IP 99-1599-C T/K Wilcher v. Kroger
Judge Tim A. Baker Signed on 2/6/02

INTENDED FOR PUBLICATION AND PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

WILCHER, JAMIE L,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
THE KROGER CO,	)	CAUSE NO. IP99-1599-C-T/?
WILSON, CARLA, IN HER	)	
REPRESENTATIVE AND INDIVIDUAL	)	
CAPACITY,	)	
	)	
Defendants.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMIE L. WILCHER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CAUSE NO. IP 99-1599-C -T/K
	)	
THE KROGER CO., and	)	
CARLA WILSON	)	
in her Representative and	)	
Individual Capacity	)	
	)	
Defendants.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION REGARDING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In September 1997 Plaintiff Jamie L. Wilcher, a food service manger at one of Defendant Kroger's Noblesville, Indiana stores, was indefinitely suspended, then terminated for allegedly violating Kroger's Employee Purchase Policy when she purchased items at cost for a bar she and her husband owned and operated. In response, Wilcher filed a grievance pursuant to the collective bargaining agreement (CBA), claiming her termination did not comply with the terms of the CBA since she was not terminated for "proper cause." After Step 3 of the grievance process, the local union decided not to pursue her claim to arbitration.

Two years later, on September 8, 1999, Wilcher filed suit in the Hamilton Circuit Court against Kroger and Carla Wilson[1] her direct supervisor, alleging the common law torts of actual

[1] Defendants correctly note that in the complaint Wilcher makes no distinction between Kroger and Wilson, referring to them collectively as "Kroger." However, the Court will address Kroger and

fraud, constructive fraud, and promissory estoppel.[2] Defendants removed the action to federal court, asserting in part, that Wilcher's claims are preempted by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185(a).

There are two motions before the Court: (1) Wilcher's motion to strike portions of an affidavit submitted in support of Defendants' motion for summary judgment; and (2) Defendants' motion for summary judgment. For the reasons set forth below, the Magistrate Judge recommends that Wilcher's motion to strike be GRANTED, and that Defendants' motion for summary judgment also be GRANTED.

I. Background

Viewing the record in a light most favorable to Wilcher reveals the following. On July 28, 1980, Wilcher began her employment with Kroger. Throughout the duration of her employment, Wilcher was a bargaining unit employee, belonging to the United Food and Commercial Worker's Union. The terms and conditions of a CBA between Kroger and the union governed Wilcher's employment during her 17 years of service. She was also subject to the policies and procedures outlined in the Kroger Associate Handbook.

Wilson in this entry as "Defendants" when referring to them collectively.

[2] In Section C of their opening brief, Defendants analyze why they believe that Wilcher's union, the United Food and Commercial Worker's Union, did not breach its duty of fair representation in handling her grievance. However, Wilcher did not name the union as a defendant in her complaint. Therefore, any claims that Wilcher may have had against the union are time-barred and waived. Accordingly, the Court need not address the issue of whether the union breached its duty of fair representation.

Wilcher worked in various positions, including as a manger and supervisor. Eventually Wilcher obtained the position of food service manager and was responsible for four departments: bakery, cheese shop, deli, and restaurant. Prior to her termination, Wilcher reported to Carla Wilson, Kroger's "perishable manager," and Mike McNulty, the store manager. [Wilcher Dep., p. 11].

In July 1997, Wilcher was allegedly given permission by Wilson to purchase sandwich containers at cost for use in a bar that Wilcher and her husband owned and operated outside of work. Wilson allegedly told Wilcher that she did not have a problem with such purchases as long as she did not "advertise it" to other store employees. Id. at 97-98. To determine the cost of an item, Wilcher utilized Kroger's "cost figures" consulted the Deli Merchandising and calculated the cost of the item based on its weight and volume, or took into consideration that Kroger usually marked up their products by 50%. Subsequent to the July purchase, Wilcher made six more purchases at cost.

The Kroger Associate Handbook's provision entitled "Employee Purchase Policy" states in pertinent part that "[a]ll items and products being purchased by an associate must have previously been offered for sale to the general public at the same price as being paid by an associate." [Dep. Ex. 11-12]. Further, the policy states that "***theft of any kind and/or violation of the Associate Purchase Policy . . . is grounds for discipline up to and including termination[.]***" Id. (emphasis in original). Wilcher alleges that Wilson gave her and another Kroger employee permission to purchase items at cost.

On September 8, 1997, Wilcher purchased at cost two boxes of chicken and four boxes of condiment packages. As Wilcher walked out of the store with the items, Wilson confronted her. Wilcher reminded Wilson that she had given her permission to purchase Kroger items at cost. Wilson

denied that she knew Wilcher was making these purchases, suspended her employment indefinitely, and later terminated her for violation of the Employee Purchase Policy.

During her indefinite suspension, Wilcher filed a grievance pursuant to the CBA alleging that Kroger suspended her without just cause in violation of Article 4 of the CBA. [Dep. Ex. 4]. On September 15, as required by Article 4 of the CBA, Kroger and the union held a Step 3 meeting. On September 24, Kroger denied Wilcher's grievance and converted her indefinite suspension into a termination. Thereafter, the union informed Wilcher of its decision not to arbitrate her claims. Wilcher appealed this decision to the Union Appeals Committee which, on October 17, 1997, affirmed its decision not to pursue her claims to arbitration.

II. Discussion

A. Motion to Strike

Rule 56 provides that affidavits filed in support of a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56; Markel v. Board of Regents of Univ. of Wisc. Sys., _ F.3d _, 2002 WL 5692, *4 (7th Cir. Jan. 3, 2002). See also Bullman v. Penske Truck Leasing Co., L.P., 2000 WL 943877, *3 (S.D. Ind. 2000) (Tinder, J.) ("Rule 56 requires that a supporting affidavit designed to establish genuine issues of fact in a summary judgment proceeding be based on personal knowledge and set forth facts that would be admissible into evidence at trial pursuant to the Federal Rules of Evidence."); Medina v. City of East Chicago, Indiana, 2001 WL 1587880, *7 (N.D. Ind. 2001) ("The

Seventh Circuit is clear on the following point; summary judgment may not be defeated by evidence that is not admissible at trial.").

Here, Wilcher moves to strike paragraph 5 of Wilson's affidavit claiming that it contains inadmissible hearsay.[3] Specifically, paragraph 5 of the affidavit states that Wilson was "informed" by Patty Cast, one of Wilcher's subordinates, that while Wilcher was on vacation, Wilcher called Cast and asked her to order some specific items from Kroger's warehouse for purchase upon her return from vacation. [Wilson Affid., ¶ 5].

The Court agrees that paragraph 5 of the Wilson affidavit contains hearsay. Under Fed. R. Evid. 801, hearsay "is a statement, other than one made by the declarant ... offered in evidence to prove the truth of the matter asserted." Baron v. City of Highland Park, 195 F.3d 333, 339 (7th Cir. 1999); Howard-Ahmad v. Chicago School Reform Bd. of Trustees, 161 F. Supp.2d 857, 865 (N.D. Ill. 2001). Wilson's statements are proffered to prove that Cast informed her of Wilcher's alleged improprieties. Since the statement is made by a person other than the declarant to prove the truth of what it asserts, the statement is hearsay. In addition, none of the exceptions to the hearsay rule apply. See Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 562 (7th Cir. 1996) ("a party may not rely upon inadmissible hearsay in an affidavit or deposition to oppose a motion for summary judgment."); Pfeil v. Rogers, 757 F.2d 850, 862 (7th Cir. 1985) (affidavit testimony containing legal

[3] In her motion to strike brief, Wilcher seeks to strike Wilson's entire affidavit, calling into question the authenticity of the signature page since it was sent by facsimile and contained a different font than the body of the affidavit. In response, Defendants submitted by motion, and the Court granted them leave to file, the original signature page. Therefore, any defects that may have arisen from Defendant filing a faxed signature page were cured.

argument, unsupported suspicions and hearsay should be disregarded).

Accordingly, Wilcher's motion to strike paragraph 5 of Wilson's affidavit is GRANTED.

B. Summary Judgment Standard

A grant of summary judgment is appropriate if the pleadings, affidavits, and other supporting materials leave no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Hall v. Bodine Electric Co., _ F.3d _, 2002 WL 15815, *3 (7th Cir. Jan. 8, 2002); Fed. R. Civ. P. 56(c). To determine whether any genuine fact exists, the Court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions, and affidavits that are part of the record. First Bank & Trust v. Firstar Information Services, Corp., 276 F.3d 317, 321 (7th Cir. Dec. 31, 2001). Thus, in ruling on a summary judgment motion, the district court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Oest v. Ill. Dep't of Corrections, 240 F.3d 605, 610 (7th Cir. 2001), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The Court must view the evidence making all reasonable and justifiable inferences in favor of the non-moving party, Wilcher. Vukadinovich v. Board of School Trustees of North Newton School Corp., _ F.3d _, 2002 WL 75883, *4 (7th Cir. Jan. 22, 2002), citing Cent. States, Southeast & Southwest Areas Pension Fund v. White, 258 F.3d 636, 639 (7th Cir. 2001); Nawrot v. CPC Intern., _ F.3d _, 2002 WL 27528, *4 (7th Cir. Jan. 11, 2002), citing Anderson, 477 U.S. at 255. The Court is not permitted to conduct a paper trial on the merits of the claim. Ritchie v. Glidden Co., 242 F.3d 713, 723 (7th Cir. 2001).

C. Section 301 Preemption

Section 301 of the Labor-Management Relations Act (LMRA) of 1947 provides in relevant part:

> 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....

Vorhees v. Naper Aero Club, Inc., 272 F.3d 398, 403 (7th Cir. 2001), quoting 29 U.S.C. § 185 (a).

Because the Court is faced with state common law claims, the Court must determine whether the LMRA preempts them. The LMRA preempts a state law claim under two circumstances. First, a state law claim may be displaced if resolution of the claim "requires the interpretation of a collective bargaining agreement." Filippo v. Northern Indiana Public Service Corp., Inc., 141 F.3d 744, 750 (7th Cir. 1998), quoting Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 413 (1988). Second, where the right is created by state law and not the collective bargaining agreement, a state claim is preempted if application of the law is "substantially dependent on analysis of a collective bargaining agreement." Caterpillar, Inc. v. Williams, 482 U.S. 386, 394 (1987); International Brotherhood of Electrical Workers v. Hechler, 481 U.S. 851, 859 n.3 (1987) (same). The purpose of Section 301 preemption is to "fashion a body of federal common law to be used to address disputes arising out of labor contracts." Allis-Chalmers Corp. v. Lueck, 471

U.S. 202, 210 (1985). Otherwise, state courts interpreting the meaning of collective bargaining agreements "could lead to inconsistent results in violation of uniform federal labor-law principles." Sizer v. Rossi Contractors, 2000 WL 116081, *2 (N.D. Ill. 2000), citing Local 174 Teamsters, Chauffeurs, Warehousemen & Helpers of Amer. v. Lucas Flour Co., 369 U.S. 95, 104 (1962); Lingle, 486 U.S. at 405-06 ("This broad preemption is based upon the need for uniform interpretation of collective bargaining agreements through labor arbitration.").

However, claims that are independent of the collective bargaining agreement or which tangentially involve a provision of a collective bargaining agreement are not preempted. See, e.g., Livadas v. Bradshaw, 512 U.S. 107, 123 (1994); Lueck, 471 U.S. at 211-12; Atchley v. Heritage Cable Vision Associates, 101 F.3d 495, 499 (7th Cir. 1996). See also Caterpillar, 482 U.S. at 395 ("a plaintiff covered by a collective bargaining agreement is permitted to assert legal rights independent of that agreement, including state-law contract rights, so long as the contract relied upon is not a collective bargaining agreement.").

Wilcher claims she did not bring her complaint to challenge whether buying the products at cost was a "proper cause" for termination. Rather, she argues because she received express permission from Wilson to purchase products at cost, she did not commit a violation of company rules, rendering her termination improper. [Pl. Opp., p. 10]. On the other hand, Defendants claim that "in determining whether [Defendants] breached any promise or committed any fraud in terminating her employment for violation of its employee purchase policy, the Court will be obligated to interpret the terms of the Management Rights clause contained in the CBA and the company rules incorporated by [it]." [Defs.' Br., pp. 11-12]. The Court agrees with Defendants.

Since Wilcher was a bargaining unit employee, she was subject to the terms of Article 3 of the CBA, entitled "MANAGEMENT'S RIGHTS." It provides in relevant part:

> The management of the business and the direction of the working forces, including the right to plan, direct and control store operations, hire, suspend or discharge for proper cause . . . are vested with the Employer....

[Dep. Ex. 2].

Therefore, under the terms of the CBA, Wilcher could only be terminated for "proper cause." Kroger's stated reason for terminating Wilcher was for violation of the employee purchase policy. [Dep. Exs. 3, 5]. After unsuccessfully challenging her termination, and the union declining to pursue her case to arbitration, Wilcher filed suit for the common law claims of actual fraud, constructive fraud, and promissory estoppel. Wilcher claims that Wilson's statements to her that it was permissible for her to purchase items at cost falls outside the CBA since "the issue is whether express permission [to purchase items at cost] was granted, not whether [Wilcher] was terminated for a proper cause." [Pl. Opp., p. 10]. These issues are indistinguishable in that the claims Wilcher asserts are challenging her termination that require an examination of the "proper cause" provision in the CBA. See Chapple v. National Starch and Chemical Co. and Oil, 178 F.3d 501, 508 (7th Cir. 1999) (whether plaintiffs were wrongfully discharged "would require a court to decide if the employer was acting within the scope of the management rights clause of the collective bargaining agreement."). In reaching this conclusion, the Court finds Wilcher's deposition testimony compelling. In her deposition, she admits that in this present action, she is challenging the sufficiency of the proper cause provision in Defendants' decision to terminate. She testifies:

> Q: Okay. Your grievance, you claim you were wrongfully dismissed from Kroger;

is that right?

A: Yes

Q: That the company did not have proper cause to terminate you under the labor agreement; is that right?

A: That they didn't have proper cause because I was given express [sic] from Carla.

Q: Okay. You are claiming in [this] lawsuit that Kroger should not have terminated you; correct?

A: Yes.

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Q: Now, in this lawsuit, you are alleging . . . that Kroger didn't have proper cause to terminate you because of what you say you were told by your supervisor?

A: Yes.

Q: So you disagree with Kroger's interpretation of proper cause?

A: Yes.

[Wilcher Dep., pp. 28, 30-31].

Although Wilcher does not bring a common law claim for misrepresentation, her claims center on alleged misrepresentations made by her supervisor. Courts faced with this situation in a collective bargaining setting have held that the claim is preempted by section 301. See, e.g., Smith v. Colgate-Palmolive Co., 943 F.2d 764, 768- 71 (7th Cir. 1991) (§ 301 preempted suit by 22 former employees claiming that employer had fraudulently induced them to move from New Jersey to Indiana under collective bargaining agreement transfer option provision, by false assurances of stable

employment); Dougherty v. American Tel. and Tel. Co., 902 F.2d 201 (2nd Cir. 1990) (plaintiffs claimed that defendant's promises induced them to transfer by failing to advise them of plans for or possibilities of work force reductions and consolidations after divestiture; Seventh Circuit affirmed granting of summary judgment on fraud and negligent misrepresentation claims); Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044, 1049 (9th Cir. 1987) (claims of fraudulent misrepresentation preempted).

Similarly, in claims of fraud where there is a CBA in place, courts have invoked the preemptive effect of Section 301. See, e.g., Gibson v. AT & T Technologies, 782 F.2d 686, 688-89 (7th Cir.), cert. denied, 477 U.S. 905 (1986) (state court fraud claim preempted by section 301 when it fell under the terms of the CBA); Talbot v. Robert Matthews Distributing Co., 961 F.2d 654, 661-62 (7th Cir. 1992) (Seventh Circuit held that an Illinois common law fraud count was preempted by Section 301 of the LMRA); Servillon v. Pacific Gas and Elec. Co., 960 F.2d 152, 1992 WL 74413, *2 (9th Cir. 1992) ("[t]he 'just cause' standard for discharge of an employee is contained in the CBA. Since the resolution of the claim for fraud is dependent upon analysis of the CBA, the claim is preempted by section 301.").

With regard to claims of promissory estoppel in a CBA setting, the result is the same – preemption. See, e.g., Doll v. U.S. West Communications, Inc., 85 F. Supp.2d 1038,1044 (D. Colo. 2000) (promissory estoppel claim "completely preempted by Section 301"); Henderson v. Merck & Co., Inc., 998 F. Supp. 532, 539 (E.D. Pa. 1998) ("detrimental reliance claims will require interpretation of the collective bargaining agreement, and, therefore, are preempted by Section 301"); Hamilton v. Vimco Mfg. Co., 1990 WL 67163 (E.D. Pa. 1990) (holding plaintiff's breach of contract

claim preempted by Section 301 where court had to interpret dismissal provisions of collective bargaining agreement in order to assess plaintiff's argument that he was discharged in violation of his alleged independent employee handbook contract); International Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW v. Loral Corp., 873 F. Supp. 57, 65 n. 6 (N.D. Ohio 1994) ("Pendent state law claims of promissory estoppel must be dismissed as preempted by Section 301.").

The damages Wilcher seeks resemble those of a wrongful discharge claim falling under the CBA. For instance, in her complaint, Wilcher describes her damages are a result of her "termination." [See Complaint, ¶¶ 51-52, 61, 71]. In her prayer for relief, she seeks punitive damages "to deter the Defendant from unjustly dismissing . . . other similarly situated employees," and seeks reinstatement. Id. at ¶¶ C, D. As to her punitive damage claim, to determine whether Defendant's conduct was extreme or outrageous requires an interpretation of the CBA. See Chapple, 178 F.3d at 508, citing Filippo, 141 F.3d at 750 (to determine whether the company's conduct was "extreme or outrageous would necessarily require an interpretation of the CBA.").

Finally, Wilcher's claims were heard through the union grievance process. After Step 3, the union decided to not pursue her case to arbitration, a decision upheld in the union's appeal process. "Generally, courts are reluctant to usurp the union's function of construing a CBA, and therefore [the Court is] highly deferential in reviewing a union's actions, and will not substitute [the] judgment for that of the union, even if, with the benefit of hindsight, it appears that the union could have made a better call." McLeod v. Arrow Marine Transport, Inc., 258 F.3d 608, 613-14 (7th Cir. 2001) (internal citations and quotations omitted).

Wilcher's claims are substantially dependent on an analysis of the terms of the CBA. A court will be required to determine whether her employer's conduct was authorized by the explicit or implicit terms of the agreement. Therefore, the Court holds that Wilcher's claims are preempted. [4]

D. Statute of Limitations

Even if Wilcher could proceed on her common law claims, they are barred because they are untimely. Section 301 claims are subject to a six-month statute of limitations. See DelCostello v. International Broth. of Teamsters, 462 U.S. 151, 169-70 (1983). The six-month statute of limitations begins to run "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation]." Sizer v. Rossi Contractors, 2000 WL 116081, *3 (N.D. Ill. 2000), quoting Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299, 304 (7th Cir. 1983).

In this case, the record reveals that Wilcher knew by October 20, 1997 that she had exhausted her appeal rights under the CBA because the union appeals committee notified her of its intention not pursue her case to arbitration. [Wilcher Dep., pp. 31-32]. However, she did not file the present action until September 8, 1999, approximately 23 months after receiving notification of the union's decision. Therefore, her claims are barred by Section 301's statute of limitations.

III. Conclusion

Paragraph 5 of Wilcher's affidavit contains inadmissible hearsay, and therefore the Magistrate

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[4] Since Wilcher's common law claims are preempted, it is not necessary for the Court to address the merits of these claims.

Judge recommends that Wilcher's motion to strike be GRANTED. However, Wilcher's claims are preempted by Section 301 of the LMRA. These claims are also untimely. Accordingly, the Magistrate Judge recommends that Defendant's motion for summary judgment also be GRANTED.

Any objections to the Magistrate Judge's Report and Recommendation shall be filed with the Clerk in accordance with 28 U.S.C. § 636 (b)(1), and failure to file timely objections within the ten days after service shall constitute a waiver of subsequent review absent a showing of good cause for such failure.

So ordered.

DATED this 6th day of February, 2002.

Tim A. Baker
United States Magistrate Judge
Southern District of Indiana

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