

STATE OF MICHIGAN
COURT OF APPEALS

ANTHONY HENRY and KEITH WHITE,

Plaintiffs-Appellees,

v

LABORERS LOCAL 1191, d/b/a ROAD
CONSTRUCTION LABORERS OF MICHIGAN
LOCAL 1191 and MICHAEL AARON,

Defendant-Appellants

and

BRUCE RUEDISUELI,

Defendant-Appellee.

UNPUBLISHED
July 3, 2012

No. 302373
Wayne Circuit Court
LC No. 10-000384-CD

MICHAEL RAMSEY and GLENN DOWDY,

Plaintiffs-Appellees,

v

LABORERS LOCAL 1191, d/b/a ROAD
CONSTRUCTION LABORERS OF MICHIGAN
LOCAL 1191 and MICHAEL AARON,

Defendants-Appellants,

and

BRUCE RUEDISUELI,

Defendant-Appellee.

No. 302710
Wayne Circuit Court
LC No. 10-004708-CD

Before: RONAYNE KRAUSE, P.J., and SAAD and WILDER, JJ.

PER CURIAM.

In these consolidated appeals, defendants Laborers Local 1191 (Local) and Michael Aaron (Aaron) (defendants) appeal by leave granted orders of the Wayne Circuit Court denying their motions for summary disposition pursuant to MCR 2.116(C)(4). Plaintiffs commenced this action under Michigan’s Whistleblower Protection Act (WPA), MCL 15.361 *et seq.*, on the basis of the termination of their employment as business agents of Local 1191, a labor union. Aaron was the union’s business manager. Plaintiffs contend that they were terminated from their employment—and bring no claims based on any alleged infringement of their membership rights—because they reported or participated in an investigation of allegedly illegal conduct in which they believed the union had engaged. Defendants’ motions for summary disposition contended that the Federal Labor Management Reporting and Disclosure Act (LMRDA), 29 USC 401 *et seq.*, and National Labor Relations Act (NLRA), 29 USC 151 *et seq.*, preempt plaintiffs’ state law claims. We affirm.

Congress has the power to preempt state law. US Const, art 6, cl 2. However, we generally presume that it does not, *Duprey v Huron & Eastern R Co, Inc*, 237 Mich App 662, 665; 604 NW2d 702 (1999), and that presumption can be overcome only where Congress clearly and unequivocally intends to do so. *Wayne Co Bd of Comm’rs v Wayne Co Airport Authority*, 253 Mich App 144, 198; 688 NW2d 804 (2002). Preemption may be express, where Congress has explicitly stated its intent to preempt state law; “field,” where state law regulates conduct in a field that Congress has intended to occupy exclusively; or “conflict,” where state law is in actual conflict with federal law. *Grand Trunk Western Railroad Co v City of Fenton*, 439 Mich 240, 243-244; 482 NW2d 706 (1992). Defendants contend that both field preemption and conflict preemption apply here. Field preemption requires federal law to occupy a field so thoroughly that it is reasonably inferable that Congress did not intend to permit states to supplement it. *Cipollone v Liggett Group, Inc*, 505 US 504, 516; 112 S Ct 2608; 120 L Ed 2d 407 (1992). Conflict preemption occurs “where it is impossible for a private party to comply with both state and federal requirements,” or where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *English v General Electric Co*, 496 US 72, 79; 110 S Ct 2270; 110 L Ed 2d 65 (1990) (citation omitted). “If a state-law proceeding is preempted by federal law, the state court lacks subject-matter jurisdiction to hear the state-law cause of action.” *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 139-140; 796 NW2d 94 (2010).

Section 2 of the WPA provides:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee’s compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee

is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.¹ [MCL 15.362 (footnote added).]

“[T]he only rationale for the WPA” is “to encourage those actions that assist in the protection of the public by in turn protecting the employee.” *Chandler v Dowell Schlumberger, Inc*, 214 Mich App 111, 122; 542 NW2d 310 (1995). Under the WPA, an “employee” is in relevant part “a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied” MCL 15.361(a). An “employee” is in relevant part “a person who has 1 or more employees.” MCL 15.361(b). Of particular significance, plaintiffs’ claims arise out of the termination of their employment by Local 1191.

The LMRDA “was the product of congressional concern with widespread abuses of power by union leadership.” *Finnegan v Leu*, 456 US 431, 435; 102 S Ct 1867; 72 L Ed 2d 239 (1982). Title I of the Act, 29 USC 411-415, was introduced as the “Bill of Rights of Members of Labor Organizations.” *Finnegan*, 456 US at 435. The *Finnegan* Court found that “it was rank-and-file union members—not union officers or employees, as such—whom Congress sought to protect.” *Id.* at 437. “[T]he Act’s overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections.” *Id.* at 441. “[T]he ability of an elected union president to select his own administrators is an integral part of ensuring a union administration’s responsiveness to the mandate of the union election.” *Id.* “Consequently there is no violation of the LMRDA if a staff member’s discharge, which does not affect his union membership, is based on union patronage, because the loyalty and cooperation of union employees is necessary to insure that the union is democratically governed and responsive to its membership.” *Montoya v Local Union III of the Int’l Brotherhood of Electrical Workers*, 755 P2d 1221, 1223 (Colo App, 1988).

This Court recently concluded that the LMRDA conflicts with and preempts a state wrongful-discharge claim based on a just-cause termination policy. *Packowski*, 289 Mich App at 136, 144. The “plaintiff’s claim would conflict with the efforts of elected union officials to implement the policies on which they were elected and, in that way, interfere with one of the purposes of the LMRDA.” *Id.* at 148. “The democratic purposes of the LMRDA would be contravened by allowing a demoted or discharged business agent or organizer to sue for wrongful discharge.” *Id.* at 144. Significantly, however, *Packowski* only considered the “plaintiff’s claim that he was terminated without just cause.” *Id.* at 134. Consequently, an exception to preemption, recognized in other cases, where a union employee claims wrongful discharge for refusing “to commit or aid in committing a crime,” did not apply because the plaintiff in *Packowski* was terminated for failing to follow legitimate policies, not for refusing to commit or aid in committing a crime. *Packowski*, 289 Mich App at 146. This Court also noted

¹ Plaintiffs reported the alleged illegal conduct to, or participated in an investigation by, the United States Department of Labor. Under MCL 15.361(d), a federal agency may qualify as a law enforcement agency and, thus, a “public body.” *Ernesting v Ave Maria College*, 274 Mich App 506, 514-515, 517; 736 NW2d 574 (2007) (concluding that the Department of Education was a law enforcement agency).

that any claim for retaliation for participating in the Department of Labor investigation could be brought in federal court under § 412. *Packowski*, 289 Mich App at 146 n 3. This Court did *not* purport to decide whether doing so was the only way for such a party to seek relief, and we likewise do not do so here.

In *Smith v Int'l Brotherhood of Electrical Workers, Local Union 11*, 109 Cal App 4th 1637, 1653-1654; 1 Cal Rptr 3d 374 (2003), finding that the LMRDA did not preempt an action “arising out of job discrimination based on age or disability,” the court noted that “courts need not be concerned about ‘patronage’ suits masquerading as suits for wrongful discharge based on age or disability.” We appreciate defendants’ concerns that a patronage suit *could* masquerade as some other wrongful discharge suit, so it is especially important for plaintiffs to show a causal connection between their reporting and the discharge in order to establish a prima facie case. *Chandler*, 214 Mich App at 114. Furthermore, “[t]he trial court must exercise caution . . . to minimize introduction of any evidence that plaintiff’s political views differed from those of [the business manager]” in order “to assure that the doctrine of preemption is not violated.” *Montoya*, 755 P2d at 1224. However, plaintiffs contended that defendants’ acts were criminal and involved more than “the federal regulatory scheme and the union’s own internal operating policies.” *Dzwonar*, 348 NJ Super at 173. Protecting terminations where an employee reports a crime, thereby refusing to conceal it, would also “encourage and conceal” criminal acts and coercion and would not “serve union democracy.” *Bloom v Gen Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F2d 1356, 1362 (CA 9, 1986). Accordingly, plaintiffs’ WPA claims are not conflict-preempted by the LMRDA.

We also find no field preemption. This Court in *Packowski* noted, in dicta, that “29 USC 412 provides for a civil action in federal court if there is retaliation based on giving truthful testimony to the Department of Labor.” *Packowski*, 289 Mich App at 146 n 3. Section 412 of the LMRDA provides:

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

As noted by the dissenting opinion in *Packowski*, “in general the LMRDA protects the rights afforded union *members* because of their status as members, not the rights afforded appointed union *employees* because of their status as employees.” *Packowski*, 289 Mich App at 152 n 1 (Beckerling, P.J., dissenting), citing *Finnegan*, 456 US at 436-437 (emphasis in original). In *Bloom*, the plaintiff’s claim was actually based on his firing as a business agent, which was not intended to be prohibited by the LMRDA. *Bloom*, 783 F2d at 1359, citing *Finnegan*, 456 US at 436-437. Without an infringement on the plaintiff’s rights as a union member, the plaintiff had no cause of action under § 411 and § 412. *Bloom*, 783 F2d at 1359. Here, plaintiffs brought

their claims as employees and have not alleged any infringement on their membership rights, so they have no cause of action under § 412. See *Bloom*, 783 F2d at 1359.²

In *Sheet Metal Workers' Int'l Ass'n v Lynn*, 488 US 347, 355; 109 S Ct 639; 102 L Ed 2d 700 (1989), the Court considered “whether the retaliatory removal of an elected official violates the LMRDA.” *Lynn*, 488 US at 353. The Court held that an elected official had a cause of action for retaliatory removal. *Id.* at 355. The Court stated that “the potential chilling effect on Title I free speech rights is more pronounced when elected officials are discharged.” *Id.* This does not suggest that an appointed business agent has a cause of action under the LMRDA. A § 102 [29 USC 412] claim might arise if a union official were dismissed “as ‘part of a purposeful and deliberate attempt . . . to suppress dissent within the union.’” *Lynn*, 488 US at 355 n 7 (citation omitted). There is no indication that plaintiffs here were terminated as part of such an attempt. We do note that sections 413 and 523(a) only save causes of action by a union member, not actions brought—as plaintiffs do here—as an employee. *Bloom*, 783 F2d at 1360. However, *Bloom* implied that the plaintiff could maintain his action if a federal interest did not preclude the cause of action. *Id.* at 1361. We find that plaintiffs’ claims are not preempted.

Defendants finally argue that the NLRA preempts plaintiffs’ WPA claims. The trial court did not decide this issue, but a challenge to subject-matter jurisdiction may be made at any time, and we conclude that defendants may do so even though our grant of leave to appeal was limited to the issues raised in the applications. See *Smith v Smith*, 218 Mich App 727, 729-730; 555 NW2d 271 (1996). We find that the NLRA does not preempt plaintiffs’ claims.

Section 7 of the NLRA, 29 USC 157, provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 provides, in part, that “[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157.” 29 USC 158(a)(1).³

² Defendants also cite *Ardingo v Potter*, 445 F Supp 2d 792 (W D Mich, 2006), for support of their argument that the LMRDA provides plaintiffs’ exclusive remedy. However, in *Ardingo*, the plaintiff’s wrongful discharge claim was based on exercising his free speech rights under the LMRDA. *Ardingo*, 445 F Supp 2d at 798.

³ 29 USC 158(b)(1) is a similar provision applying to labor organizations and their agents.

“When an activity is arguably subject to [§] 7 or [§] 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board [(NLRB)] if the danger of state interference with national policy is to be averted.” *San Diego Bldg Trades Council, Millmen’s Union, Local 2020 v Garmon*, 359 US 236, 245; 79 S Ct 773; 3 L Ed 2d 775 (1959). However, there are exceptions to the NLRB’s primary jurisdiction. *Chaulk Servs, Inc v Mass Comm Against Discrimination*, 70 F3d 1361, 1364 (CA 1, 1995). The states may regulate activity that is only of “‘peripheral concern’ to federal labor policy” or that is “‘so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, courts cannot infer that Congress has deprived the states of the power to act.’” *Id.* at 1364-1365 (citations omitted). “[T]he critical inquiry [for the latter] is whether the controversy presented to the state court is identical to or different from that which could have been presented to the NLRB.” *Id.* at 1366.

In *Calabrese v Tendercare of Mich, Inc*, 262 Mich App 256, 260; 685 NW2d 313 (2004), this Court found the plaintiff’s claims of wrongful discharge and tortious interference preempted by the NLRA. The plaintiff claimed she was terminated for refusing “to fire employees for legal unionizing activities.” *Calabrese*, 262 Mich App at 259. The Court found this an unfair labor practice under § 8, so the claims could have been brought before the NLRB. *Calabrese*, 262 Mich App at 262-263. In *Flores v Midwest Waterblasting Co*, unpublished memorandum opinion and order of the Eastern District of Michigan, issued September 26, 1994 (Docket No. 93-72586), 1994 WL 16189543, the court found a WPA claim preempted by the NLRA under *Garmon*. The court relied on the fact that the plaintiffs had only reported misconduct to the NLRB, which is a protected activity; in contrast, if the plaintiffs had identified any public bodies other than the NLRB to which they had allegedly made reports, the NLRA would not necessarily have applied and the WPA claim would not have been preempted. *Flores*, 1994 WL 16189543 at *9 and *9 n 4. Alternatively, in *Roussel v St Joseph Hosp*, 257 F Supp 2d 280, 285 (D Maine, 2003), the court found that a Maine Whistleblowers’ Protection Act claim was not preempted by the NLRA. The court found that even if the plaintiff had engaged in concerted activity, her claim that she was terminated in retaliation for exercising her rights under the Maine Whistleblowers’ Protection Act was peripheral to the NLRA. *Id.*

Plaintiffs asserted that they reported their “suspicions of illegal activity” to either the United States or Michigan Department of Labor, not to the NLRB. Furthermore, we agree with the reasoning in *Roussel*. A claim for retaliatory discharge arising out of an employee’s report of suspected illegal activity or participation in investigation thereof is only of peripheral concern to the NLRA’s purpose of protecting employees’ rights to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” See *Roussel*, 257 F Supp 2d at 285. Therefore, plaintiffs’ WPA claims are not preempted.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Henry William Saad
/s/ Kurtis T. Wilder