CWA may argue that the case at bar is controlled by the Supreme Court's decision in *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), in which the Court found state law claims preempted by section 301 of the LMRA. The facts of *Lueck*, however, were so unlike those in the case at bar that *Lueck* in no sense controls the determination of the present case. In *Lueck*, an employee brought a state law action for bad faith against his employer and an insurer that administered a disability insurance plan *included in the CBA*. The Court began its analysis by stating that not every dispute concerning employment or tangentially involving a provision of a CBA is preempted by section 301 or other provisions of federal labor law. *Id.* at 211. However, state law rights and obligations *that do not exist independently of private CBAs* are preempted by those agreements. *Id.* at 213. The Court determined that a claim for bad faith in handling an insurance claim arises from the contract that establishes the insurance coverage, in this case the CBA. *Id.* at 215. The Court found that a cause of action for bad faith under an insurance contract is not distinguishable from the duties set forth in the contract. *Id.* at 218. Therefore, the right asserted by the plaintiff derived from the CBA and was defined by the contractual obligation of good faith. *Id.* Consequently, any attempt to assess liability would involve interpretation of the CBA. *Id.* According to

the Court, when resolution of a state claim is substantially dependent on analysis of the terms of a CBA, the claim must be treated as a section 301 claim or dismissed as preempted by federal labor contract law. *Id.* at 220.

Specifically, the CBA does not prohibit misrepresentations as to an employee's job status. Virginia common law does. The CBA does not require representations of any particular character. Virginia common law requires that if a person makes an affirmative representation knowing that another is relying on that representation, the person making the statement not misrepresent the facts. *E.g.*, *Caperton v. A.T. Massey Coal Co.*, 285 Va. 537, 740 S.E.2d 1 (2013). For these reasons, the Plaintiffs could not have stated a cause of action for breach of contract based upon the misrepresentations alleged in the Complaints. The circuit court had no occasion to interpret the CBA in order to determine whether the Plaintiffs stated tort causes of action for fraud and negligent misrepresentation under Virginia law. Whether or not Verizon actually had a "surplus" of employees within the meaning of the CBA is simply irrelevant to the Plaintiffs' claims. Verizon's purported support for its misrepresentation, a surplus of employees, is not an essential element of the Plaintiffs' claims for fraud and negligent misrepresentation. What is relevant is that Verizon told the Plaintiffs that they were in imminent danger of losing their jobs, and that

they would lose valuable benefits if they did not sign the EISP immediately and resign voluntarily. Interpretation of a CBA is unnecessary, and section 301 of the LMRA does not preempt a state tort cause of action, when an employer uses the terms of a CBA as a pretext to engage in the tortious acts alleged by the plaintiff. *See Martin Marietta Corp. v. Md. Comm'n on Human Relations*, 38 F.3d 1392 (4th Cir. 1994). It is clear that a court need not interpret the CBA in order to resolve the Plaintiffs' tort claims under Virginia common law. In the language of the Court in *TA \c 33 \s "Allis-Chalmers v. Lueck, 471 U.S. 202 (1985)" \l "Lueck*, the present case is one that merely tangentially involves a provision of a CBA.

2. Fourth Circuit Precedent.

Precedent of the U.S. Court of Appeals for the Fourth Circuit further clarifies the fact that the Plaintiff's claims are not preempted by the LMRA. A state tort claim is preempted by section 301 if it is founded on a duty created by a CBA and is without existence independent of the agreement. *White v. Nat'l Steel Corp.*, 938 F.2d 474 (4th Cir. 1991) (section 301 did not preempt state law contract and constructive fraud claims of former union members who had accepted management positions after allegedly being promised the right to return to positions in bargaining units; claims were primarily grounded in individual employment contracts, not in CBAs, and no

interpretation of a CBA was necessary to consider employer's defense that it did not make promises, that any statement it did make did not rise to level of independent employment contract, and that asserted contracts were barred by Statute of Frauds). Even if dispute resolution pursuant to a CBA and state law would both require addressing the same set of facts, a state law claim is independent, and not preempted by section 301, if the claim can be resolved without interpreting the CBA itself. *McCormick v. AT&T Techs.*, Inc., 934 F.2d 531 (4th Cir. 1991). State tort claims are preempted if reference to a CBA is necessary to determine if a duty of care exists or to define the nature and scope of that duty. *Id.* at 536. The bare fact that a CBA will be consulted in the course of state law litigation, however, "plainly" does not require preemption under section 301. *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994); *Foy v. Giant Food, Inc.*, 298 F.3d 284, 287 (4th Cir. 2002). Another U.S. court of appeals has held that a state tort claim arises independently of a CBA and, therefore, is not preempted by section 301 of the LMRA, when the parties to the CBA could not possibly have negotiated an employee's state law right to be free of tortious conduct. *See Hayden v. Reickerd*, 957 F.2d 1506 (9th Cir. 1991) (common-law battery).

Like the Supreme Court, the Fourth Circuit applies the well-pleaded complaint rule, which provides that federal jurisdiction exists only when a

federal question is presented on the face of the plaintiff's properly pleaded complaint, without consideration of any potential defenses. *Harless v. CSX Hotels, Inc.*, 389 F.3d 444 (4th Cir. 2004). Under the well-pleaded complaint rule, an employer cannot convert a state law claim into one preempted by section 301 merely by injecting a defense that may require analysis of a CBA. *Id.* at 450. The court in *Barbour v. Int'l Union*, 594 F.3d 315, *vacated on other grounds*, 640 F.3d 599 (4th Cir. 2011)*Barbour v. Int'l Union*, 594 F.3d 315, *vacated on other grounds*, 640 F.3d 599 (4th Cir. 2011)*Jackson v. Kimel*, 992 F.2d 1318 (4th Cir. 1993)Section 301 did not preempt employee's state law tort claim for intentional infliction of emotional distress alleging that plaintiff's supervisor coerced her into having sexual intercourse; interpretation of CBA was not necessary to determine whether supervisor owed duty to refrain from alleged conduct).

3. Claims Relating to Job Security.

Fraud and misrepresentation claims relating to job security are not preempted by the LMRA under circumstances like those of the case at bar. For example, in *Miller v. Fairchild Industries*, 668 F. Supp. 461 (D. Md. 1987), some former employees filed suit against their former employer, alleging that the defendant publicly promised job security to the plaintiffs, while it planned privately to shut down its plant. The plaintiffs brought state

law claims for fraud and misrepresentation. The court concluded that such claims were not preempted by section 301 of the LMRA, on the basis that the claims were not dependent on the CBA and could be resolved without reference to the CBA. Citing and distinguishing *Martin v. Associated Truck Lines, Inc.*, 801 F.2d 246 (6th Cir. 1986) (discussed below), the *Miller* court explained:

> This case is more analogous to *Anderson* than *Martin*. The plaintiffs have alleged that the defendants misrepresented facts about their job security. However, they do not allege that the defendants violated the bargaining agreement, and it does not appear that resolution of their claims would require interpretation of any term in the agreement. They do not allege injury related in any way to the agreement, and they do not seek remedies provided for in the agreement. Taking plaintiffs' allegations at face value, it appears that their intentional misrepresentation and concealment claims assert rights independent of the collective bargaining agreement and can be resolved without reference to the agreement. Therefore they are not preempted by § 301.

668 F. Supp. at 466 (footnote omitted); *see also Milne Employees Ass'n v. Sun Carriers*, 960 F.2d 1401 (9th Cir. 1991) (employees' fraud claims alleging that employer falsely told them that company would not shut down and that their jobs were secure were not preempted by section 301 because claims did not require interpretation of CBA).

Similarly, in *Kittle v. Prudential Insurance Co. of America*, 102 F. Supp. 2d 1029 (S.D. Ind. 2000), the plaintiff brought state law claims

against his employer for fraudulently inducing the plaintiff to quit in reliance on a promise that he would receive exclusive rights to certain sales territory. The court concluded that the plaintiff's fraud claim did not assert rights created by the CBA, despite a provision in the CBA giving the employer sole discretion in assigning territories. *Id.* at 1035. Therefore, the LMRA did not preempt the plaintiff's claims. *Id.*

Moreover, in *Paradis v. United Technologies*, 672 F. Supp. 67 (D. Conn. 1987), a former employee brought an action against his former employer after his discharge for allegedly refusing to help the employer identify fellow employees who used drugs. The plaintiff's action included state law claims for fraud, deceit, and misrepresentation, based on the allegation that the defendant fraudulently promised the plaintiff that he would not be terminated if he confided in the defendant about his drug abuse problems. The court held that the plaintiff's claims for fraud, deceit, and misrepresentation were not preempted by the LMRA, even though the CBA contained provisions on when just cause existed for terminating an employee. The court explained:

> In Count Three, Paradis alleges that defendant promised him that he would not be terminated, disciplined or otherwise retaliated against if he confided in defendant. Complaint at ¶ 15. His allegation of fraud, deceit and misrepresentation claimed in Count Five are presumably premised on the same factual allegations. *Defendant argues that these claims are inextricably*

> *intertwined with the Collective Bargaining Agreement because they hinge on the terms and conditions of Paradis' Collective Bargaining Agreement.* It argues that plaintiffs are attempting to limit the just-cause provision by claiming that defendant promised not to terminate Paradis for drug usage. Although defendant is correct in noting that Counts Three and Five necessarily call into question the propriety of Paradis' discharge, defendant is incorrect in concluding that that fact thereby preempts plaintiffs' claims. *Plaintiffs are not claiming that defendant represented that drug usage would not constitute a just-cause reason for terminating Paradis, but that defendant would not terminate him if he confided in it, <u>irrespective</u> of whether his drug usage would be considered just cause for his termination. Under that construction of the complaint, plaintiffs need only show that Paradis' termination was contrary to what defendant promised, not that it was unjust.* In response, defendant would merely have to show that it made no such promise. Neither party would have to resort to construing the contract. *Cf. Baldracchi*, 814 F.2d at 105. Plaintiffs rely on promises made independent of the Collective Bargaining Agreement. *Caterpillar.* Counts Three and Five are not preempted and are hereby remanded.

Id. at 70-71 (court's emphasis underlined) (other emphasis added) (footnotes omitted); *see also Borek v. Weinreb Mgmt.*, 933 F. Supp. 357 (S.D.N.Y. 1996) (employee's action seeking declaration that document he signed releasing employer from liability for terminating his employment was void because it was obtained through misrepresentations was not preempted by section 301; action did not implicate CBA because merits could be determined without considering whether plaintiff was discharged without cause in violation of CBA).

To the same effect is *Voilas v. GM Corp.*, 170 F.3d 367 (3d Cir. 1999), wherein employees sued their employer for common-law fraud for intentionally misrepresenting that the plant where the employees worked would be closed, in order to induce the plaintiffs to leave employment voluntarily. The court concluded that the plaintiffs' claim was not preempted by section 301 because it was not directly based on the CBA, and its resolution did not require interpretation of the CBA. *Id.* at 376. The court explained that the employees were arguing not that the employer misrepresented the early retirement agreement, but that the employer lied to them to induce them to accept the early retirement agreement. *Id.*; *see also Aldridge v. DaimlerChrysler Corp.*, 809 So. 2d 785 (Ala. 2001) (former employees' claims against employer for fraudulent misrepresentation and other state law causes of action alleging that plaintiffs were promised preferential rehiring if they participated in voluntary employment termination program were not preempted by section 301, even though program was provided for in CBA; plaintiffs' claims arose from statements allegedly made to employees outside the agreement); *Walton v. UTV of San Francisco, Inc.*, 776 F. Supp. 1399, 1402 (N.D. Cal. 1991) (employee's fraud and misrepresentation claims, based on alleged promises that he could be fired only for good cause, were not subject to the complete preemption doctrine

for claims dependent or based on rights created by a CBA; claims were not based on specific rights created by a CBA, and interpretation of the CBA was not required, even though the term "just cause" was used in the CBA); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217 (3d Cir. 1995) (LMRA did not preempt former employees' state law fraud claims alleging that former employer made false and misleading statements concerning guarantee of continued employment upon which employees relied in decertifying union, notwithstanding contention that analysis of plaintiffs' justifiable reliance required interpretation of CBA; essence of claim was proof of justifiable reliance on separate guarantee, not CBA, and examination of employer's behavior, motivation, and statements did not substantially depend on terms of CBA).

Authority that Verizon and CWA may cite in support of an argument that the LMRA preempts fraud claims involving job security are distinguishable from the facts of the present case. For example, in *Martin*, the misrepresentation could be fraudulent irrespective of the terms of the CBA.

In *Alley v. Quebecor World Kingsport, Inc.*, 182 S.W.3d 300 (Tenn. Ct. App. 2005), the court held that resolution of the plaintiffs' state law claim of misrepresentation based upon their relinquishment of their recall rights

under the CBA "for a pittance of their value," in reliance on the employer's misrepresentation that a plant closing was imminent, was dependent on the terms of the CBA, and was therefore preempted by the LMRA. *Id.* at 301. In so holding, the court stated that an analysis of the plaintiffs' claim would require the court to examine the CBA to determine if such recall rights existed and what they were, and then to examine the subsequent agreement to determine whether the plaintiffs relinquished such rights and were injured thereby. *Id.* at 305.

By contrast, in the present case, the Plaintiffs have not alleged that they lost benefits under the EISP or the CBA as a result of the misrepresentation that their jobs were in serious jeopardy, but that they lost their jobs themselves by agreeing to a so-called "voluntary termination" in reliance upon Verizon's and CWA's misrepresentation. (App. 2-4, ¶¶ 5, 7, 15.) There is no occasion to interpret the CBA to determine what the Plaintiffs' rights were under the EISP since the Plaintiffs' claims are not based on the loss of such rights.

In *Augustin v. SecTek, Inc.*, 807 F. Supp. 2d 519 (E.D. Va. 2011), *appeal dismissed*, 465 F. App'x 243 (4th Cir. 2012), the court held that the plaintiff's common-law claims for fraud and constructive fraud were preempted by the LMRA, when the plaintiff alleged that the defendant

made misrepresentations in a letter terminating the plaintiff. The court found that the misrepresentations regarding the reasons for plaintiff's termination were inextricably intertwined with the CBA, which outlined the requirements for just cause for terminating an employee. *Id.* at 525. The court cited Virginia authority to the effect that in a fraud action, when the conduct at issue related to a duty arising out of contract, the claim sounds in contract, not in tort. *Id.*

In the present case, by contrast, the misrepresentation that the Plaintiffs' jobs were in serious jeopardy did not relate to a duty arising out of the CBA. The Plaintiffs are claiming not that they were terminated in violation of the requirements of the CBA, but that Verizon and CWA fraudulently misrepresented to the Plaintiffs the status of their jobs in order to give the Plaintiffs no choice but to resign. Virginia common law, not the CBA, proscribed the making of such a false representation. For these reasons, the provisions of the CBA have no applicability to the Plaintiffs' claims, and the CBA is not inextricably intertwined with such claims.

In *Clark v. Newport News Shipbuilding & Dry Dock Co.*, 937 F.2d 934 (4th Cir. 1991), the court held that an employee's state law cause of action against his union for negligent representation after the plaintiff's termination was more appropriately characterized a claim of unfair representation and,

therefore, was preempted by section 301 of the LMRA. In the present case, the Plaintiffs have made no such claim.

4. Claims Relating to Severance or Early Retirement Benefits.

There are numerous federal decisions finding a lack of preemption under section 301 in cases involving representations made as to severance or early retirement benefits. For example, in *Muenchow v. Parker Pen Co.*, 615 F. Supp. 1405 (W.D. Wis. 1985), the plaintiff employees brought state law claims of deceptive misrepresentation against their employer, who allegedly misrepresented maximum employment levels to induce the plaintiffs to accept severance benefits in exchange for termination of their seniority rights. The court concluded that the plaintiffs' claims were not preempted by section 301, because the plaintiffs relied upon state rules existing independently of the CBAs involved, which could not be prospectively waived or altered by such agreements. *Id.* at 1415.

> Similarly, the plaintiff former employees in Felix v. Lucent Technologies, 387 F.3d 1146 (10th Cir. 2004), sued their employer in state court for fraud arising out of alleged misrepresentations made by the employer to encourage the plaintiffs to take an early retirement benefits package. The court held that the plaintiffs' state law fraud claim was not preempted by section 301 because the plaintiffs were asserting rights independent of the CBA and resolution of their claim would not require interpretation of the CBA. The court explained: Defendant in the instant case argues that Plaintiffs' fraud claims are simply an attempt to vindicate their

rights under the February 19 Memorandum of Agreement ("MOA") (modifying existing CBA), which set forth their early retirement benefits package. *However, Plaintiffs do not assert any violation of contractual rights under any labor agreement, but rather sue to vindicate their right not to be defrauded. They are thus asserting rights independent of the contract and are not preempted by § 301.*

Plaintiffs' claims are very similar to those asserted by the plaintiff in *Wynn v. AC Rochester*, 273 F.3d 153 (2d Cir.2001) (per curiam). In Wynn, the plaintiff was not completely preempted by § 301 of the LMRA because "[h]is claim [was] not that GM did not provide what the CBA required, but that GM officials misled him into selecting one option by misrepresenting the availability of the other." *Id.* at 159. Another analogous case was also decided by the Second Circuit in *Foy*, where the plaintiffs alleged that their employer made false promises regarding transfer opportunities prior to lay-offs, and the court found no removal jurisdiction under § 301 of the LMRA. 127 F.3d at 234-35. "State law—not the CBA—is the source of the rights asserted by plaintiffs: the right to be free of economic harm caused by misrepresentation." *Id.* at 235. Similarly, Plaintiffs in the instant case are asserting rights independent of their labor agreements with Defendant.

Defendant also argues that Plaintiffs' fraud claims will require us to interpret the CBA (through the February 19 MOA, which modified the CBA). Defendant correctly points out that Oklahoma law requires as an element of fraud "reasonable reliance" on misrepresentations, and that "an action for fraud may not be predicated on false statements when the allegedly defrauded party could have ascertained the truth with reasonable diligence." *Silver v. Slusher*, 770 P.2d 878, 882 n. 8 (Okla.1988). *Defendant insists that because Plaintiffs allege misrepresentations regarding the MOA and CBA, we will have to interpret those contracts in order to ascertain whether Defendant's representations were actually false.*

However, *Defendant misunderstands the nature of Plaintiffs' claims.* Plaintiffs do not allege that Defendant made

> any misrepresentations about the terms or application of the MOA or CBA. Rather, *they allege that Defendant lied in informing them regarding the choice between retiring under the June plan or waiting until later. Therefore, there is simply no need to interpret the MOA or CBA in order to ascertain whether Defendant's representations were false*, and the actual meaning of the CBA and MOA is not in dispute. Just as in *Foy*, Plaintiffs' state law misrepresentation claims "depend upon the employer's behavior, motivation, and statements, as well as plaintiffs' conduct, their understanding of the alleged offer made to them, and their reliance on it. Reference to the CBA may be needed, but state law will play no part in determining what the parties agreed to in the CBA . . . ." 127 F.3d at 235 (citation omitted).

Id. at 1164-65 (court's emphasis underlined) (other emphasis added).

In *Wells v. GM Corp.*, 881 F.2d 166 (5th Cir. 1989), former employees brought an action alleging that their former employer had fraudulently induced them to accept voluntary termination of an employment plan by falsely indicating that the plaintiffs would be eligible for rehiring. The court concluded that the plaintiffs' fraud claims were not preempted by the LMRA. *Id.* at 174. In so holding, the court rejected the employer's argument that the fraud claims required the court to interpret the CBA:

> GM presents a forceful argument that resolution of plaintiffs' fraudulent misrepresentation claims requires interpreting the terms of the collectively-bargained VTEP [Voluntary Termination of Employment Plan]. *Its claim is that in order to determine whether GM falsely represented the consequences of accepting the VTEP, there must be an examination and interpretation of the VTEP to determine what a*

truthful representation would have been. In such a case, it argues, preemption occurs. *See Lingle*.

However, GM's position is flawed in two important respects: First, it is not the case that section 301 preemption occurs whenever a collectively-bargained agreement becomes relevant to a dispute of this nature; rather, the resolution of the particular dispute must be "*substantially* dependent upon analysis of the terms" of the collective bargaining agreement. *Lueck*, 471 U.S. at 220, 105 S.Ct. at 1915. Second, the argument rests upon an unsound premise: namely, that the plaintiffs' claim is that GM's representatives fraudulently misrepresented what was in the contract. *Instead, as plaintiffs observe, their claim was that GM fraudulently induced individual employees to opt for the VTEP by making an extraneous promise concerning their future employment eligibility. They do not claim that the promise had anything to do with the contents of the VTEP.*

Thus, plaintiffs urge that they are not relying upon any contract at all, but only upon an inducement that was separate and apart from the VTEP, was not covered by it, and was never a subject of negotiation. It is GM that claims, as a defense, that the contract contemplates, albeit not expressly, the circumstances that eventually occurred and therefore must be "interpreted" in order to resolve these claims.

But that is not a defense to a fraudulent-inducement claim in this context. The dispute is a highly fact-bound one concerning what was said, or promised, at the meeting. *The defense to such a claim is not that "the VTEP might be construed to say otherwise"; rather, it is that "we made no such representation" or that "no such representation could have been made given the VTEP's provisions."*

. . . .

Because no governing provision can be found in the VTEP, resolution of the plaintiffs' claims is not inextricably intertwined with the agreement in the sense described by the

> *Lueck/Hechler/Lingle* line of cases. Under these narrow circumstances, the rationale supporting section 301 preemption, i.e., avoiding the danger of inconsistent interpretations of collectively-bargained labor agreements, is not at work. Mississippi has a deeply-rooted interest in protecting its citizens from fraudulent conduct, and unlike the federal scheme, provides remedies designed to compensate the victims of fraud for economic harm they may have suffered as a result of their reliance upon false promises. *See Moore*, 739 F.2d at 317 (Fagg, J., dissenting); *Berkline*, 453 So.2d at 702. Accordingly, we conclude that there is no federal preemption here.

Id. at 173-75 (court's emphasis underlined) (other emphasis added) (footnote omitted.)

5. Other Claims.

Other cases not involving job security, severance, or early retirement benefits also support the conclusion that section 301 does not preempt the Plaintiffs' claims in the case at bar. For example, in *Romero v. San Pedro Forklift, Inc.*, 266 F. App'x 552 (9th Cir. 2008), the plaintiff sued his former employer for fraud in misrepresenting that a pension plan was in place and was being funded by the employer. The court held that section 301 did not preempt the plaintiff's state law claims for fraud, promissory fraud, and fraudulent inducement, because none of his claims required an interpretation of the CBA between the parties. *Id.* at 556.

Similarly, in *Foy v. Pratt & Whitney Group*, 127 F.3d 229 (2d Cir. 1997), the plaintiff employees alleged that the employer induced them to

forgo a limited transfer opportunity by falsely assuring them that another transfer opportunity would be given at some later time prior to a layoff. The court held that the plaintiffs' misrepresentation claims did not require interpretation of the CBA and therefore were not preempted by section 301. *Id.* at 233. The court explained that resolution of the plaintiffs' claims required consideration of the employer's behavior, motivation, and statements, as well as the employees' conduct, their understanding of the alleged statement and their reliance on it, but not interpretation of the CBA so as to result in preemption. *Id.* at 235. The court explained:

> Pratt & Whitney's argument proves too much: a collective bargaining agreement can always be consulted to determine whether an employee is justified in relying upon an employer's promise. The argument comes down to the idea that an employee is never justified in relying upon any promise by the employer that is not enforceable under a CBA. If that were so, the existence of a CBA would require preemption in all cases involving representations made to employees. But the Supreme Court has recently clarified that § 301 preemption applies only when necessary
>
> > to assure that the purposes animating § 301 will be frustrated neither by state laws purporting to determine questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, nor by parties' efforts to renege on their arbitration promises by relabeling as tort suits actions simply alleging breaches of duties assumed in collective-bargaining agreements.

> *Livadas*, 512 U.S. at 122-23, 114 S.Ct. at 2078. Our examination of the provisions of the CBA cited by Pratt & Whitney assures us that the purposes behind § 301 will in no way be thwarted by allowing plaintiffs to go forward with their state law claims in state court.

Id. at 234; *see also Wynn v. AC Rochester*, 273 F.3d 153 (2d Cir. 2001) (Section 301 did not preempt state fraud claim arising from employer's alleged misrepresentation of laid-off employee's rights under CBA; only dispute was whether alleged misrepresentations were made regarding availability of one option set forth in CBA, and there was therefore no need to interpret CBA); *DeSanzo v. Titanium Metals Corp.*, 351 F. Supp. 2d 769 (S.D. Ohio 2005) (because proof of former employee's state law causes of action, including misrepresentation, did not require an interpretation of the terms of the CBA, his claims against employer, that were based upon his contention that his timely decision to remain in management was the product of certain representations made to him that were actionable under state law, were not preempted by section 301); *Beals v. Kiewit Pac. Co.*, 114 F.3d 892 (9th Cir. 1997) (former employee's claim that employer negligently misrepresented that he could not be terminated for lack of work did not require interpretation of terms of CBA and was not preempted by section 301); *Dollear v. G.F. Connelly Mech. Contractors, Inc.*, 355 F. Supp. 2d 937 (N.D. Ill. 2005) (LMRA did not preempt retiree's state court

action against former employer alleging fraudulent misrepresentations regarding the payment of bonuses under individual incentive contract with employer; claims were not predicated in any respect on CBA but rested solely on incentive contract, which did not depend on CBA).

6. The CBA Is Irrelevant to the Falsity and Reliance Elements of the Plaintiffs' Claims.

Verizon and CWA may attempt to argue that the element of the Plaintiffs' claims that Verizon and CWA made a false representation requires interpretation of the CBA. This is incorrect. In their Complaints, the Plaintiffs alleged that Verizon and CWA misrepresented that the Plaintiffs' "employment was in serious jeopardy" and that they would have to make an immediate decision as to whether to accept the EISP. (App. 2.) The Plaintiffs did not allege that Verizon and CWA made any representation about whether they were "surplus" employees. (App. 2.) Whether or not the Plaintiffs were "surplus" employees, within the meaning of the CBA, is not relevant to the Plaintiffs' claims for fraud and negligent misrepresentation. The status of the Plaintiffs' jobs was subject to misrepresentation by Verizon and CWA regardless of whether they were "surplus" employees. For example, even if the Plaintiffs were "surplus" employees within the meaning of the CBA, the Plaintiffs' jobs may not have been "in serious jeopardy." This possibility is supported by the fact that

less than a month before representing to the Plaintiffs that their jobs were "in serious jeopardy" and while they were aware of the fact that Verizon had 12,000 "surplus" employees, Verizon and CWA told the Plaintiffs that given their seniority, the Plaintiffs' jobs would not be in jeopardy. (App. 2; Tr. 3.) The Plaintiffs' allegations also include the possibility that Verizon and CWA consciously avoided using the term "surplus" in making the representation to the Plaintiffs, and that such conduct was itself fraudulent. What the Plaintiffs have alleged is that Verizon and CWA misrepresented to them that their jobs were in serious jeopardy, irrespective of the reason why their jobs were at such risk.

For the same reasons, in the case at bar, interpretation of the CBA would not assist in determining whether the Plaintiffs have satisfied the reliance element of their claims for fraud and negligent misrepresentation. In *Williams v. NFL*, 582 F.3d 863 (8th Cir. 2009), the court concluded that the plaintiffs' claims for fraud, constructive fraud, and negligent misrepresentation, alleging that the league failed to disclose to the plaintiffs that a certain dietary supplement contained a banned substance, were preempted by section 301 because the question of whether the plaintiffs reasonably relied on the asserted lack of disclosure could not be ascertained independently of the terms on the league's drug-testing policy incorporated into the CBA.

Here, the Plaintiffs have alleged that they relied on the statement by Verizon and CWA that their jobs were in serious jeopardy. Unlike in *Williams*, reliance can be determined solely from the making of the alleged misrepresentation and the Plaintiffs' acts in response. There is simply no occasion for interpreting the CBA in order to evaluate the element of reliance.

7. Application of Relevant Authority to Plaintiffs' Claims.

In the case at bar, the Plaintiff's claims are common-law tort claims for fraud and negligent misrepresentation, which are not defined by any contractually created obligation or a duty that does not exist independently of the CBA. The Plaintiff has alleged that Verizon and CWA stated to the Plaintiff that his job was in serious jeopardy and that he would lose his benefits if he did not immediately sign the EISP that Verizon presented to him. The Plaintiff relied on such statement in signing the EISP, which contained a provision by which the Plaintiff voluntarily resigned his employment with Verizon. As the foregoing authority makes clear, there is no need to interpret the CBA between Verizon and CWA in order to resolve the issue of whether the Plaintiff was defrauded by Verizon's and CWA's statement. As explained above, a claim based upon a misrepresentation involving a CBA does not require a court to interpret that agreement in

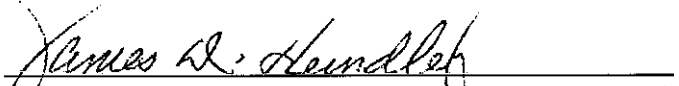
order to ascertain whether the employer's representations were actually false. *Felix*, 387 F.3d at 1164-65. As in *Felix*, the Plaintiff in the case at bar is alleging not that Verizon and CWA made misrepresentations about the content or meaning of the "surplus" employee provision of the CBA or about whether that provision, if triggered, allowed Verizon to terminate some employees, but that Verizon and CWA lied to him regarding the choice that the then existing circumstances presented. In other words, the Plaintiff is not alleging that Verizon and CWA misrepresented the CBA or the EISP, but he is claiming that Verizon and CWA made a false representation to him to induce him to accept the EISP. *Voilas*, 170 F.3d at 376. Accordingly, as the *Paradis* court recognized, the Plaintiff need only show that the harm he suffered was caused by the misrepresentation, not that it violated the CBA. *Paradis*, 672 F. Supp. at 70-71. Under such circumstances, the defense of Verizon and CWA would be a showing that they did not make the alleged misrepresentation. *Id.* For this defense, it is not necessary to resort to construing the CBA. *Id.* As the court in *Wells* observed, the defense to such a claim is not that "'the [EISP] might be construed to say otherwise'; rather, it is that 'we made no such representation' or that 'no such representation could have been made given the [EISP's] provisions.'" 881 F.2d at 174.

For all these reasons, the circuit court erred in determining that the Plaintiffs' common-law claims for fraud and negligent misrepresentation were not independent of the CBA and that the court would be required to interpret the CBA in order to resolve such claims. Upon this error, the circuit court incorrectly concluded that the Plaintiffs' claims are preempted by section 301 of the LMRA and dismissed the Plaintiffs' Complaints.

CONCLUSION

For all the foregoing reasons, the Appellants, Richard Anthony, et al., respectfully request that this Honorable Court reverse the judgment of the circuit court, reinstate the Plaintiffs' Complaints, and remand their cases to the circuit court for further proceedings consistent with such an order.

Respectfully submitted,
Richard Anthony, et al.

By: 

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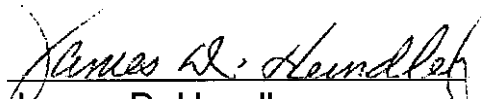

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