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State Regulation Of Drug Testing: Are Organized Workplaces Exempt?

Paul Alan Levy†

In recent years, both courts and commentators have invoked state law to provide remedies for employees who have been subjected to drug testing by their employers.1 Meanwhile, unions have sought to bargain with employers for contractual protections against unfair testing, and have pursued to arbitration a number of individual cases under collective bargaining agreements.²

Thus far, little attention has been paid to the relationship between employees' remedies under collective bargaining agreements and those remedies available through public law either in the form of legislation or common law adjudication.³ At least theoretically,

† B.A., Reed College; J.D., University of Chicago. At this juncture, I should mention that I am an attorney at Public Citizen Litigation Group. My practice is devoted to representing union dissidents, and I have represented plaintiffs or amici curiae in a number of the cases discussed in this article. These cases include: Lingle v. Norge, 823 F.2d 1038 (7th Cir. 1987) (subsequent to the writing of this Article, the author's views prevailed and the Seventh Circuit decision was reversed by the Supreme Court, 108 S. Ct. 1877 (1988)); Willoughby v. Central Illinois Light Co., 826 F.2d 1067 (7th Cir. 1987); Gonzalez v. Prestress Engineering Corp., 115 Ill.2d 1, 503 N.E.2d 308 (1986); DeSoto v. Yellow Freight System, 811 F.2d 1333 (9th Cir. 1987); Lepore v. National Tool and Mfg. Co., 224 N.J. Super. 463, 540 A.2d 1296 (1988); Day v. Teamsters, No. 86-3157 (D.D.C. 1986). In two cases that were companions to Lingle and Willoughby, I have presented oral argument before the Court of Appeals for the Seventh Circuit on the preemption issue.

I wish to express my gratitude to Barbara Harvey for her assistance in preparing this article, as well as my appreciation for her ground-breaking litigation in this area of the law.


² The General Counsel of the National Labor Relations Board recently decided that employers are obligated to bargain with unions about drug testing, and that unilateral imposition of a drug-testing program will, absent unusual circumstances, violate the duty to bargain. See NLRB Gen. Coun. Mem. 87-5 (September 8, 1987), which canvasses the issues. See also Note, Use and Abuse of Urinalysis Testing in the Private Sector, 35 Emory L.J. 1011, 1029 (1986) (using arbitral decisions as the basis for developing drug-testing legislation).

³ One issue that has been litigated at great length, but which this article does not discuss, is whether an arbitrator's reinstatement of drug or alcohol users, particularly in jobs posing safety risks either to other workers or to the general public, are enforecable as an affront to public policy. See United Paperworkers International Union, et. al. v. Misco Inc.,
private sector employees should be able to invoke either type of remedy. Yet employers argue, often successfully, that collectively bargained remedies supersede any remedies available under state law. To the extent that the literature surveys this problem, it has tended to favor employers' preemption claims. This Article argues that these preemption claims are dead wrong.

This Article argues that the protections available to employees through collective bargaining may not fulfill the promise of even the best possible provisions in collective bargaining agreements. First, it will discuss employers' use of drug testing and the response of the labor movement generally and of rank-and-file activists, in particular, to drug testing programs. The next section surveys preemption and the congressional intent behind the preemption doctrine. Finally, the Article refutes the various policy arguments often advanced in favor of preemption, under the Labor Management Relations Act (LMRA) and the National Labor Relations Act (NLRA). It concludes that invoking state law provides both the best comprehensive protection for workers from drug testing and maintains an appropriate workplace balance between workers and employers.

I. THE NATURE OF THE PROBLEM

The mounting hysteria over drug abuse has led to a proportional increase in the frequency of drug testing, both in the public and the private sector. Apart from the questionable accuracy of drug testing techniques, employers admittedly have at least one legitimate reason for testing their employees: The employer is entitled to receive a fair day of work in return for a fair day of pay. A worker who shows up with faculties impaired will not do the job that the employer properly expects. Similarly, an employee who re-


* See Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987); Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985).


ports to work impaired may endanger the safety of other workers, of customers, or of other members of the public to whom the employer may be liable for mishaps. Insofar as drug testing identifies such impairment, employers ought to be able to insist that a worker fix the problem by entering a treatment program and should be able to discharge workers who prove to be unable or unwilling to stop coming to work impaired.

On the other hand, few employers have any legitimate interest in demanding that workers conform to some ideal code of conduct outside of work, or indeed while working except insofar as their work is affected. Employees rightly object to employer efforts to extend control and to increase regimentation of the workforce. The most that employers can do is argue that long-term drug use may increase disability or health-care costs, or that those who use drugs outside the workplace may be more likely to fail to perform their workplace obligations adequately. Even assuming that these correlations can be established, I doubt that this is a legitimate basis for firing drug users or invading the privacy of non-users, because that argument could justify employer consideration of a large variety of life-style or socio-economic status factors that might also correlate with health problems. There should be no question that it would be considered an unconscionable invasion of privacy if a worker’s livelihood depended on proper responses to tests that delve into such matters as sexual or food consumption habits, dangerous hobbies, family health histories, unhealthy residential locations and the like. Yet each of the items could be said to affect employers indirectly, to a greater or lesser degree, in a manner comparable to the use of drugs.

The one difference between drug testing and most of these other factors is that many abused drugs are illegal. But, except for a very few jobs, illegality is irrelevant to the worker’s ability to perform job tasks. In effect, then, most employers that seek to test for drug use outside the workplace will have been harnessed to serve some purported goal of public policy. Yet it is unclear that public policy favors denial of employment as a means of discouraging the use of illegal drugs. Although a number of courts have overturned arbitration awards that reinstated workers discharged for using or selling drugs and alcohol at work, no statutes forbid employment of drug users. Indeed, adoption of such a policy may disserve many of the goals of the war against drugs, especially the reduction of crime committed to pay for drugs and the elimination of the culture of poverty and despair which fosters drug-dependency. Moreover, if employers who test for drugs and subsequently
fire users are collaborating with the government in the performance of a public function, one wonders why legal standards that limit the authority of public officials should not similarly apply to private employers.

In addition, there is potential for overuse or abuse of drug testing by employers anxious to exert greater control over workers. Even where protections against unfair drug testing have been written into the bargaining agreement, employees have good reason to fear that employers will not provide the requisite protections on the shop floor and that unions will not insist on such protections in practice. Many labor activists fear that employers may try to use drug testing to manipulate employment incentives. For instance, a work rule that requires a drug test whenever a worker has been injured will discourage the reporting of injuries, if workers fear the misuse of the tests. This system saves on worker compensation claims. Similarly, widespread use of poorly designed drug tests may enable employers to discharge large numbers of high-seniority employees and to reduce pension liability.

Employers also use drug testing programs to conceal discriminatory motives for discharges. Managers may use tests that result in a high rate of false positives and determine to whom the tests should be administered. Employers have the opportunity to manipulate test results by switching samples or using low-quality tests and laboratories. It is difficult for an employee to dispute being fired either for refusing to take a drug test or pursuant to a positive finding of drug use. Management simply points to the results of the scientific testing procedure. Before the introduction of tests carrying a patina of scientific respectability, employees had a better opportunity to discover and persuade the trier of fact of the supervisor's fabrication.

With some prominent exceptions, the labor movement has

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* See O'Brien v. Papa Gino's of America, 780 F.2d 1067 (1st Cir. 1986). See also Alliance Rubber Co., 286 NLRB No. 57, 126 LRRM 1217, 1218 (1987) (polygraph examiner testifies that it is his normal practice during drug investigations to inquire about union activities).

10 One union, the Teamsters, has actively supported employee drug-testing. Through their then-president, Jackie Presser, the Teamsters consented to the inclusion of a draconian program in the National Master Freight Agreement. NMFA effective 1985-1988, art. 35, sec. 3. Under that program, an employee may request leave for the purpose of undergoing treatment for alcoholism or drug use, but an employee who is tested for drug use (under a "probable suspicion" standard), or who refuses to take a drug test, may be fired
been vehemently opposed to drug testing in the workplace. Based on its long-standing attitude that workers should not be fired simply because they have developed personal problems that cause no serious harm to their fellow workers or to the employer, most unions oppose random or mass testing of employees, except for employees holding particularly safety-sensitive jobs, such as airline

without any prior offenses and does not have the opportunity to be treated. The program also provides for mandatory drug testing of all drivers in the course of biannual physical examinations, subject to the same discharge rules as the probable suspicion tests.

The program provides good protection against tampering with test results, but the level of drugs found in the urine or blood that warrant discharge is so low that discharged workers may not have been impaired, and indeed, may have been victimized by "passive smoking." With its various "me-too" agreements, the contract affects up to 200,000 employees in the trucking industry. These efforts were touted in the union's monthly magazine. See 83 International Teamster, No. 8, 6-8 (November 1986).

In other contracts as well, Presser went out of his way to encourage inclusion of a drug testing program. The union was apparently the author of the drug testing proposal, which was taken virtually word-for-word from the Freight Agreement, and which was added to the National Automobile Transporters Agreement effective 1985-1988 after that contract was ratified by the membership. Affidavit of R. Ian Hunter, 10/17/87, par. 5 in Day v. Teamsters, No. 86-3157 (D.D.C. 1986). A drug-testing rule has also been incorporated into at least one of the regional supplements in the United Parcel Service Agreement effective 1987-1990. Southern Conference Supplement, art. 44(B).

There is an emerging consensus among the Teamsters for a Democratic Union (TDU), the Teamster reform movement, that it ought to oppose drug testing programs, absent solid guarantees—both on paper and in practice—that the innocent will not be swept out with the guilty. It is difficult to generalize from TDU members' attitudes to the attitudes of employees generally. TDU is strongest among truck drivers, who tend to be more politically conservative than workers generally. On the other hand, those who become and remain active in TDU, and thus are most likely to come into contact with legal counsel, may be more aware of the ramifications of various employment-related issues and more willing to oppose union and employer actions. There is, however, at least one indication that the Teamster leadership realizes the membership disagrees with its wholehearted endorsement of drug testing. In Day, No. 86-3159, plaintiffs sued to force the union to conduct a membership referendum before continuing a drug-testing program that had been incorporated into the Automobile Transporters contract. Rather than face electoral defeat, the union and the employers simply repealed the program. Minutes of the Meeting of the National Automobile Transporters National Negotiating Committee 1-2 (January 8, 1987). In the 1988 referendum on a new proposed freight agreement, the union changed the drug-testing program to meet some of TDU's criticisms and trumpeted these genuine improvements as a reason to ratify an otherwise concessionary agreement.

Nevertheless, it is unlikely that the membership will press for the elimination of drug testing altogether on such grounds as privacy or technical inaccuracy, advanced by many opponents. Though increasingly concerned about the potentials for drug abuse and the increase in the number of unfair dismissals, the T.D.U. membership is also supportive of truck safety and of efforts to reduce drug abuse. Indeed, much of the impetus for the Teamster reform movement among trucking industry workers was found in the truck safety campaigns of the Professional Drivers Council for Safety and Health (PROD), which was organized by Arthur Fox, a colleague of this author's at the Public Citizen Litigation Group.

pilots. The official AFL-CIO position requires that testing be supported by "exhibit[jion] of symptoms of job-related impairment," which means that some variant of "probable cause" or "reasonable suspicion" is required. Some unions oppose testing, even with cause. Others have taken the position that an employee who tests positive should be given the opportunity to enter a treatment or rehabilitation program, where sick leave provisions are applicable.

Union protection is often not enough, however, even when unions have obtained contract provisions that appear adequate on paper. Many union business agents lack the skills needed to enforce effective contract language on drug testing, such as enforcing chain of custody possession rules, analysis of scientific reports, and development of expert opinions to counter laboratory reports. Even sophisticated national unions that oppose drug testing may not adequately train their local representatives to enforce the provisions they win in bargaining. When confronted with a potential grievance over a drug testing related discharge, union agents often respond by urging the employee to settle for a voluntary quit on the argument that it will appear better on the employee's record. In an unusually positive situation, where the discharged employee has a good political relationship with the union leadership, where the union is particularly conscientious or concerned about drug testing, or where workers turn a particular case into a cause celebre, the union may take the case seriously enough to win the employee's job back.

But, in the ordinary case, the rank-and-file worker cannot count on union leadership to fully enforce her rights in drug testing cases. The problem is especially acute for union dissidents, who must rely on political opponents within the union to investigate the employer's action and prosecute any resulting grievance. Mere

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13 AFL-CIO Statement.
15 Kass Survey at 1 (cited in note 12).
16 Such a program may even be funded by the employer, perhaps through the health insurance benefit. SEIU Guide at 15 (cited in note 14); AFL-CIO Statement (cited in note 12).
18 Id. at 137.
negligence in the grievance procedure, even when coupled with the “coincidence” of political hostility, may not suffice to impeach the union’s handling of a dissident’s grievance absent a smoking gun showing that the union intentionally pitched the grievance in order to retaliate against the employee. Accordingly, unless the union’s representatives are so careless as to leave around such evidence, or unless some higher standard applies to union representation in drug testing cases, the union’s decision to accept the employer’s factual allegations or test results at face value will likely be immune from challenge.

Because contractual provisions and union enforcement are often inadequate alone to protect workers from unfair drug testing practices, workers need state remedies as well. State remedies are necessary to protect workers’ rights from being systematically violated.

II. AN OVERVIEW OF PREEMPTION

The Supreme Court has developed separate lines of authority under each of the Acts relevant to the following discussion about preemption, the LMRA (Section 301) and the NLRA. Until the last few years, preemption under Section 301 has been confined to a narrow area that may readily be summarized.

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18 See, for example, Early v. Eastern Transfer, 699 F.2d 552 (1st Cir. 1983); Grant v. Burlington Industries, 832 F.2d 76, 79 (7th Cir. 1987).

19 The circuits are increasingly divided over the question of whether a breach of the duty of fair representation—which must be found before an employee may sue her employer for breach of the collective bargaining agreement, Vaca v. Sipes, 386 U.S. 171 (1967); Hines v. Anchor Motor Freight, 424 U.S. 554 (1976)—is shown by merely arbitrary or perfunctory processing of the grievance, or whether, as the Seventh Circuit now holds, the employee must establish that the union acted for some impermissibly invidious or discriminatory reason. See, for example, Dober v. Roadway Express, 707 F.2d 292 (7th Cir. 1983). See generally Ronald Turner, Intentional Misconduct and the Union’s Duty of Fair Representation, 63 Chi.-Kent L. Rev. 43 (1987); Michael Harper & Ira Lupu, Fair Representation as Equal Protection, 98 Harv. L. Rev. 1211 (1985). The force of the rule is lightened for the dissident if, as Professor James D. Holzhauer has indicated, the trier of fact is free to infer hostility from the circumstances of a union’s assertion that it simply “forgot” to investigate the dissident’s claim. James Holzhauer, The Contractual Duty of Competent Representation, 63 Chi.-Kent. L. Rev. 255, 264-65 (1987). But, as a practical matter, the requirement of proof of intentional misconduct is a summary judgment standard, and the courts are not receptive to claims based on circumstantial evidence of the sort that Professor Holzhauer indicates should be sufficient. Early, 699 F.2d at 552.


23 The LMRA and the NLRA do not apply to railroads and airlines. Instead, such employers are governed by the Railway Labor Act (RLA), 45 U.S.C. sec. 151, et seq. (1982), which has its own set of preemption cases and doctrines. This article addresses solely the
The question of preemption under Section 301 begins and ends with the determination of whether the state cause of action is substantially dependent on an interpretation or application of the collective bargaining agreement. The Supreme Court has held that Section 301 requires the federal courts to develop a federal common law of the collective bargaining agreement. Further, the Court has held that, to avoid undue forum shopping and to promote certainty between the parties about the meaning and effect that would be given to their agreements, state courts are required to apply federal law when enforcing collective bargaining agreements. Any state law that purports to regulate the enforcement of such agreement is thus preempted. But none of the Supreme Court cases, at least until Allis-Chalmers v. Lueck, sought to extend the preemptive reach of Section 301 beyond the scope that Congress plainly intended Section 301 to have—in effect, the enforcement of collective bargaining agreements. Allis-Chalmers and subsequent decisions suggest that employees' state tort claims in connection with drug-testing programs survive Section 301 preemption, unless they are "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." NLRA preemption, by contrast, does not depend on the existence of a collective bargaining agreement. Under the NLRA, state laws may not regulate conduct that is either arguably prohibited or arguably protected by Sections 7 and 8 of the NLRA. In part, the NLRA preempts state law because state definition of the precise scope of the NLRA's protections or of the remedies available for conduct violating the NLRA, would infringe on the primary jurisdiction of the National Labor Relations Board to define the national labor policy pertaining to labor-management relations and former statutes, although in the final analysis the scope of RLA preemption will be comparable.
collective bargaining. Even if Congress did not intend the Labor Board to regulate certain forms of economic self-help, an activity may be exempt from state regulation on the theory that Congress intended such conduct to be "controlled by the free play of economic forces." Balanced against Congress' desire to provide a national forum for the regulation of labor-management relations, however, is the state's interest in regulating matters of intense local concern. Therefore, a state law may avoid NLRA preemption if the law relates to a subject of particular state or local concern and is peripheral to matters of federal concern.

It could be argued that any time a state regulates employment conditions in any respect, the state is affecting the balance of power between unions and employers and giving employees "for free" a right or remedy which they might otherwise be required to obtain through collective bargaining by trading away other benefits which they might desire. If that were sufficient to void the substantive regulation, the only rights a unionized employee would have would be those which the union has won at the bargaining table. But, as I demonstrate below, Congress did not intend to subject employees to such a deprivation of public law rights as a consequence of exercising their right to engage in collective bargaining.

Two typical cases follow, illustrating the potential inadequacies of collective bargaining agreements and the need to resort to state law for protection of employee rights.

In the first case, Kirby v. Allegheny Beverage Corp., the supervisor called employee Kirby into his office, accused him of drug abuse, and ordered a search of Kirby's person and his car. Upon refusing to allow his car to be searched, he was fired. Although Teamsters Local 992 represented him in collective bargaining, the union refused to process his grievance over the incident. Kirby sued in state court alleging, among other things, that the state common law of privacy protected him from such searches, and that both the personal search and his dismissal for refusing to consent

32 See Farmer v. Carpenters, 430 U.S. 290 (1977); Linn v. Plant Guard Workers, 383 U.S. 53 (1966). As indicated by both Farmer and Linn, preemptive considerations may limit the scope of the state law claim, even if they do not preclude prosecution of any claim at all.
33 811 F.2d 253 (cited in note 4).
to the car search violated state law.

Defendants removed the case to federal court, where it was dismissed because the availability of the state law right depended upon whether the contract allowed such searches and whether the employer’s actions

were reasonable in light of the contract . . . . [T]he issues presented by the search in this case are ‘grist for the mill of grievance procedures and arbitration.’ [Kirby] could have challenged the action in a grievance proceeding pursuant to the collective bargaining agreement. If the Union had refused to submit the grievance, he could have sued for breach of the duty of fair representation . . . . The availability of remedies under the labor contract precludes appellant’s pursuit of those remedies in a state law tort action.34

In a second typical case, Strachan v. Union Oil Co.,35 the company suspended employees Strachan and Gaspard and then subjected them to medical examinations, blood and urine tests, and searches that produced negative results for possible drug use, and reinstated the employees. The employees sued in state court alleging various state law torts, including breach of the right of privacy, false arrest, and slander. Again the employer removed the case to federal court in search of a sympathetic hearing on its preemption defense.—

Once again, as in Kirby, the court dismissed the case, partly because the contract gave the employer the right to demand medical examinations where doubt existed about the physical condition

34 Kirby, 811 F.2d at 256 (cited in note 4).
35 768 F.2d 703 (cited in note 4).
36 Removal of such cases is one of the most insidious aspects of employer litigation tactics in these cases. Given the relatively recent revival of limitations on the doctrine of employment at will, employees who pursue cases such as this are generally asking for some sort of development of the state common law, which is usually much more difficult to achieve in the federal than in the state courts. See Anderson v. Marathon Petroleum Co., 801 F.2d 936, 942 (7th Cir. 1986). Thus, to the extent that preemption issues involve a weighing of the relative interests of federal and state governments, the plaintiff who opposes preemption is at a distinct disadvantage. The disadvantage is even greater as the defendant argues that there really is no such state claim, and the plaintiff has “artfully pleaded” a contractual claim in terms of state tort law. However, given the recent decision in Caterpillar v. Williams, 107 S. Ct. 2425 (1987), which reemphasized that state claims based on a source of rights other than the collective bargaining agreement cannot be removed to federal court, even if the defendant claims that the agreement and Section 301 preempt the alternate source of right, it is less likely that innovative claims of this source will be removed absent diversity of citizenship.
of an employee at work. If the employees disagreed with the de-
mand, they could have refused to be searched or examined and
filed grievances challenging the employer's actions as conflicting
with the collective bargaining agreement, the court said. The
court went on to suggest that, as a matter of federal law, employer
investigations under collective bargaining agreements are entitled
to some special privilege against state law:

To hold otherwise in this case would subject thousands of
grievance procedures involving disciplinary investigations
and disciplinary actions . . . to lawsuits asserting state
court claims . . . . [T]he critically important aspect of col-
lective bargaining which is involved in the establishment
of the grievance procedure to protest breaches of labor
contracts would be destroyed.

The court did not focus on the employees' fear of discharge for
refusing a drug test and their need for a remedy that would deter
invasion of privacy without raising the economic stakes to the level
of employment loss.

These two decisions are fundamentally wrong, both as a mat-
ter of policy and as a matter of law. Before a court can forbid
states from regulating in the area of employment testing, it must
find that Congress intended solely federal regulations to apply.
Congress' intent is "the ultimate touchstone," the Court has re-
peatedly stated. Additionally, our federal system requires a strong
presumption against finding congressional intent to preempt state
laws. Certainly, such an intent is lacking with respect to state
drug testing rules.

Undoubtedly, if Congress chose to regulate the circumstances
under which employees may be tested for drug use it would have
the power to do so under the Commerce Clause. Furthermore, if
Congress wished to make its regulatory scheme the exclusive
means for employees to object to such testing, the Supremacy

37 Strachan, 768 F.2d at 705 (cited in note 4).
38 Id. at 705. The court also ruled that defamation claims in particular are "preempted
by the grievance-arbitration procedure unless malice is shown." Id. at 706, citing Linn, 383
471 U.S. at 208 (cited in note 27). See also Retail Clerks v. Schmerhorn, 375 U.S. 96, 103
(1963).
41 Commonwealth Edison Co. v. Montana, 453 U.S. 609, 634 (1981). See also California
Clause would prevent the states from legislating in this field. Despite the fact that Congress has provided criminal penalties for the possession and sale of various drugs, it has not enacted employment related restrictions to reinforce those criminal laws. Therefore, the case for preemption based on improper drug testing must rest on the contention that the labor laws make the collective-bargaining regime the exclusive means of challenging such testing.

Nevertheless, it is certainly clear that Congress intended the federal mechanism of collective bargaining to exist side-by-side with a wide variety of laws, including state regulation, governing many substantive terms in the employment relationship. The substantive areas include health and safety, pensions, wages and hours, and workers compensation. Indeed, the same Congress that enacted the Taft-Hartley Act in 1947 to amend the substantive provisions of the NLRA also passed the Selective Service Act of 1948 whose protections for the reemployment of veterans were intended to be enforced by civil actions in addition to, or even contrary to, claims that employees represented by unions in collective bargaining agreements could bring.

III. THE REGIME OF NON-PREEMPTION

A. Preemption by the Labor Management Relations Act: Interpreting the Collective Bargaining Agreement

The indicators of congressional intent do not support preemption of drug testing regulation. Neither the language of the LMRA itself, nor its legislative history, provides a basis for concluding that certain forms of state regulation would be inconsistent with Congress' purpose. In fact, if the language of Section 301 provides

42 Gibbons v. Ogden, 22 U.S. 1 (1824).
43 See Paperworkers v. Misco, 108 S. Ct. 364 (1987) (finding no general public policy against employment of workers who have at one time had marijuana in their cars). There may be, however, industry-specific arguments that could be made to bar state laws protecting employees against drug testing. For example, if pending legislation requiring certain transportation employers to perform periodic testing for drug use such as S. 1485, 100th Cong., 1st Sess. (July 10, 1984), is enacted, state laws that inhibited such testing might well be preempted.
46 Id. at Title I, sec. 9, 62 Stat. 614-618.
any guidance at all, it counsels against preemption of state tort
regulation of the substantive terms and conditions of employment. It provides jurisdiction only over "suits for violation of contracts." Moreover, because the federal common law of collective bargaining agreements and its concomitant preemption of state law governing the same subject, have been developed by the judiciary without substantial guidance from Congress, the courts should be particularly circumspect about making the policy judgments that are implicit when state laws, based on substantive public policies, rather than on the enforcement of private promises, are overridden on the ground of conflict with Section 301.

On the federal level, many statutes, other than specific labor laws, regulate employment. The existence of these statutes indicates that Congress does not regard public law regulation of terms and conditions of employment as inconsistent with collective bargaining. Indeed, Congress has enacted so many statutes governing employment that one commentator has been moved to write of "the deprivatization of labor relations law."

These various federal substantive requirements not only create rights for individual employees apart from the collective bargaining agreement, they also contain enforcement mechanisms which may be invoked notwithstanding any contractual limitations pertaining to the same subject matter. Congress has extended regulation of the employment relationship to discriminatory discharges or firing in retaliation for the exercise of employee rights, as defined in a number of applicable federal statutes.

Nor has Congress said that the states may not impose additional substantive terms and conditions on the employment relationship. To the contrary, the states have traditionally been allowed to legislate in such areas as workers compensation, wages and hours, and employment discrimination. In some statutes, Congress explicitly barred state regulation in these areas. Indeed, Congress' choice to preempt state regulation of a few, select

49 For example, Jewell Ridge Coal Corp. v. United Mine Workers Local 6167, 325 U.S. 897, 903 (1945).
52 See, for example, McDonald v. City of West Branch, 466 U.S. 284 (1984).
54 For example, Section 514, Employee Retirement Income Security Act, 29 U.S.C. sec. 1144 (1982); Sections 18(a) and (b), Occupational Safety and Health Act, 29 U.S.C. sec. 667(a) and (b) (1982).
substantive subjects makes it highly unlikely that Congress intended to deny states the right to regulate other terms and conditions of employment not specifically preempted by federal legislation. Such an inference "would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefitting from state labor regulations imposing minimum standards on non-union employers."\(^{56}\)

The efficacy of state regulations depends upon a state’s abilities to protect individuals’ freedom to assert rights the states have created. Obviously, if employers could punish employees who seek to invoke state law, employers could frustrate the state’s policy objectives. Accordingly, most states have provided a retaliatory discharge remedy for employees who are fired or otherwise abused for asserting at least some of their state law employment rights.\(^{87}\) Congress has no more forbidden the states to create such remedies than it has barred the substantive programs that retaliatory-discharge laws are designed to protect from employer interference.\(^{58}\)

The courts in *Strachan* and *Kirby* thought that *Allis-Chalmers*\(^{59}\) barred the application of state remedies to employees’ claims regarding drug testing in workplaces covered by collective bargaining agreements, but their reading of that decision ignores the Court’s express caution to the contrary. In *Allis-Chalmers*, an employee, Lueck, had sued both his employer and its insurance company, Aetna, which issued a group health and disability policy required by the collective bargaining agreement between Allis-Chalmers and the United Auto Workers, which represented Lueck. Lueck asserted that Aetna and *Allis-Chalmers* repeatedly and


\(^{57}\) *Metropolitan Life*, 471 U.S. at 755 (cited in note 53).


\(^{60}\) 471 U.S. at 202 (cited in note 27).
unreasonably failed to make the payments required under the collectively-bargained insurance policy, and thus committed a tort under Wisconsin law. The Supreme Court of Wisconsin held that, although the tort arose as a consequence of the insurance provisions that were incorporated by reference to the collective bargaining agreement, it was independent of the contract itself. Accordingly, the court concluded that the state law rights were not preempted by the conditions imposed on employee-employer contract suits under Section 301.60

The Supreme Court reversed. It noted that the collective bargaining agreement regulated both the payments that were required under the insurance policy and the manner in which the payments were to be made.61 The agreement also provided a grievance and arbitration procedure through which claims of contract violations could be adjudicated.62 Accordingly, the Court reasoned, if a state could create a tort defined by the contractual obligation, whose application depends on a particular construction of the terms of the agreement, it would be able to evade the congressional mandate "that federal law govern the meaning given contract terms."63 The state would also be able to deprive unions and employers of "their federal right to decide who is to resolve contract disputes."64 Hence, preemption was required to protect "the congressional goal of a unified federal body of labor-contract law."65 The fact that the state chose to label the claim as a tort rather than a contract violation did not prevent the application of the preemption doctrine.

However, the Court was careful to point out the limits of its ruling. It stated that Section 301 does not regulate the substance of the parties’ collective agreement,66 and Congress has meticulously avoided either dictating the terms of collective agreements,67 or "giv[ing] the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation."68 As the Court explained,69

[s]uch a rule of law would delegate to unions and

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62 Id. at 219.
63 Id. at 218-19.
64 Id. at 219.
65 Id. at 220.
66 Id. at 211.
68 Allis-Chalmers, 471 U.S. at 212.
69 Id.
unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, Section 301 does not grant the parties to a collectively-bargained agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of [Section] 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that prescribe conduct, or establish rights and obligations, independent of a labor contract.

Thus, rather than supporting the employers in Strachan and Kirby, Allis-Chalmers requires that those employees be permitted to pursue their state law claims.

Moreover, the Court has reaffirmed this aspect of Allis-Chalmers on at least four separate occasions. First, it dismissed an appeal from a decision of the Hawaii Supreme Court which concluded that there was no preemption of a state claim where a worker alleged her employer had discharged her, in retaliation for filing a workers compensation claim. The appeal claimed that only the collective bargaining agreement and its accompanying grievance procedure could provide the remedy for employee discharges. Therefore, employers alleged that federal labor laws favoring exclusive use of that procedure preempted any state claim. However, for want of a substantial federal question, the Court dismissed the case, less than two months after it decided Allis-Chalmers.

Second, in Metropolitan Life Ins. Co. v. Massachusetts, the Court cited Allis-Chalmers to support its ruling that neither the NLRA nor a collective bargaining agreement preempted state law setting minimum standards for group health insurance. Third, in a 1987 case, the Court held that Section 301 preemption did not mean removal of state law contract claims. There, the Court stated,

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72 471 U.S. at 748 (cited in note 53).

73 Id. at 755-56.
Section 301 does not . . . require that all employment-related matters involving unionized employees be resolved through collective bargaining and thus be governed by a federal common law created by Section 301 . . . . Claims bearing no relationship to a collective-bargaining agreement beyond the fact that they were asserted by an individual covered by such an agreement are simply not preempted by Section 301.74

Finally, in the dicta of a case holding that federal law preempted an employee's state law claim that her union had assumed the responsibility for preventing her from working on jobs for which she was not qualified, the Court carefully noted that the question of whether the state could impose such responsibilities on unions, independent of any contracts, was not properly before it.75

These decisions following Allis-Chalmers, as well as Allis-Chalmers itself, require that employees' state claims against tortious conduct in connection with drug-testing programs survive the preemptive effect of Section 301 unless they are "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract."76

In fact, most such state claims are not dependent on the contract. Thus, state law claims for such torts as defamation, invasion of privacy and the like, and certainly any claims based on statutory regulation of drug testing, need not mention any rights under the collective bargaining agreement and will not directly or indirectly depend upon that agreement. Unlike the claim in Allis-Chalmers, which was a contract claim disguised as a tort, such claims are not derived in any way from the rights that an employee enjoys as a result of the union's collective bargaining agreements with an employer.77 Thus, the claim filed by an employee covered by collective bargaining agreements is precisely the same as the claim which the employee would have made if she worked in an unorganized shop.

The argument for preemption of such claims under Section 301 initially boils down to two separate propositions. First, it is argued that when a collective bargaining agreement covers a worker, the worker's remedy is a potential federal contractual remedy that is necessarily exclusive of any state remedies.78 In other

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76 Allis-Chalmers, 471 U.S. at 220 (cited in note 27).
78 Strachan, 768 F.2d at 705 (cited in note 4); Kirby, 811 F.2d at 256 (cited in note 4).
words, if a worker has two parallel claims, one under state law and one under the contract, the state claim is automatically the "same" as the contract claim, and thus the two are intertwined and mutually dependent. Second, it is argued that in deciding whether the employer has behaved in a way proscribed by state law, a state court would necessarily have to decide whether the employer had a valid reason for acting—one permitted by the contract.79

The same response addresses both of the above propositions. Neither the parallelism of state law and contractual claims, nor the employer's defense that its actions were authorized by contract, should imply that the employee asserting rights under state law is making an effort to enforce collectively bargained terms or that enforcement of state rights could undermine the arbitration process. Organized employees frequently assert rights under federal statutes protecting working conditions that are parallel in some respects to rights that may have been negotiated in a collective bargaining agreement—indeed, many union contracts expressly incorporate various federal statutory rights. Yet it has never been the law that such rights, or the statutory procedures for enforcing them, are supplanted by the collectively bargained grievance and arbitration process.

To the contrary, in the federal area, the Supreme Court has held repeatedly that employees may invoke their federal statutory rights by using the statutory enforcement procedures either in addition to, or instead of, the contractual arbitration process. The Court has reasoned that unions will not always be willing to protect the federal statutory right of individual employees in the arbitration procedure, and that arbitration cannot provide sufficient

See also Lingle v. Norg, 823 F.2d 1038, 1044, 1046 n. 17, 1048 (7th Cir. 1987) (preemption of state retaliatory discharge claim), rev'd 108 S. Ct. 1877 (1988).

79 See Strachan, 768 F.2d at 705 (cited in note 4); Kirby, 811 F.2d at 256 (cited in note 4). See also Lingle, 823 F.2d at 1046 (cited in note 78). With respect to defamation claims, employers raise still another point. They assert that allowing such claims will impose an undue burden on the grievance process. However, such a contention is based in the NLRA rather than on Section 301 preemption. See notes 152-78.

It is important to keep the two preemption arguments separate, because Section 301 preemption gives the employer significant advantages—particularly with respect to removal. See text at note 36. Additionally, the "burden" argument, properly understood, warrants preemption in a narrower range of cases than every one in which a collective bargaining agreement is present. See notes 174-78 and accompanying text.

protections to assure the vindication of the federal interests for which Congress has provided judicial remedies. Furthermore, the Court has expressly rejected the contention that allowing organized employees to assert parallel claims in court would either undercut the grievance procedure or discourage employers from including arbitration clauses in collective bargaining agreements.\textsuperscript{81}

Although all of the above cases involved federal statutes, and protections against private-sector drug testing are to be found in state law, the distinction is irrelevant. Congress' intent to encourage judicial enforcement of federal rights indicates a parallel intent with respect to judicial enforcement of state rights.\textsuperscript{82} Indeed, given the general presumption against preemption of state law,\textsuperscript{83} it would be odd to assume that Congress intended to permit independent federal claims to proceed but to deny similar treatment to independent state claims.

Symmetrical treatment of federal and state claims is borne out in several cases where state rights prevailed. In one case, the Court stated that union employees should benefit from state minimum employment standards, just as they benefitted from similar federal standards.\textsuperscript{84} The Court stated: "We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards."\textsuperscript{85} In another case, the Court found an individual's substantive right to be based on an independent body of law that could not be subordinated to the contract.\textsuperscript{86} Similarly, in \textit{Colorado Comm'n v. Continental},\textsuperscript{87} the Court held that state civil rights laws could be enforced notwithstanding the arbitration policies fostered by the Railway Labor Act which, as we have seen has at least as much preemptive effect as Section 301.

If Congress did not intend to preclude the federal claims, there is no reason to conclude that it meant to obviate state claims. Even if an employee's state law claim relating to drug testing finds an exact parallel in the collective bargaining agreement, and even if the employer asserts that its actions were authorized by the col-

\textsuperscript{81} \textit{Gardner-Denver}, 415 U.S. at 54-55 (cited in note 53).
\textsuperscript{82} \textit{Metropolitan Life}, 471 U.S. at 755 (cited in note 53).
\textsuperscript{84} \textit{Metropolitan Life}, 471 U.S. at 755.
\textsuperscript{85} Id.
\textsuperscript{86} \textit{Gardner-Denver}, 415 U.S. at 52.
\textsuperscript{87} 372 U.S. 714 (1963).
lective bargaining agreement, the Court's holdings described above seem to address each of these concerns.88

An additional argument that has been suggested in favor of Section 301 preemption is that in order to decide the relief to which the employee is entitled, it is necessary to interpret the contract to determine the appropriate measure of damages.89 There are two responses to this contention: First, in the Gardner-Denver line of cases involving the enforcement of federal labor standards, the courts have not viewed interpreting the collective bargaining agreement at the remedy stage as an obstacle to independent court enforcement.90 Second, it is by no means clear that the courts must interpret the contract at all. For instance, measuring back pay can be, and often is, wholly distinct from the terms reached in the agreement. If a dischargee is employed in a non-union shop, the amount of back pay is calculated by determining how much money another employee, working in the same job as the dischargee, earned during the time of the discharge, and then perhaps making any necessary adjustments for interim earnings, differences in skill, and the like. Although the contract's terms could be used as a shorthand for performing the same calculations, the contract remains only a surrogate for an evidentiary proceeding that could be conducted without a contract.91 In those circumstances, a state tort

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88 The collective bargaining agreement may become an issue indirectly. For example, if the employer argues its real motivation for discharge was not the employee's refusal to take a drug test but her position as a union shop steward. The plaintiff in such a case might well respond to that factual argument, in part, by contending that both the NLRA and the contract give employees the right to be active in union affairs and forbid discharge for that reason. Accordingly, the plaintiff might argue that the employer is admitting to a blatantly illegal motivation only because the statute of limitations for pursuing such claims has expired.

The plaintiff is permitted to advance this evidentiary argument about the meaning of the contract, as well as the meaning of the NLRA, not because the trier of fact is entitled to enforce those legal authorities, but because their existence undercuts the employer's motivation argument. Of course, if the trier of fact is nevertheless persuaded that the employer was motivated by the NLRA or contract violation, not by the retaliatory motive forbidden by state law, then judgment would have to be given to the employer. Merely invoking the agreement in these limited circumstances should be no more likely to lead to preemption than would arguing the power of the NLRA.

89 Brief for respondent at 19, Lingle, 823 F.2d 1031 (cited in note 78).

90 The problem was particularly apparent in Barrentine, in which the plaintiffs claimed that they were entitled to overtime pay for certain work done checking their employer's trucks. Plainly, apart from the question of whether the work was "in the service of the employer," in order to formulate a back pay order a court would be required to decide the rate of pay on which time-and-a-half should be calculated. But the Court did not even consider it necessary to address the argument that this sort of calculation was dependent on a construction of the contract that should be deferred to arbitration.

91 It might be necessary to interpret the contract if, for example, the employer asserts
remedy that required an award of compensatory damages could produce a back pay calculation very different from that which the contract would require an arbitrator to perform.

Some alternative proposals to the prevailing system of total preemption or instituting no preemption have been proposed, but none stands up to legal precedent or to practical considerations. In a recent dissenting opinion, Circuit Judge Richard Posner set forth a modified rule of preemption to an absolute prohibition on state tort claims.\textsuperscript{92} He observed that under a rule of preclusion, the worker's state tort claim is dismissed "merely because the interpretation of a collective bargaining agreement might—not that it must—become material."\textsuperscript{93} Rather than dismissing such claims, he proposed that they be stayed pending an adjudication of the contractual aspects of the claim, under the doctrine of primary jurisdiction.\textsuperscript{94} Under this approach, it would be up to the arbitrator to decide whether the employer had grounds under the contract to discipline the employee. If the arbitrator rules against the employee, there would be no further investigation. On the other hand, if the arbitrator rules that the employer violated the collective bargaining agreement, then the state tort proceeding could continue.

Judge Posner's proposal is surely more favorable to the employee and less intrusive upon state sovereignty than the rule of complete preclusion—it is usually better to have a chance of coming back to court than to be dismissed without hope of reprieve. Nevertheless, the application of primary jurisdiction is seriously flawed. It assumes that the state tort adjudicator cannot resolve the state claim without first deciding whether the contract authorized the employer's conduct. However, the court need only look to the contract first if the contract supersedes state law, or if federal law gives the union the authority to waive the employee's protection under such state law. Yet, \textit{Allis-Chalmers} holds any degree of

\begin{itemize}
  \item that, notwithstanding the retaliatory discharge, it suffered a loss of business and had to lay off a number of employees and, in light of the contractual provisions for priority in layoff, the plaintiff would have been laid off thirty days following the unlawful discharge. If that defense were accurate, then the back pay liability would end after the thirty day period. But even if it would be necessary to construe the contract in order to determine the validity of the employer's back pay defense, the defense scarcely goes to the heart of the state law claim, and the state claim should not be preempted even if it "tangentially involv[es] a provision of the collective bargaining agreement." \textit{Caterpillar v. Williams}, 107 S. Ct. 2425, 2432 n. 10 (1987), quoting \textit{Allis-Chalmers}, 471 U.S. at 211 (cited in note 27).

\begin{footnote}
\textsuperscript{92} \textit{Jackson v. Consolidated Rail Corp.}, 717 F.2d 1045, 1058-61 (7th Cir. 1983) (Posner, concurring).
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\textsuperscript{93} Id. at 1060.
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\textsuperscript{94} Id. at 1059.
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supersession to be illegal. Therefore, Judge Posner's proposal is contrary to accepted case law.5

It is also possible that Judge Posner had in mind the kind of case in which the employer uses the agreement as a pretext for discharging a worker, when the real reason would violate state law. Even in this hypothetical case, primary jurisdiction is still inappropriate. First, it is quite possible that, even if the employer had the lawful reason in mind, it also had the unlawful reason in mind, and would have acted for the forbidden reason notwithstanding the availability of the permitted one. More importantly, such a plan requires congressional intent authorizing a limited preemption concept. Without such intent, Judge Posner cannot allocate to the arbitrator the task of deciding whether the unlawful reason was the "but for" motive for the employer's action (assuming that that is the decisional model adopted by the state).96

No additional evidence exists to support more limited preemption than the complete preemption favored in Strachan and Kirby. Moreover, the Court has never accepted the primary jurisdiction argument when considering parallel federal claims, such as Title VII and the Fair Labor Standards Act. As discussed earlier, the Court has repeatedly declined to subject plaintiffs under those statutes to either collateral estoppel by an arbitration decision97 or to a requirement that the parties exhaust arbitral remedies.98 Thus, a rule of primary jurisdiction, such as that proposed by Posner, is equally untenable under Section 301 as the total preemption rule adopted in Strachan and Kirby.

Alternatively, it has also been suggested that the Labor Board's policy of deferring state statutory claims under the NLRA

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96 Allis-Chalmers, 471 U.S. at 212. However, use of the doctrine of primary jurisdiction may be appropriate with respect to state claims which may be waived by the union. For example, the union may waive some types of state contract claims in collective bargaining, although at this point it is extremely unclear where the line of waivability will be drawn. See Caterpillar, 107 S. Ct. at 2431-32 (cited in note 91). Nor is it clear what standard will be adopted to determine whether a waiver has occurred. See generally Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) (requiring clear and unmistakable provision in the collective bargaining agreement, not simply a general provision, in order to waive rights under the NLRA). To the extent that it becomes necessary to interpret the contract in order to decide what the parties actually agreed to permit, it may be appropriate to defer only that question to arbitration. See generally Wade H. McCree, Foreword, 23 Wayne L. Rev. 255 (1977) (certification of state law questions to state courts).


98 See, for example, Gardner-Denver, 415 U.S. 36 (cited in note 51).

to arbitration provides a sound model for treatment of state law under the preemption doctrine. In giving an arbitrator's resolution of contractual issues more than mere evidentiary weight in a subsequent Labor Board proceeding, the Board has refused to follow the lead of the Supreme Court in Gardner- Denver. The Board's justification for rejecting the Gardner-Denver approach has been that the NLRA, unlike Title VII and other federal labor laws, seeks to encourage collective bargaining rather than to provide substantive protection to individual employees.

A state may choose to adopt such a model voluntarily, as a matter of state law, but the preemption doctrine provides no basis for imposing such an approach. If on the other hand, a state concludes that it wishes to provide substantive protections to individual employees, the reasons that have led the Board to accommodate grievance arbitration through its deferral policy scarcely denies the states the right to provide an independent cause of action comparable to the right to sue provided by Congress for violations of such federal protections as the Civil Rights and Fair Labor Standards Acts. Under the Board's rationale, the merits of the NLRA's construction may be debated, especially as it may be applied to individual employees' rights.

B. Preemption by the National Labor Relations Act: Balancing Federal and State Interests

Under the NLRA, balancing federal and state interests may become crucial. If a court determines that the case has implicated a federal interest supported by the NLRA, then the court

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99 Under Collyer Insulated Wire, 192 NLRB 837 (1971), unfair labor practice charges are "deferred," meaning delayed, until the grievance and arbitration procedure resolves related claims under the collective bargaining agreement. Under Spielberg Mfg Co., 112 NLRB 1080 (1955), the Board will "defer" to an arbitrator's resolution of contractual claims, in the sense of accepting that decision as a determination of related statutory claims, if certain criteria relating to consent, procedural regularity, fairness, and consistency with the Act are satisfied.


101 The Board's broader applications of the deferral policy have been rejected in such cases as Taylor v. NLRB, 786 F.2d 1516 (11th Cir. 1986). See also Paul Alan Levy, The Unidimensional Perspective of the Reagan Labor Board, 16 Rutgers L.J. 269, 372-87 (1985). For another view, see Calvin William Sharpe, NLRB Deferral to Grievance-Arbitration: A General Theory, 48 Ohio St. L.J. 595 (1987).

102 See notes 29-32 and accompanying text for the broad outlines of NLRA preemption law.
must identify the state interests that are at stake and perform a "sensitive balancing" of the respective interests. Thus, the court determines the nature and importance of each interest and the extent to which enforcement of the state law rights may interfere with the federal scheme.¹⁰⁴

The principal argument that is advanced in favor of NLRA preemption of state claims for retaliatory discharge and related state torts is that the employee who asserts a state law right is arguably engaging in "concerted" activity which is protected by Section 7.¹⁰⁵ At least for the present, there seems to be no danger of preemption, because after holding for several years that a single employee's invocation of a state law right that is of common interest to several employees is nevertheless "concerted" and thus protected by Section 7,¹⁰⁶ the Board now construes the NLRA to deny protection to a single employee who asserts a state law right without involving her fellow employees in a collective effort.¹⁰⁷

If the Board finds state drug testing claims to be preempted, either based on a finding of concerted activity¹⁰⁸ or by reviving its previous interpretation of Section 7, such preemption would apply to every other kind of state regulation of the substantive terms and conditions of employment, including minimum wages, work safety, workers compensation, and discrimination.¹⁰⁹ The scope of preemption thus implied is extraordinary and cannot prevail; it is unlikely that Congress intended to encourage collective bargaining¹¹⁰

¹⁰⁸ As when an employer seeks to perform drug tests without probable cause on two employees simultaneously and they both refuse to take them. The fact that the employees were actually acting in concert is insufficient, however, to grant them protection unless the employer is aware of the concertedness, and thus can be said to have directed its retaliation against the concertedness. See Brucker & Co., 273 NLRB 1306 (1984); Center Ridge Co., 276 NLRB 105 (1985).
¹⁰⁹ The Labor Board decision in Alleluia Cushion, 221 NLRB 999 (cited in note 106) provides that preemption also operates in organized and unorganized workplaces alike, because Section 7 rights apply whether or not a collective bargaining agreement recognizes a right comparable to the state law right the employee invokes.
¹¹⁰ There is certain irony in employers' reliance on such Congressional intent in arguing
by regulating substantive work conditions. Rather, it hoped to encourage collective bargaining over many issues not regulated by the states. If the mere fact that more than one employee asserted the state law right were enough to find preemption—or indeed if a single assertion warranted preemption—the NLRA would supersede the state law drug-testing claims merely by “piggy-backing” on them and could override every other kind of state law claim pertaining to employment in the same manner. Just as the state may avoid the limitations imposed by Section 301 by defining a tort in such a way that it adheres to the contract, so the NLRA may not preempt otherwise independent state law claims merely by providing a federal means for their enforcement.

If state law claims are preempted, the protections provided by Section 7 itself might also be lost. The “disappearance” of the state claim could effectively destroy an employee’s ability to rely on state law to support the assertion that his or her actions were “reasonable” and therefore protected. Surely this was not Congress’ intent. Thus, there is not even a significant federal interest at stake to be weighed in the preemption balancing.

for preemption, in light of the Taft-Hartley amendments that guarantee the right to refrain from concerted activity and collective bargaining. See Pattern-Makers League v. NLRB, 473 U.S. 95, 100-01 (1985).

See Terminal R. Ass’n v. Brotherhood of R. Trainmen, 318 U.S. 1, 6-7 (1943) (Railway Labor Act).

Metropolitan Life, 471 U.S. at 751-56 (cited in note 53).


Although the Board’s current rules do not treat an individual’s exercise of state law rights as “concerted” and thus as protected under Section 7, the Board does consider the employee’s action to be concerted if the right is contained in the collective bargaining agreement, because the assertion of a collectively bargained right is considered to grow out of the concerted activity that produced the contract. NLRB v. City Disposal Syst., 465 U.S. 822 (1984). Perhaps it could be argued that because the assertion of the right is thus protected by Section 7, state enforcement procedures are preempted. However, for the same reasons that piggy-backing preemption should not succeed under the Alleluia Cushion, 221 NLRB at 999 (cited in note 106), decision, it should also fall under City Disposal.

City Disposal Systems, 465 U.S. at 837.

Nor does Teamsters v. Oliver, 358 U.S. 283 (1959), favor a finding of preemption. In that case, the Court struck down a portion of a state antitrust law that forbade the parties from reaching any agreement on the price of truck leases. The Teamsters had sought to regulate lease prices in a collective bargaining agreement because of the close relationship between a lease operator’s total costs and the portion that is derived from labor costs. The preemptive objection to the Ohio law in Oliver was not that it sought to establish certain working conditions, because it did not. Rather, the law sought to regulate the process by which wages would be set, requiring individual rather than collective bargaining.

The court found such an approach to be preempted, because it was contrary to the express requirement in the NLRA that employers bargain collectively with the representatives of their employees concerning the question of wages. There is, however, dicta in Oliver suggesting that states may not “limit[] the solutions that the parties’ agreement can provide
Moreover, even if there were sufficient federal interest to warrant application of a balancing test to determine whether the NLRA preempts state law, the state interests far outweigh the minimal federal interest. As Congress has concluded with respect to various federal policies, states should be entitled to decide that the public policy motives which prompted limitations on drug testing or regulation of the terms and conditions of employment will not be adequately served by requiring organized employees to seek vindication through their unions in the arbitration process. There are several reasons why they may so conclude.

First, arbitration may not provide a forum in which employees can vindicate their public law rights at all. The question of the role of external law in labor arbitration, and the extent to which arbitrators are authorized to import considerations of external law absent express authorization in the contract, has been hotly debated for many years, and continues to provoke widely varying reactions. Obviously, if a state cannot be sure that its law will be applied by the arbitrator, it has every reason to insist that employees have access to its own judicial or administrative processes. Moreover, many contracts contain a clause that limits grievances to claims concerning the collective bargaining agreement, and that forbid the arbitrator to modify or add to the contract. Thus, in effect, the contract bars reliance on public law where it differs from the contract. But the courts which have held that state claims are preempted routinely ignore the actual language in the collective bargaining agreements at issue, except insofar as they occasionally note that the contract makes the arbitration procedure exclusive or to the problems of wages and working conditions,” 358 U.S. at 296. See also Alessi v. Raybestos-Manhattan, 451 U.S. 504, 526 (1981) (“pension plans [that] emerge from collective bargaining . . . themselves become expressions of federal law, requiring preemption of intrusive state law”). The Court has repeatedly rejected efforts to preempt state substantive regulation on that ground. See Metropolitan Life, 471 U.S. at 752-58 (cited in note 53); Utility Trailer Sales v. Machinists District 190, 464 U.S. 1005 (1983); Baltimore & Ohio RR Co. v. Pennsylvania Dept of Labor & Industry, 423 U.S. 806 (1975). See also Allis-Chalmers, 471 U.S. at 212 (cited in note 27) (Congress did not “give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation”).


According to a poll by Hoyman and Stallworth, lawyers representing management tend to oppose incorporation of external law, but lawyers representing unions tend to favor it. Michele M. Hoyman and Lamont E. Stallworth, Arbitrating Discrimination Grievances in the Wake of Gardner-Denver, 106 Monthly Lab. Rev. 3, 6 (Oct. 1983). The division of opinion is scarcely surprising, because most regulations found in external law, especially in heavily organized states, primarily limit the employer.
the arbitrator's decision final and binding.\(^{120}\)

Second, arbitration may not provide the same procedural protections as the state courts, such as the availability of discovery, the right to be represented by counsel, and trial by jury.\(^{121}\) One may well argue about whether the absence of lawyers, judges, and legal formalities is a blessing or a curse. However, inasmuch as the issue in preemption cases is whether the state's policy judgment is superseded under the Supremacy Clause, the very fact that the desirability of formalities is arguable militates against concluding that a state's decision to insist on them is impermissible.

Third, states may reasonably conclude that collective bargaining agreements will not provide remedies adequate to protect state rights from interference by employer abuses. Even an eventual award of reinstatement with full back pay may not provide sufficient protection to encourage employees to exercise their legal rights; employees may still lose their mortgages, become unable to pay necessary expenses for their families, or otherwise suffer injuries not fully remedied by a simple award of back pay years later.\(^{122}\)

This problem is particularly acute for employees who work under contract provisions permitting back pay at lower rates than they would have earned had they been working during the period of their discharge.\(^{123}\) It may be entirely defensible for a union to

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\(^{120}\) Courts holding that state claims are preempted routinely ignore the actual language in the collective bargaining agreements anyway, except noting occasionally that the contract has made the arbitration procedure exclusive or the arbitrator's decision final and binding. See, for example, *Lingle*, 823 F.2d at 1050-51 (cited in note 78).

\(^{121}\) *McDonald v. City of West Branch*, 466 U.S. 284, 291 (1984). Some of the decisions also rely on the fact that an arbitrator may not have legal expertise. Id. at 291. That analysis may be undercut by a recent survey of arbitration awards published in BNA's Labor Arbitration Reports, which found that some 85% of the arbitrators whose education was identified had a law degree. Perry A. Zirkel, The Use of External Law in Labor Arbitration, 1985 Det. C. Law Rev. 31, 38 (1985). On the other hand, persons who have attended law school do not necessarily have experience in the practice of law. Moreover, the apparently high proportion of arbitration opinions written by lawyers in Zirkel's survey may be skewed, if lawyers' arbitration awards are more likely to be accompanied by written opinions, and to be published in BNA's reporter, than are other arbitrators' awards.

\(^{122}\) *Brock v. Roadway Express*, 107 S. Ct. 1740, 1745-46, 1748 (1987). The legislative history of 49 U.S.C. sec. 2305, which was at issue in *Roadway Express*, contains useful testimony showing why many remedies for retaliatory discharges, including reinstatement with back pay, may often be inadequate either to persuade employees to exercise their rights at the risk of losing their jobs, or to deter employers from violating workers' rights.

\(^{123}\) For example, in *Lingle*, 823 F.2d 1031 (cited in note 78), the contract provided that workers on a piece-rate pay schedule receive back pay at a special rate, specified in the contract, which applies to workers who have been involuntarily idled by breakdowns in the assembly line and similar reasons beyond their own control. Id. at Joint Appendix 12 and 15. This rate was not only lower than the hourly rate which all incentive workers were guar-
make such a concession in collective bargaining, either because the union is economically weak or because it obtains some other important contract provision in return. But a company might decide that it is profitable to fire employees who exercise their rights—notwithstanding the risk of having to provide reinstatement with back pay (less the worker’s interim earnings) years later—as a deterrent to other workers’ exercise of their rights. The states should not be compelled to agree to adopt weak remedies in the enforcement of their own public policies.

In light of this problem, many federal retaliatory discharge statutes provide for additional incentives for employer compliance, such as statutory penalties, compensatory damages and attorneys’ fees. When states likewise decide that enforcement of their public policies requires that punitive or other remedies be awarded in addition to the reinstatement and back pay, they should be free to exercise their police power in that way.

Fourth, a state may conclude that it cannot rely on unions to fully enforce state public policies through the grievance procedure. Under federal law, a union’s handling of grievances and arbitration hearings is governed by the duty of fair representation, but that duty leaves unions ample leeway to decide not to pursue the contract claims of individual employees. For example, the union may fail to act because it does not believe that the claim is meritorious, or because it cannot afford to take the claim to arbitration, or because a particular claim is inconsistent with the collective in-
A union may also opt to pursue an arbitration in a way that is designed to maximize the collective interest of the workers, even if the individual employee's claim is harmed. If a state had to rely on union enforcement of its public objectives, subject only to the duty of fair representation, its "public policy would become a mere bargaining chip, capable of being waived or altered by the private parties to a collective bargain." Although Congress has decided that the enforcement of contractual rights which were created by the union's bargaining efforts should be left to the union, the states should be entitled to insist on having their own judges and the members of their own bars available to enforce state law rights.

It has been argued that, in the long run, more employers will be deterred from violating employee rights by a strong arbitration system than by the remedies afforded by state law. Whether or not that policy is correct, preemption analysis does not require the states to subscribe to any particular economic theory, whether propounded by judges or legislators. Similarly, neither the NLRA nor Section 301 bars the states from deciding that their public policies may be served more adequately by resorting to state law rights.

Decisions favoring preemption have raised a number of policy concerns regarding the effect of permitting employees to pursue state claims that are parallel to claims made under the collective bargaining agreement in arbitration. For example, one court contended that allowing state law to provide protection to all workers would diminish the attractiveness of unions. This, the court said, would make workers less reliant on arbitration remedies, such as protection against arbitrary discharge, contained in collective bargaining agreements. Precisely the opposite is true, however. It may be true that the theoretical ability of non-union workers to pursue state wrongful discharge claims may lead them to believe that they have less need for union representation, but federal

132 See Harberson v. NLRB, 810 F.2d 977, 980-81 and n. 3 (10th Cir. 1987).
134 Lingle, 823 F.2d at 1047 (cited in note 78).
135 As the author argues below, denying preemptive effect to the collective bargaining agreement is not, in fact, likely to have a significant effect on the strength of the arbitration system. See notes 142-46 and accompanying text.
136 CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637, 1651 (1987). See also id. at 1653 (Scalia, concurring) ("a law can be both economic folly and constitutional").
137 Lingle, 823 F.2d at 1047.
138 See Susan L. Catler, The Case Against Proposals to Eliminate the Employment At
preemption cannot solve that problem. It can only deprive organ-
ized workers of equal access to the forums provided by state law.
Indeed, if only non-union workers may assert state law rights, an
employer could argue during an organizing campaign that workers
who vote for the union will lose state law protection. Thus, a state
law that deprives employees of state law benefits, should they
choose to engage in collective bargaining, might itself be pre-
empted under the NLRA because it discourages the exercise of
Section 7 rights.139

Those favoring preemption are also concerned that unions and
employers will stop arbitrating, if employees who are allowed to
file their own suits under state law and in state court.140 In
Strachan, the court expressed concern that unless employees were
compelled to confine such claims to those contractual procedures,
"the critically important aspect of collective bargaining which is
involved in the establishment of the grievance procedure to protest
breaches of labor contracts will be destroyed."141 Yet, in Gardner-
Denver, the Supreme Court rejected the argument that allowing
independent statutory remedies for discriminatory discharges
"would sound the death knell for arbitration clauses in labor
contracts."142

The Court's prediction has been substantiated by time. De-
spite employers' fears, the proportion of all collective bargaining
agreements that contain clauses forbidding discrimination has sub-
stantially increased, from 74% in 1975 to 88% in 1986.143 During
the same period of time, an increasing number of contracts, begin-

Will Rule, 5 Indus. Rel. L.J. 471 (1983) (arguing that wrongful discharge law simply creates
a misleading illusion of protection for the unorganized employee that may discourage selec-
tion of union representation).


140 In the vivid imagery of the court in Strachan, unions and employers would lose
"grist for the mill of grievance procedures and arbitration." 768 F.2d at 705 (cited in note 4).

141 Id. at 705. See also Lingle, 823 F.2d at 1046 (cited in note 78) (preemption required
so that states cannot "circumvent the arbitration and grievance procedures envisioned by
the Congress as exclusive")

142 415 U.S. at 54 (cited in note 51).

143 The figures are taken from periodic studies released by the Bureau of National Af-
fairs, Basic Patterns in Union Contracts ("BNA Studies"). The figures are for provisions
banning discrimination based on race, color, creed, sex, national origin or age. From 1970 to
1981, the Bureau of Labor Statistics published figures on discrimination provisions on an
annual or biennial basis in its Bureau of Labor Statistics, Characteristics of Major Collective
Bargaining Agreements, Bulletin Nos. 1686, 1729, 1784, 1822, 1888, 1957, 2013, 2065, and
2095 ("BLS Studies"). These reports also show a steady increase in provisions barring race
discrimination in the years following Gardner-Denver, although the percentage figures are
somewhat higher than the BNA studies.
ning with 10% in 1975, and reaching 28% in 1986, have required compliance with all federal, state and local antidiscrimination laws.\footnote{BNA Studies.} Moreover, several other federal employment statutes have been added to the list of those under which claims may proceed independent of arbitration.\footnote{Age Discrimination in Employment Act, 29 U.S.C. sec. 626(e)(1) (1982); Fair Labor Standards Act, 29 U.S.C. sec. 201 et seq. (1938); Occupational Safety and Health Act 29 U.S.C. sec. 651 et seq. (1970); Employee Retirement Income Security Act, 29 U.S.C. sec. 1001 et seq. (1974).} Yet, the proportion of collective bargaining agreements containing arbitration clauses also has increased slightly, from 96% in 1975 to 99% in 1986.\footnote{BNA Studies; BLS Studies (cited in note 143).} This history makes it highly unlikely that the availability of a state forum for the litigation of claims relating to drug testing (which are but a small portion of the kinds of complaints that may be addressed under contract clauses forbidding discharge without just cause or authorizing employer investigations) will have any significant effect on the frequency of adoption or use of arbitration procedures.

It is also highly unlikely that the parties will abandon arbitration simply because a few employees may pursue statutory claims after the grievance procedure has been completed.\footnote{Gardner-Denver, 415 U.S. at 54-55 (cited in note 51). It is unrealistic to suggest that after a union has either refused to pursue a grievance or has taken it to arbitration and lost, all or even most of the employees will pursue their claims in state court. Employees generally do not have the financial resources to do so on their own, and lawyers who might take cases on a contingency basis will of course evaluate the likelihood of success before investing their own resources.} As the court noted in Gardner-Denver, there are many reasons why unions and employers adopt and use arbitration procedures, including its therapeutic value,\footnote{After a discharged employee gets a hearing on her complaint, she may be satisfied with the process, or even persuaded by the adverse decision, although she obviously would have preferred to be reinstated.} its relative convenience, and the fact that arbitration is, after all, the quid pro quo for the no-strike clause. In any event, the federal policy favoring labor arbitration does not extend to the arbitration of claims under statutes or the common law, but applies only to “settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.”\footnote{LMRA sec. 203(d), 29 U.S.C. sec. 173(d) (1982).}

By contrast, it would be difficult to overstate the adverse impact that preemption could have on the states’ ability to exercise their power to regulate working conditions of nonunion and union employees alike. If states may not protect their citizens against
drug testing, simply because a collective bargaining agreement might provide equivalent protection, similar arguments may be made against the enforcement of state civil rights laws, state wage laws, state occupational safety laws, and even state workers compensation laws. Thus, many collective bargaining agreements provide for discrimination claims, workplace safety, and even workers compensation. Sometimes contracts have their own detailed rules governing these subjects, sometimes they incorporate statutory protections by reference, and sometimes the application of state law may simply be inferred from general provisions such as "just cause."

However, if unions and employers may not contract themselves out of their state law obligations, they may not substitute their own enforcement mechanisms and deny employees access to state court simply by adopting contract provisions that piggy-back on state law. To paraphrase Chief Justice John Marshall, the power to adjudicate is the power to destroy. As one court has observed, preemption in such circumstances would allow "an employer [or] a union [to] strip an employee of the protections of [state] law by merely restating the rights and obligations that arise thereunder in a private labor agreement." The effect would be to "accord the substantive provisions of a private labor agreement the supremacy of Federal law, thereby preempting State law."

Similar considerations apply to state causes of action for defamation, with one important exception noted below. Thus, a state court can readily rule on whether an employee was a drug user, whether that accusation was explicitly or implicitly made by the

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151 Id.
152 See notes 176-78 and accompanying text. The author is uncomfortable with any use of defamation law, even by employees against employers, because of its impact on the First Amendment right of free speech. However, given the developments of the past decade concerning constitutional privilege, the question is not whether anybody should be able to bring slander suits, but whether employers ought to enjoy some special privilege under the labor laws that is not available under the Constitution. Additionally, given the differences between workers and companies with respect to access to the podium, ability to impose economic harm, and indeed credibility to listeners, slander suits are considerably less offensive in this context than in most others. In the context of industrial society, the employer's accusation of drug use is comparable to the police disseminating a list of alleged shoplifters. See Paul v. Davis, 424 U.S. 693 (1976).

Employees have turned to slander suits because the law has denied them the ability to sue for wrongful discharge, and indeed has cut off their right to do so by virtue of federal preemption of state suits that might otherwise be viable. Slander suits are an attempt to avoid limitations on legal efforts to redress the economic harms caused by unfair discharges, and my reservations about slander suits in other contexts thus have less force here.
employer, and whether the employer did or did not act with malice in making the statement, without making any reference to the collective bargaining agreement. The employer may try to defend on the ground that the collective bargaining agreement authorized the acts or statements alleged to be defamatory, but that sort of defense is not materially different from the defense that the agreement authorized a discharge or, indeed, that the defamatory acts were permitted by a presumptively “at-will” agreement concerning the slander victim’s employment. Yet none of these defenses would avoid a slander claim, and the fact that the contract has been federalized should make no difference.

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183 See Keehr v. Consolidated Freightways, 825 F.2d 133, 137-38 (7th Cir. 1987); Tellez v. Pacific Gas & Electric Co., 817 F.2d 536 (9th Cir. 1987). See also Harrison v. UPS, 119 LRRM 2163, 2170 n. 8 (C.D. Cal. 1984). In Tellez, the court suggested that although arbitrators can determine whether an employee was fired without just cause, they cannot determine whether an employer has acted in an outrageous manner. 817 F.2d at 538-39. Even if that were true under the collective bargaining agreement, most contracts do permit grievances over harassment by supervisors. See United Technologies Corp., 115 LRRM 1049 (1984). Keehr forthrightly acknowledged that a defamation plaintiff could file a grievance for “abusive language,” but, in an opinion by one of the dissenters in Lingle, 823 F.2d 1031 (cited in note 78), the court indicated that preemption is not warranted merely because a claim could be taken through the grievance procedure. Rather, the issue is whether the state law tort claim “purports to give meaning to the terms of the labor contract,” which a defamation claim does not. Keehr, 825 F.2d at 137.

184 There may be some cases in which the employer’s statement cannot be evaluated without interpreting the collective bargaining agreement. Suppose, for example, that the employer accuses an employee of failing to comply with the appropriate production standards; reference may be needed to the contract to decide what the appropriate standards were, to determine both the truth and the falsity of the statement and the employer’s negligence or malice, as required by state law. In that event, the defamation claim might be preempted by Section 301, although it is difficult to imagine how a defamation suit over such charges would be worth very much simply as a matter of state law. By contrast, accusations of “theft,” “dishonesty” and “drug use” seem to be the most common subjects of defamation suits in which preemption issues are raised. Even if the contract uses those terms in describing permissible bases for discharge, the employee’s defamation suit can be resolved by reference to the obvious meaning of the terms, without requiring reference to the contract.

On the other hand, the mere fact that the discharge letter uses a term found in the contract would not require preemption of a consequent defamation action. But see Harris v. Hall’s Motor Freight, 73 LRRM 2274, 2277 (D.C. Gen. Sess. 1969) (defamation action held collaterally estopped by contrary result in grievance procedure). For example, many Teamster contracts bar discharge unless the employee has received a prior warning letter for the same offense; but some offenses are excluded from this requirement, including “dishonesty.” Id. at 2275. This rule encourages employers to try to squeeze employees’ actions into the category of dishonesty, so that, for example, an employee whose real crime was loafing will be accused of dishonesty by “stealing time.” A statement that the employee is discharged for dishonesty should not, however, be immunized from suit, because a libel plaintiff could recover without proving that he was not “dishonest” within the meaning of the contract. Instead, she could establish that the word “dishonest” was capable of a defamatory meaning, whether or not the contractual term was applicable, and could prove that defamatory
The court in *Strachan* held that preemption considerations impose a malice requirement on state law slander claims about a statement made in the course of the disciplinary process, a proposition for which it cited *Linn*. But *Linn* concerned a statement in a union leaflet during an organizing campaign that attributed various nefarious actions to management. Because Section 7 of the NLRA protects a union's right to make charges against management in an effort to win votes, and management has a concomitant right under Section 8(c) of that Act, the Court held that imposing damages liability on overstatements in the course of election campaigns would unduly burden a process that Congress and the Labor Board had taken care to encourage. The Court emphasized in its opinion that its holding was limited to statements made during "organizing campaigns" or in the course of "labor debate," and lawsuits designed to increase the pressure on one side or another to resolve "labor disputes." The Court adopted the malice standard of *New York Times v. Sullivan* because the constitutional standards governing public debate seemed to be analogous to the considerations which ought to govern debates about industrial government.

The Court has uniformly described the preemption holding in *Linn* as a function of the fact that the communication was during a "labor dispute." The courts and the NLRB have extended *Linn* to apply to statements made during other kinds of labor disputes, including organizing efforts conducted after the union had been certified, concerted protests over working conditions, strikes and meaning was false. If exposure to defamation liability encourages employers to adopt more neutral terms for such employee misconduct, it is difficult to believe that either federal labor policy, or any genuine public interest, will suffer as a result.

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108 *Strachan*, 768 F.2d at 706 (cited in note 4).
109 383 U.S. at 53 (cited in note 32). More precisely, in *Strachan* the court cited *Linn* for the proposition that defamation claims "have been preempted by the grievance arbitration process." 768 F.2d at 706. That citation was plainly wrong: *Linn* arose during a campaign to organize an office of the Pinkerton agency, at a time when there was obviously no collective bargaining agreement in effect, not to speak of a grievance or arbitration procedure.
110 *Linn*, 383 U.S. at 60-62.
111 Id. at 55, 58, 61, 63.
112 Id. at 63, 64.
113 Id. at 58, 63, 65.
picketing, and intra-union elections or other controversies. But drug use by a single employee, and the statements that an employer may make about such use or a resulting discharge, are scarcely comparable to the kind of labor disputes that have properly been given either First Amendment or preemptive protection under Linn. The Linn rule has also been applied in a number of cases to statements by employers, but it must be borne in mind that employers, unlike employees, do not enjoy rights under Section 7. Moreover, the Court has cautioned that in applying free speech guarantees to employers, it is essential to bear in mind the fact that employers' statements may be inherently more coercive than statements by unions or individual employees. Thus, an employer's allegations about drug use by an individual employee do not enjoy the same preemptive protection against defamation litigation as statements made during labor disputes.

An employer which is sued for defamation, after discharging a worker for drug use or intoxication, often defends on the ground that the collective bargaining agreement required it to disclose the reason for dismissal, and that federal law protects it from being held liable for complying with their contractual obligations to the union. This defense should not prevail. Even employers who may legally dismiss workers without stating a reason normally provide an explanation as a matter of sound management technique, whether to avoid charges of discrimination, to foster employee morale by reassuring them that they are not subject to arbitrary treatment, or indeed to let other employees know that particular

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169 But see Mitchell v. Pepsi-Cola Bottlers, 772 F.2d 342, 348 and n. 2 (7th Cir. 1985) (Linn standard applies to defamation claim by discharged employee). Taking the New York Times v. Sullivan analogy one step further, because the individual employee is not a "public figure" within the context of the industrial government and the industrial community, the constitutional malice standard would not apply; rather, the Constitution would not require a standard higher than simple negligence. Gertz v. Welch, 418 U.S. 323 (1974). Moreover, only in the rarest of cases would an individual employee's use of drugs pertain to a matter of public controversy before the initial accusations were made, and so it is unclear that the employer's statements would enjoy any constitutional privilege that could be applied by analogy. See Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985).
170 Several courts have held that such defamation claims are preempted. See, for example, Hasten v. Phillips Petroleum Co., 640 F.2d 274 (10th Cir. 1981). See also Cokely v. PGE, 119 LRRM 3454, 3458 (N.D. Cal. 1984) (defamation in performance evaluations).
behavior will not be tolerated. Thus, simply because it agreed to the creation of a grievance procedure in the collective bargaining agreement, an employer cannot argue that a state would be imposing burdens on it by permitting slander suits brought by unionized employees. Nor, as some courts have held, do defamation suits based on the reasons given in notices of termination impose an undue burden on the collective bargaining process, because the suits would be viable even if there were no collective bargaining agreement. Only if unions are empowered to contract away employees' substantive rights under state law, can the contract supersede a state defamation claim. However, the Supreme Court has forbidden such a waiver.

There may, however, be a stronger argument in favor of preemption of slander claims based on statements necessarily made to union representatives in the course of the grievance procedure. Unlike statements made by supervisors and employees in the course of the working day, which would likely occur whether or not there was a union, a contract, or a Labor Management Relations Act, the grievance and arbitration procedure is in large part an outgrowth of the federal labor policy which strongly encourages the peaceful settlement of disputes about the interpretation and application of contracts. It is difficult to imagine how a grievance procedure could continue if the parties were afraid that they might be sued for incautious remarks. Indeed, the NLRB has formulated special protections for the participants in grievance meetings in order to ensure that the parties may be relatively uninhibited in their discussions. Nor will the states' interest in the protection of their citizens' reputations be unduly harmed if employees are unable to obtain redress for comments made in this limited setting.

The law has erected a privilege for statements made during

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172 The states, of course, remain free to create privileges for statements made in the course of the employment relationship, or in notices of termination. See *Brooks v. Solomon Co.*, 542 F. Supp. 1229, 1232 n. 2 (N.D. Ala. 1982).


175 Thus, for example, employees are generally given special protection against employer discipline based on statements made during the grievance-adjustment process. See *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 731 (5th Cir. 1970); *Max Factor & Co.*, 239 NLRB 804, 818 (1978), enf'd *NLRB v. Max Factor*, 640 F.2d 197 (9th Cir. 1980). See also *Chicago Cartage Co. v. Intern. Broth. of Teamsters*, 659 F.2d 825, 829 (7th Cir. 1981) (law discourages tape recording of grievance proceedings in order to encourage free and open discussion).
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judicial or administrative proceedings, and has extended to arbitrators many of the immunities which apply to judges. For similar reasons, and by analogy to the federal privilege for non-malicious statements during organizing campaigns recognized in *Linn*, it is appropriate to recognize a federal privilege, which preempts any contrary state law, for non-malicious statements made during a grievance meeting or an arbitration hearing, but not of course, if the statements are repeated outside that context. For slanderous remarks made outside of the "labor disputes" (including grievance procedures) context, employees should have access to state remedies.

IV. Conclusion

As the states have increased their regulation of the terms and conditions of employment, and as employees have increasingly turned to the state courts to obtain workplace protections that their unions have been unable or unwilling to provide, employers have tried to invoke federal preemption to avoid liability for their abuses. But Congress has scarcely considered such questions, no less intended the federal laws of collective bargaining to give employers immunity against state law claims based on substantive laws regulating employment or privacy. Thus, these employer defenses of preemption should fail, and they will have to rely on the political processes if they wish to prevent further developments in the state laws that address these subjects.

Postscript

Before this article went to press, the Supreme Court held that the Illinois cause of action for retaliatory discharge for filing worker compensation claims is not preempted by Section 301 of


177 See, for example, *Lewis v. NLRB*, 779 F.2d 12, 13 (6th Cir. 1985) (evidence of arbitral deliberations is inadmissible); *International Union, United Auto, etc. v. Greyhound Lines*, 701 F.2d 1181, 1185-86 (6th Cir. 1983) (arbitrators, like judges, are immune from suit); *Larry v. Penn Truck Aids*, 94 F.R.D. 708, 724 (E.D. Pa. 1982).

178 *General Motors Corp. v. Mendicki*, 367 F.2d 66 (10th Cir. 1966) (recognizing an absolute privilege); *Watts v. Grand Union Co.*, 114 LRRM 3158, 3160-61 (N.D. Ga. 1983); *Honaker v. Florida Power & Light Co.*, 95 LRRM 3265, 3268-70 (M.D. Fla. 1977). But see *Dunning v. Boyes*, 351 So.2d 883 (Ala. 1977) (recognizing only a qualified privilege). Since *Dunning* was decided, a district court in Alabama has held both that federal law provides an absolute privilege that preempts the state rule, and that state law claims are removable. See *Brooks v. Solomon Co.*, 542 F. Supp. 1229 (N.D. Ala. 1982).
the LMRA.\textsuperscript{179} The Court reasoned that Section 301 preempts state claims only if they "require construing the collective bargaining agreement,"\textsuperscript{180} and that neither factual determination of whether the employee was discharged for the retaliatory reason, nor evaluation of the employer's defense "turn[s] on the meaning of any provision of the collective bargaining agreement."\textsuperscript{181} The fact that the collective agreement might forbid such retaliation, and that the state court would be making the same factual inquiries as an arbitrator would in a grievance proceeding, is not sufficient to make the state law claim dependent on the contract.\textsuperscript{182} Although the Court did not expressly say that such retaliatory claims are saved from preemption as a matter of law, the absence of any references to the record in the case strongly suggests that the decision would apply equally to any retaliation claim.

The Court departed in one respect from the analysis offered here, in that it rejected a bright line based on whether the state law claim in nonnegotiable.\textsuperscript{183} Though agreeing that most non-preempted claims will also be nonnegotiable, the Court indicated that some negotiable claims might nevertheless be unpreempted; similarly, some nonnegotiable claims might turn on the interpretation of a contract for its application.\textsuperscript{184} This aspect of the Lingle decision may turn out to be very important in light of recent decisions of the Ninth Circuit that the California right of privacy, which has been claimed to prohibit random drug testing, is waivable and therefore preempted and, accordingly, removable.\textsuperscript{185} The conclusion of waivability is at least open to question as a matter of California law,\textsuperscript{186} and using removal to federal court as a means of preventing the state courts from deciding this question for themselves is certainly troubling. But if the only relevant question is whether the state claim requires construction of the contract, rather than whether a union could and did give away the state rights, then the basis for removal, and for preemption, disappears.

There is reason to wonder whether the Court thought carefully

\textsuperscript{180} Id. at 1884.
\textsuperscript{181} Id. at 1882.
\textsuperscript{182} Id. at 1882-83.
\textsuperscript{183} Id. at 1882 n. 7.
\textsuperscript{184} Id.
\textsuperscript{185} Utility Workers Local 246 v. Southern California Edison, 852 F.2d 1083 (9th Cir. 1988); Laws v. Calmat, 852 F.2d 430 (9th Cir. 1988).
\textsuperscript{186} In Phillips v. California State Personnel Board, 229 Cal. Rptr. 502, 184 Cal. App.3d 651 (1986), the court indicated that federal constitutional rights could not be waived in collective bargaining.
about this problem, because the Illinois law was plainly nonwaivable and, because of the employer's broad view of the scope of Section 301's preemptive force, the parties never really made issue of the impact of nonnegotiability. Negotiability would seem important because, if the claim is negotiable, then the question of whether the union actually waived the right might be thought to represent a question of contract construction. On the other hand, the application of the clear and unmistakable waiver doctrine, which the Court held as applicable at least as a matter of federal law, could be considered a legal question on which states are not compelled to defer to the arbitrator chosen by the union and employer. The Court did not state whether arbitrators must be allowed to determine this question, although, if it did focus on it, the Court's assertion that negotiability by itself does not render the state claim preempted must be taken as an indication that the decision on waivability is not subject to arbitration as a matter of law under Section 301. In any event, the preemption of state laws regulating drug testing will certainly continue to demand judicial attention for years to come.

187 Lingle, 108 S. Ct. at 1883 n. 9 (cited in note 179).
188 If it is ultimately decided that the question must be arbitrated as a matter of pre-emption law, then the issue might be a good candidate for the application of Judge Posner's primary jurisdiction approach. See notes 92-96. Under this approach, questions of state law would be returned to the state courts if the arbitrator finds no waiver. In addition, the possibility that some aspects of a state law claim might be preempted, but not others, is raised in a footnote of Lingle, which raises the possibility that portions of the compensatory damages claim might be subject to analysis under Section 301. See Lingle, 108 S. Ct. at 1885 n. 12.