

STATE OF MICHIGAN
COURT OF APPEALS

JAMES T. RODDY,

Plaintiff-Appellant,

v

GRAND TRUNK WESTERN RAILROAD, INC.,
TRACY MILLER, LAWRENCE T. WIZAUER,
DAVID CROMIE, PETER BRANDON,
THOMAS WILLETT, and LAWRENCE R.
MARTENIS,

Defendants-Appellees.

UNPUBLISHED
January 30, 2007

No. 271208
Shiawassee Circuit Court
LC No. 02-008184-NZ

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the opinion and order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) and denying his motion for sanctions pursuant to MCR 2.114(D), in this civil rights action. We affirm.

I. Background

Plaintiff is employed by defendant Grand Trunk Western Railroad, Inc. (GTW) as a conductor. On July 11, 2000, he was arrested while off duty for possession of marijuana and resisting arrest.¹ Given that plaintiff was supposed to report to work in three hours time, his wife called GTW and reported that he was "unavailable for work." GTW's officers somehow learned of plaintiff's arrest and temporarily suspended his employment. GTW then secured a copy of plaintiff's arrest record and used it as evidence against him at a formal labor hearing conducted pursuant to the collective bargaining agreement (CBA). Plaintiff was subsequently terminated from his employment.

Plaintiff then appealed his termination through the Railway Labor Act (RLA), 45 USC 151 *et seq.* As a result of that appeal, plaintiff was ultimately returned to service in August 2003. In the meantime, however, plaintiff filed the instant suit alleging that GTW's officers conspired to interfere with his rights under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.* Plaintiff alleged that GTW requested and maintained a record regarding his misdemeanor arrest

¹ Railroad employees are forbidden from using illegal controlled substances, while on or off duty, under the Federal Rail Safety Act (FRSA), 49 USC 20101 *et seq.* 49 CFR 219.102.

when a conviction did not result in violation of MCL 37.2205a(1), which provides in relative part:

An employer . . . or labor organization . . . shall not . . . in connection with the terms, conditions, or privileges of employment or membership request, make, or maintain a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result.

Defendants removed this case to the United States District Court for the Eastern District of Michigan. On defendants' motion, the federal district court dismissed plaintiff's state law claim. The federal district court found plaintiff's claim to be completely preempted by the RLA because it involved the parties' rights and obligations under the CBA and, therefore, was subject to mandatory arbitration. Furthermore, the federal district court found that plaintiff's state law CRA claim was alternatively preempted under the FRSA because plaintiff's claim was in direct conflict with defendants' responsibilities to perform an investigation under the FRSA. *Roddy v Grand Trunk Western R*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued November 21, 2002 (Docket No. 02-72976), slip op at 4 (*Roddy I*). On appeal to the United States Court of Appeals for the Sixth Circuit, however, plaintiff's claim was remanded to state court. The Sixth Circuit found that removal to federal court was inappropriate because Congress did not intend the RLA to completely preempt state law. However, the issue of ordinary preemption properly remained before the state court. *Roddy v Grand Trunk Western R, Inc*, 395 F3d 318, 321, 323, 325 (CA 6, 2005) (*Roddy II*).

Upon the lawsuit's return to state court, the trial court delayed discovery until the resolution of defendants' motion for summary disposition based on federal preemption. Although defendants failed to present the CBA as documentary evidence, the trial court ultimately determined that plaintiff's state law claim was "inextricably intertwined" with the CBA and defendants' duties to investigate under the FRSA and, therefore, was not independent of the CBA or defendants' duties under the FRSA, and thus was preempted by federal law. This appeal followed.

II. Standard of Review

We review a trial court's determination regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone and should be granted only if the factual development of the claim could not justify recovery. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).

To the extent that the trial court interpreted provisions of statutes and regulations, this Court's review is also de novo. *Williams v City of Troy*, 269 Mich App 670, 675; 713 NW2d 805 (2005). When interpreting a federal statute, we must apply "the statute as written." *State Treasurer v Abbott*, 468 Mich 143, 148; 660 NW2d 714 (2003). Where the statute is ambiguous, we must defer to a federal agency's reasonable interpretation. *Id.* We review preemption issues de novo. *X v Peterson*, 240 Mich App 287, 289; 611 NW2d 566 (2000).

We review a trial court's determination whether to impose sanctions under MCR 2.114 for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). A decision is

clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

III. Analysis

The trial court properly granted defendants' motion for summary disposition on the ground that plaintiff's CRA claim was preempted by federal law. There are two types of federal preemption – complete and ordinary preemption. When a state law claim is completely preempted by federal law, removal to federal court is justified. *Roddy II, supra* at 323. The Sixth Circuit found that plaintiff's state law claim was not removable under complete preemption. *Id.* at 326, citing *Hawaiian Airlines, Inc v Norris*, 512 US 246, 257; 114 S Ct 2239; 129 L Ed 2d 203 (1994). That court left to the state court system the question of ordinary preemption. *Roddy II, supra* at 321-325.

Ordinary preemption applies when “federal statutory sections . . . arguably supersede conflicting state laws without creating the right of removal.” *Roddy II, supra* at 323. In the absence of express preemption, state law is preempted if it actually conflicts with federal law. *X, supra* at 289. Conflict occurs when it is impossible to comply with both federal regulations and state law, or when state law is an obstacle to the accomplishment of Congress' objectives in enacting the relevant regulations. *Fidelity Federal Savings & Loan Assoc v De La Cuesta*, 458 US 141, 153; 102 S Ct 3014; 73 L Ed 2d 664 (1982). Federal regulations have the same preemptive effect as federal statutes. *Id.* Congressional intent is the cornerstone of preemption analysis. *X, supra* at 289.

The FRSA was designed “to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs,” and its regulations provide that “no employee may use or possess alcohol or any controlled substance while assigned by a railroad to perform covered service.” 49 CFR 219.1(a); 49 CFR 219.101(a)(1). Moreover, the regulations specifically provide that “no employee may report for covered service, or go or remain on duty in covered service while . . . [u]nder the influence of or impaired by any controlled substance.” 49 CFR 219.101(a)(2)(iii). Not only is an employee prohibited from possessing a controlled substance while on duty, but the regulations also expressly provide that an employee is prohibited from using a controlled substance *at any time*: “No employee who performs covered service may use a controlled substance at any time, whether on duty or off duty . . .” 49 CFR 219.102.

It is the duty of the railroad employer to ensure that the safety provisions prohibiting drug and alcohol abuse are followed:

(a) A railroad may not, with actual knowledge, permit an employee to go or remain on duty in covered service in violation of the prohibitions of § 219.101 or § 219.102. As used in this section, the knowledge imputed to the railroad must be limited to that of a railroad management employee (such as a supervisor deemed an “officer,” whether or not such person is a corporate officer) or a supervisory employee in the offending employee's chain of command.

(b) A railroad must exercise due diligence to assure compliance with §§ 219.101 and 219.102 by each covered employee. [49 CFR 219.105.]

We conclude that MCL 37.2205(a)(1) conflicts with defendants' duty under the FRSA to diligently investigate plaintiff's alleged off duty use or possession of a controlled substance, 49 CFR 219.101, .102 and .105, because the state statute is an obstacle to defendants' ability to fully investigate off duty drug activity involving a misdemeanor arrest that does not result in a conviction. *De La Cuesta, supra* at 153. The facts reveal that defendants were complying with their duty under the federal regulations by inquiring into the circumstances of plaintiff's arrest, and whether it involved the use of a controlled substance while off duty. 49 CFR 219.102, .105. However, as previously discussed, MCL 37.2205(a)(1) prevents an employer from making a request for information regarding a misdemeanor arrest that does not result in a conviction. The federal district court came to this same conclusion:

In fact, plaintiff's state law claims are in direct conflict with defendants' responsibilities under these federal regulations. Pursuant to § 219.105, defendants have a duty to investigate and assure compliance with § 219.102's prohibition against off duty use of a controlled substance. This is a broad requirement that does not distinguish between misdemeanor drug violations and felonies or between arrests leading to convictions and those that do not. A railroad employer cannot comply with these federal regulations and MCL 37.2205a when the off duty drug activity involves a misdemeanor arrest, detention, or disposition not resulting in a conviction. [*Roddy I, supra*, slip op at pp 9-10.]

Although this analysis may not have been sufficient for a complete preemption, we believe it is consistent with our conclusion that plaintiff's state law claim is preempted under ordinary preemption analysis. Accordingly, plaintiff's CRA claim is preempted by federal law and the trial court properly granted defendants' motion for summary disposition. *De La Cuesta, supra* at 153; *X, supra* at 289.²

In regard to plaintiff's argument that the trial court erred when it denied his motion to impose sanctions, we conclude that plaintiff has abandoned this argument by failing to address it in his brief. Failure to brief a question on appeal "is tantamount to abandoning it." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). In any event, because we agree with defendants on the merits of this appeal, there is no basis for sanctions.

² We note that although the RLA preempts state law claims that depend on the interpretation of CBA terms, *Hawaiian Airlines, supra* at 252-253, it is impossible to conclude that plaintiff's CRA claim requires an interpretation of the parties' CBA terms, given that a copy of the CBA was not attached to defendants' motion for summary disposition. MCR 2.116(G)(3)(a) and (b). Furthermore, all pertinent written instruments must be attached to a motion for summary disposition. MCR 2.113(F)(1). Thus, we accede to plaintiff's position that the trial court erred to the extent that its order granting defendants' motion for summary disposition was based on its erroneous finding that plaintiff's CRA claim was preempted by the RLA because it required an interpretation of the parties' CBA terms. However, this Court will not reverse a trial court's order "when the right result was reached for the wrong reason." *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

Affirmed.

/s/ Christopher M. Murray

/s/ E. Thomas Fitzgerald

/s/ Donald S. Owens