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Peter Zablotzky

Touro Law Center, pzablotzky@tourolaw.edu

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THE CONTINUING AVAILABILITY OF RETALIATORY DISCHARGE AND OTHER STATE TORT CAUSES OF ACTION TO EMPLOYEES COVERED BY COLLECTIVE BARGAINING AGREEMENTS

Peter Zablotsky*

I. INTRODUCTION

In the mid-twentieth century, Congress enacted the Labor Management Relations Act¹ ("LMRA") and other major federal labor statutes, thereby asserting control over many aspects of national labor policy. Defining the precise scope of this control, and determining which state causes of action are valid in spite of the federal exercise of control, has required decades of analysis of applicable preemption principles.

During the 1980s, several seminal Supreme Court cases helped resolve some of these long standing preemption issues.² One of these cases was *Lingle v. Norge Division of Magic Chef, Inc.*³ *Norge* dealt with the state tort action of retaliatory discharge for filing workers' compensation claims. *Norge* concluded that the tort was not preempted by section 301(a) of the LMRA—the key preemption provision in the context of federal labor law—even if the employee was covered by a collective bargaining agreement.⁴

It is the thesis of this Article that in analyzing and resolving the preemption issues surrounding retaliatory discharge the courts have developed an analytical framework that is critical to the section 301 preemption analysis of all state tort causes of action applicable to employees covered by collective bargaining agreements. The Article begins by placing the analytical framework in context, with a historical discussion of the relevant preemption principles and cases. The

* Associate Professor of Law, Touro College, Jacob D. Fuchsberg Law Center. B.A. (1977), Pennsylvania State University; J.D. (1980), Columbia University School of Law. The author would like to thank Sharon Feliciano, Andrea McNamara, Sandy Randonis, and Seth Wolnek for their assistance with research.

¹ Labor Management Relations (Taft-Hartley) Act of 1947 ("L.M.R.A."), 29 U.S.C. §§ 141-97 (1988).

² See *infra* notes 6-35 and accompanying text.

³ 486 U.S. 399 (1988).

⁴ *Id.* at 409-10.

Article then articulates and analyzes the analytical framework used to resolve the preemption issues raised by the tort of retaliatory discharge when applied in the collective bargaining context. This section includes a discussion of *Norge*. The Article goes on to discuss the contribution of the retaliatory discharge analysis to preemption analysis generally, and the specific application of the analytical framework to state tort actions protecting whistleblowers and proscribing invasions of privacy. The Article concludes that, pursuant to the analytical framework, these state tort causes of action should survive preemption challenges.

II. BACKGROUND

Section 301(a) of the LMRA states in part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties"⁵ This section empowered the federal courts to construct federal laws for the enforcement of collective bargaining agreements. Since its enactment in 1947, courts at all levels of the judicial system have labored to determine the extent to which the section preempts causes of action arising under state law.⁶ The task was left to the courts because Congress, in enacting section 301, never explicitly ex-

⁵ L.M.R.A. § 301(a), 29 U.S.C. § 185(a) (1988).

⁶ See, e.g., *International Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851 (1987); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F.2d 102 (2d Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988); *Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987), *rev'd*, 486 U.S. 399 (1988); *Peabody Galion Div., Peabody Int'l Corp. v. Dollar*, 666 F.2d 1309 (10th Cir. 1981); *Signal-Stat Corp. v. Local 475, United Elec. Workers*, 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957); *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 210 F.2d 623 (3d Cir. 1954), *aff'd*, 348 U.S. 437 (1955); *Rock Drilling, Local Union No. 17 v. Mason & Hanger Co.*, 217 F.2d 687 (2d Cir. 1954), *cert. denied*, 349 U.S. 915 (1955); *United Elec. Workers v. Oliver Corp.*, 205 F.2d 376 (8th Cir. 1953); *Milk & Ice Cream Drivers Union, Local No. 98 v. Gillespie Milk Prods. Corp.*, 203 F.2d 650 (6th Cir. 1953); *Hamilton Foundry & Mach. Co. v. International Molders & Foundry Workers Union*, 193 F.2d 209 (6th Cir. 1951), *cert. denied*, 343 U.S. 966 (1952); *Textile Workers Union v. Arista Mills Co.*, 193 F.2d 529 (4th Cir. 1951); *Shirley-Herman Co. v. International Hod Carriers, Local Union No. 210*, 182 F.2d 806 (2d Cir. 1950); *Schatte v. International Alliance of Theatrical Stage Employees*, 182 F.2d 158 (9th Cir.), *cert. denied*, 340 U.S. 827 (1950); *American Fed'n of Labor v. Western Union Tel. Co.*, 179 F.2d 535 (6th Cir. 1950); *Maier v. New Jersey Transit Rail Operations*, 570 A.2d 1289 (N.J. Super. Ct. App. Div. 1990), *aff'd in part and rev'd in part*, 593 A.2d 750 (N.J. 1991).

pressed its intention regarding the preemptive scope of the section.⁷ The problem arises because of the following conflict: it is beyond dispute that Congress has the power to both preempt state law⁸ and legislate in the field of labor relations.⁹ At the same time, Congress has yet to occupy the entire field of labor relations and thus has not preempted all state law that touches on the area.¹⁰

The two seminal Supreme Court cases articulating the preemption principles relevant to section 301 are *Textile Workers Union v. Lincoln Mills*,¹¹ and *Local 174, Teamsters v. Lucas Flour Co.*¹²

In *Lincoln Mills*, a union brought a federal action to compel arbitration under a clause in the applicable collective bargaining agreement.¹³ The first issue faced by the Court was whether section 301 was substantive or purely procedural. Based on the section's legislative history, the Court held, in oft cited language, that the section was substantive in nature, and that it "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements."¹⁴ The Court then turned to the more specific

⁷ See *Lueck*, 471 U.S. at 208. Where Congress has not clearly stated its intention to preempt a local regulation, it will generally be sustained unless it conflicts with federal law, would upset the federal scheme, or Congress has completely occupied the field to the exclusion of the states. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

⁸ Congress's power to preempt state law is derived from the Supremacy Clause of the U.S. CONST. art. VI, cl. 2.

⁹ *Lueck*, 471 U.S. at 208 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

¹⁰ *Id.* (citing *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 289 (1971); *Brown v. Hotel and Restaurant Employees, Int'l Union Local 54*, 468 U.S. 491 (1984); *Garner v. Teamsters, Local Union No. 776*, 346 U.S. 485, 488 (1953)).

¹¹ 353 U.S. 448 (1957).

¹² 369 U.S. 95 (1962). In *Lucas Flour*, an employee was fired for allegedly performing unsatisfactorily, as provided for under the collective bargaining agreement. *Id.* at 97. The union protested and, in violation of the agreement, called a strike. *Id.* After eight days of striking, the issue was sent to arbitration. *Id.* The arbiters found that the employee's work was in fact unsatisfactory and his discharge within the agreement. *Id.* Before the decision was rendered, the employer sued the union for damages from the strike. The lower court rejected a § 301 preemption assertion, finding the matter was one of contract which falls under state law and not federal law as prescribed by § 301. *Id.* at 97-98. The Supreme Court held that federal labor relations law applied as prescribed by § 301 and, nonetheless, under federal law the arbiters' decision should be affirmed. *Id.* at 103.

¹³ *Lincoln Mills*, 353 U.S. at 449. The collective bargaining agreement provided, in part, that no strikes or work stoppages would be tolerated and that all grievances would follow a specific procedure. The last step in these procedures provided that either side could take the issue to arbitration. *Id.*

¹⁴ *Id.* at 451. While § 301 was in the conference stage, congressmen and senators considered different devices to ensure the enforcement and binding authority of collective bargaining agreements. *Id.* at 452-54. In its final form, however, § 301 relied on the normal process of contract enforcement rather than the National Labor Relations Board. *Id.* In keeping with this theme, it has been held that § 301 governs controversies between employers and employees, or unions representing employees, and further empowers federal district courts to maintain juris-

issue of what law was to be applied pursuant to the section, and concluded, in equally celebrated language, that it was "federal law, which the courts must fashion from the policy of our national labor laws."¹⁵

Lucas Flour involved an employer who brought an action against a union that went on strike. The action was brought in the state court of Washington and sought damages for business losses.¹⁶ Penultimately, the Supreme Court of Washington decided the case pursuant to principles of state contract law, and held that despite *Lincoln Mills*, state courts were still free to apply state law in actions to enforce collective bargaining agreements.¹⁷ Ultimately, the United States Supreme Court upheld both state court jurisdiction in section 301 cases and the result reached by the Washington Supreme Court, but rejected the notion that section 301 did not preempt incompatible doctrines of local law.¹⁸ Rather, the Court held that in order to avoid competing and disruptive influences on the negotiation, entering into, and administration of collective bargaining agreements, "substantive principles of federal labor law must be paramount in the area covered by [section 301]."¹⁹

The facts of *Lucas Flour* were originally analyzed under state tort law, but ultimately resolved under contract law.²⁰ It was not until the mid-1980s that the significant precedent articulating the principles specifically relevant to section 301 preemption of state tort law causes of action emerged, with the Supreme Court decisions of *Allis-Chalmers Corp. v. Lueck*²¹ and *International Brotherhood of Electrical Workers v. Hechler*.²²

Allis-Chalmers involved a Wisconsin employee who bypassed the arbitration provision of the applicable collective bargaining agree-

diction over these matters and apply § 301 procedures. See, e.g., *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137, 141 (D. Mass. 1953). In *Textile Workers Union v. American Thread Co.*, the Union sued to compel the employer to submit to arbitration the question of whether, under certain provisions of a collective bargaining contract, an employer is responsible for separation pay. *Id.* at 138. The court held that under § 301, courts have the power to order specific performance of collective bargaining agreements. *Id.* at 141.

¹⁵ *Lincoln Mills*, 353 U.S. at 456. The Court noted that federal courts were empowered to create laws where federal rights were concerned and that they could incorporate any state rules that were compatible with federal policy. *Id.* at 457.

¹⁶ *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 97 (1962).

¹⁷ *Id.* at 97-98.

¹⁸ *Id.* at 102-03.

¹⁹ *Id.* at 103.

²⁰ *Id.* at 98.

²¹ 471 U.S. 202 (1985).

²² 481 U.S. 851 (1987).

ment and filed a state law tort action against his employer for bad-faith delay in making disability-benefit payments due under the agreement.²³ The Wisconsin Supreme Court held that because the present action was a state tort claim, section 301 was not implicated.²⁴ It found that section 301 applied only to violations of labor contracts and that under Wisconsin law, the tort claim of bad faith is independent of any contract.²⁵ The court went on to hold that the Wisconsin tort claim was not preempted by the National Labor Relations Act ("NLRA").²⁶

The Supreme Court reversed, holding that in order to give national labor policy full effect, the preemptive scope of section 301 must extend beyond state causes of action for simple breach of contract.²⁷ The Court then held that the tort claim for bad-faith was preempted by section 301 because the claim was substantially dependent on the terms of the collective bargaining agreement.²⁸ The Court reasoned that to hold otherwise would diminish the critical role that arbitration was designed to play in labor relations, and thereby frustrate the goals of national policy.²⁹

²³ *Allis-Chalmers Corp.*, 471 U.S. at 204-06.

²⁴ *Id.* at 207.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 210-11. By finding that § 301 extended preemption to disputes arising out of tortious acts, as well as contract claims, the Court intended to prevent the relabeling of actual contract actions as tort by individuals seeking to avoid § 301's effect. *Id.* at 211. The Court reasoned that the existence of a uniform federal law governing labor contract interpretation would be diluted under any other application and that the fears discussed in *Lucas Flour* would become reality, with parties not knowing what they had bound themselves to under a collective bargaining agreement. *Id.*

The Court noted, however, that § 301 does not apply to every controversy involving a collective bargaining agreement. *Id.* Private parties can agree to anything that is not legally prohibited by state or federal law, without any implication of § 301. *Id.* In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Court did not apply principles of normal contract law in finding that an employee might have an action against his employer and union if he proves that the employer violated the agreement and the union breached its duty of fair representation. The Court stated that a collective bargaining agreement is a general code governing many cases which its draftsman could not have anticipated. *Id.* at 183-88.

²⁸ *Allis-Chalmers Corp.*, 471 U.S. at 217-19. The Court found that "the tort [under Wisconsin law] intrinsically relates to the nature and existence of the contract." *Id.* at 216 (citing *Hilker v. Western Auto. Ins. Co.*, 235 N.W. 413, 414-15 (Wis. 1931)). In *Hilker*, the court reasoned that the good faith behavior mandated by the collective bargaining agreement in filing insurance claims was independent of the state insurance laws. *Hilker*, 235 N.W. at 414. The good faith requirement held the parties to the specific terms of the contract. Therefore, under a federal interpretation, the parties were bound by the literal words of the agreement. *Id.* at 415.

²⁹ *Allis-Chalmers Corp.*, 471 U.S. at 219. The Court classified this critical role as our "'system of industrial self-government.'" *Id.* (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960)). In order to preserve the strength of collective bargaining agreements and the arbitration process, preemption of a derivative tort claim is essen-

Most significantly, during the course of its analysis, the *Allis-Chalmers* Court focused on whether the state tort action "confer[red] nonnegotiable state-law rights on employers or employees independent of any right established by contract."³⁰ The Court was careful to point out that it was not preempting every state law tort action that in some way related to a collective bargaining agreement, and that the preemptive effect of section 301 on other tort claims would have to be determined on a case-by-case basis.³¹

Whether a state tort claim is sufficiently independent of a collective bargaining agreement so as not to require an interpretation of the agreement became the critical question in determining when section 301 preempts state tort claims. One of the first major cases to apply the *Allis-Chalmers* "sufficiently independent" test was *International Brotherhood of Electrical Workers v. Hechler*.³² *Hechler* involved an employee who filed a state tort claim alleging that her union had breached its duty to provide her with a safe work place.³³ The Court stated that in order to evaluate the duty element of the tort, it was necessary to interpret the collective bargaining agreement to determine whether the union had a duty to provide the employees with a safe work place, and the nature and scope of that duty.³⁴ The Court, quoting *Allis-Chalmers*, concluded that the state

tial. Otherwise, one could reformulate a contract claim as tort and sidestep the arbitration process and § 301 preemption. *Id.*; see also *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (noting that grievance policy is fundamental to federal labor policy because it promotes the goal of industrial harmony by providing a channel for disputes to be settled without involving the judicial system).

³⁰ *Allis-Chalmers Corp.*, 471 U.S. at 213. The Court found that state law rights which are dependent on private agreements are preempted by those agreements. *Id.* "If the state tort law purports to define the meaning of the contract relationship, that law is pre-empted." *Id.*

³¹ *Id.* at 220.

³² 481 U.S. 851 (1987).

³³ *Id.* at 853. Specifically, the plaintiff was injured while engaged in work-related tasks that were allegedly beyond her scope of training. *Id.* The collective bargaining agreement between the parties provided that employees would not be required to take undue risks which would be considered unsafe. *Id.* The agreement also held supervisors and foremen responsible for the enforcement of the safety rules. *Id.* at 861 n.4.

³⁴ *Id.* at 862. The need to utilize contract interpretations to ascertain the duty of the union invoked § 301's preemptive power. If the Court could have determined the duties of the parties without involving the collective bargaining agreement, the case might have survived under state law. This was the first time, however, that Hechler tried to argue that the union's duty arose outside the collective bargaining agreement. *Id.* at 862 n.5. She now claimed that it was possible for the union's duty to arise through independent state law, by virtue of the relationship with its members. Until this point the plaintiff had claimed that the union's duty arose out of the collective bargaining agreement, with her as a third party beneficiary. *Id.* Consequently, the Court was not willing to hear this new argument at this late stage of the judicial process. *Id.* at 862 n.5.

tort claim was preempted, stating, "it is clear that 'questions of contract interpretation . . . underlie any finding of tort liability.'"³⁵

Although it was not specifically articulated, the Court appeared to follow an approach that separately evaluates each element of the tort to determine if the element can be established without resorting to the collective bargaining agreement. Pursuant to such an approach, a state court action could avoid preemption only if all elements of the tort were sufficiently independent of the agreement.

III. APPLYING THE ANALYTICAL FRAMEWORK TO THE TORT OF RETALIATORY DISCHARGE

A. *The Problem in Perspective*

The tort of retaliatory discharge, as used in this Article, is a state cause of action that arises when an employee is discharged for filing a workers' compensation claim. The tort has two critical elements—one concerning the employer's conduct, the other concerning the employer's intent. Generally, the plaintiff employee must establish that: (1) the employer discharged, or, in some jurisdictions, threatened to discharge, him from his employment; and (2) the intent of the employer regarding the actual or threatened discharge was to deter or interfere with the employee's exercise of rights granted to him pursuant to a state's workers' compensation statute.³⁶

The tort of retaliatory discharge has been created both by legislation and by common law. At this point, at least twenty-one states and the District of Columbia have enacted statutory provisions establishing the tort, or have enacted workers' compensation statutes

³⁵ *Id.* at 862 (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 218 (1985)).

³⁶ *See, e.g., Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988).

with provisions that courts have interpreted as establishing the tort.³⁷ In a number of states the tort is found in common law.³⁸

The cause of action is generally available to all employees, including those covered by a collective bargaining agreement that includes both the employee's union and employer.³⁹ With respect to those employees covered by collective bargaining agreements, however, a conflict arises. The state cause of action, regardless of how it is created, allows an aggrieved employee to seek damages in state court.⁴⁰ At the same time, collective bargaining agreements generally contain provisions that prohibit the discharge of an employee for other than "just cause."⁴¹ The agreements also contain arbitration provisions that

³⁷ The following twenty-one states and the District of Columbia have statutes establishing the tort of retaliatory discharge for filing workers' compensation claims: CAL. LAB. CODE §§ 132a(1), 4553 (Deering 1991); CONN. GEN. STAT. ANN. § 31-290a (West 1987); D.C. CODE ANN. § 36-342 (1988); FLA. STAT. ANN. § 440.205 (West 1991); KY. REV. STAT. ANN. § 336.130(1) (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. § 23:1361 (West 1985); ME. REV. STAT. ANN. tit. 39, § 111 (West 1989); MINN. STAT. ANN. § 176.82 (West Supp. 1992); MO. ANN. STAT. § 287.780 (Vernon Supp. 1992); MONT. CODE ANN. § 39-2-901 to 914 (1991); N.J. STAT. ANN. § 34:15-39.1 to 39.2 (West 1988); N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1993); N.C. GEN. STAT. § 97-6.1 (1991); OHIO REV. CODE ANN. § 4123.90 (Anderson 1991); OKLA. STAT. ANN. tit. 85 § 5 (West Supp. 1993); OR. REV. STAT. § 659.410 (1991); TENN. CODE ANN. § 50-6-114 (1991); TEX. REV. CIV. STAT. ANN. art. 8307c (West Supp. 1993); VA. CODE ANN. § 65.2-308 (Michie 1991); WASH. REV. CODE ANN. § 51.48.025 (West 1990); W. VA. CODE § 23-5A-1 (1985); WIS. STAT. ANN. § 102.35 (West 1988).

³⁸ The following cases illustrate those states that recognize common law actions for retaliatory discharge for filing workers' compensation claims: Wal-Mart Stores, Inc. v. Baysinger, 812 S.W.2d 463 (Ark. 1991); Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 109 (Colo. 1992); Puchert v. Agusalud, 677 P.2d 449 (Haw. 1984); Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978); Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1973); Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988); Coleman v. Safeway Stores, Inc., 752 P.2d 645 (Kan. 1988); Firestone Textile Co. v. Meadows, 666 S.W.2d 730 (Ky. 1983); Ewing v. Koppers, 537 A.2d 1173 (Md. 1988); Federici v. Mansfield Credit Union, 506 N.E.2d 115 (Mass. 1987); Goins v. Ford Motor Co., 347 N.W.2d 184 (Mich. App. 1983); Wiltsie v. Baby Grand Corp., 774 P.2d 432 (Nev. 1989); Krein v. Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987); Wilmot v. Kaiser Aluminum and Chem. Corp., 821 P.2d 18 (Wash. 1991); Greiss v. Consolidated Freightways Corp., 776 P.2d 752 (Wyo. 1989).

Some states recognize a general action for wrongful discharge as a matter of public policy but have not specifically addressed whether retaliatory discharge for filing workers' compensation claims falls within the action. For a comprehensive listing of states that recognize an action for wrongful discharge see Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 106 n.3 (Colo. 1992). A minority of states have rejected the wrongful discharge cause of action. *Id.* at n.4; see also Theresa Ludwig, Annotation, *Retaliatory Discharge from Employment*, 32 A.L.R.4th 1221 (1985).

³⁹ See *supra* notes 37-38 and accompanying text.

⁴⁰ See *supra* notes 37-38 and accompanying text.

⁴¹ See generally THOMAS A. KOCHAN & HARRY C. KATZ, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 340-41 (2d ed. 1988) (explaining the use of "just cause" provisions to secure protections for workers and arbitration as a means for adjudicating disputes arising from interpretation of the "just cause" standard).

establish procedures for resolving grievances, including grievances arising from discharges that are not for just cause. Thus, the state remedy for the tort of retaliatory discharge overlaps with the arbitration remedy established by the collective bargaining agreement. Beyond this, the fundamental interests involved at both the state and federal levels are acute—the understandable and clearly expressed state interest of compensating injured workers, and the long established and equally clearly expressed federal interest of effective national labor policy.

Recently, many courts have faced the issue of whether an employee's state law remedy for retaliatory discharge is preempted by section 301 if the employee is covered by a collective bargaining agreement containing a contractual remedy for discharge without just cause.⁴² The most significant cases are *Peabody Galion v. Dollar*,⁴³ *Herring v. Prince Macaroni*,⁴⁴ *Baldracchi v. Pratt & Whitney Aircraft Division*,⁴⁵ *Johnson v. Hussmann Corp.*,⁴⁶ and *Lingle v. Norge Division of Magic Chef, Inc.*⁴⁷ The court in *Hussmann* and the lower court in *Norge* held that section 301 did preempt the state action for retaliatory discharge.⁴⁸ In contrast, the Courts in *Dollar*, *Prince Macaroni*, *Pratt & Whitney*, and, ultimately, the Supreme Court in *Norge*, held that the cause of action for retaliatory discharge was not preempted.⁴⁹ The latter holding is, of course, controlling.

The fact patterns of these cases are relatively simple and straightforward. All involve an employee who was covered by a collective bargaining agreement and who filed a workers' compensation claim. The employee was then discharged or not rehired, and subsequently brought a cause of action for retaliatory discharge in lieu of, or while simultaneously, resorting to the available contractual remedy.⁵⁰

The analytical framework used by these courts is based upon the *Lincoln Mills* and *Lucas Flour* approach of furthering national labor policy and protecting the integrity of collective bargaining agree-

⁴² See *supra* notes 6-35 and accompanying text.

⁴³ 666 F.2d 1309 (10th Cir. 1981).

⁴⁴ 799 F.2d 120 (3d Cir. 1986).

⁴⁵ 814 F.2d 102 (2d Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988).

⁴⁶ 805 F.2d 795 (8th Cir. 1986).

⁴⁷ 486 U.S. 399 (1988), *rev'g* 823 F.2d 1031 (7th Cir. 1987).

⁴⁸ *Hussman*, 805 F.2d at 797; *Lingle v. Norge Div. of Magic Chef*, 823 F.2d 1031, 1046 (7th Cir. 1987).

⁴⁹ See *infra* notes 54-66 and accompanying text.

⁵⁰ See *infra* notes 54-66 and accompanying text.

ments,⁵¹ the general sufficiently-independent approach of *Allis-Chalmers*,⁵² and the more specific sufficiently-independent element-by-element approach of *Hechler*.⁵³ The Article now turns to an analysis and critique of that framework.

B. Retaliatory Discharge as a Sufficiently Independent Tort—A Specific Approach

The most effective analysis of the issue begins by applying a form of the approach used in *Hechler*, i.e. an approach which analyzes each element of the tort for its independence from the collective bargaining agreement. This was the approach followed by the Supreme Court in *Norge*,⁵⁴ and by the Second Circuit in *Pratt & Whitney*.⁵⁵

As stated above, the first element of retaliatory discharge is an actual discharge of the employee by the employer.⁵⁶ This element can obviously be resolved without reference to or interpretation of a collective bargaining agreement; it involves nothing more than a factual inquiry as to whether the employee has been fired.

Inquiry into the second element of retaliatory discharge, i.e. discharge by the employer with the intent to discourage the employee from exercising his rights under the workers' compensation statute, is more complex. One could argue that in order to determine whether the employer's reason for discharging the employee was legitimate, one must interpret and apply the "just cause" provision of the collective bargaining agreement.⁵⁷ On closer scrutiny, however, it is clear

⁵¹ See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

⁵² See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

⁵³ See *International Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851 (1987).

⁵⁴ *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988) (questions of employee conduct and motivation of the employer were questions of fact not requiring interpretation of the agreement).

⁵⁵ *Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F.2d 102, 105-06 (2d Cir. 1987) (the requirement that the employee show that the act of filing the claim was the basis of dismissal had no connection with the agreement), *cert. denied*, 486 U.S. 1054 (1988).

⁵⁶ *Norge*, 486 U.S. at 407 (1988) ("[T]o show retaliatory discharge, the plaintiff must set forth sufficient facts from which it can be inferred that . . . he was discharged or threatened with discharge . . .").

⁵⁷ See, e.g., *Norge*, 823 F.2d 1031, 1046 (7th Cir. 1987), *rev'd*, 486 U.S. 399 (1988). The Seventh Circuit reasoned that because of the just cause provision, "a state court would be deciding precisely the same issue as would an arbitrator: whether there was 'just cause' to discharge the worker." *Id.*

that whether the discharge is for "just cause" is irrelevant.⁵⁸ Rather, the proper focus of the factual inquiry is limited to whether the employee was discharged for a reason related to the filing of a workers' compensation claim.⁵⁹ An employee can be discharged for a reason that fails to qualify as "just cause" under the agreement, and at the same time is unrelated to the filing of a claim; such a situation would constitute a grievance under the contract, but would not run afoul of the retaliatory discharge statute.⁶⁰ Ultimately, then, the inquiry into the employer's intent does not require resorting to the collective bargaining agreement.⁶¹

A similar, and equally problematic, issue arises when the collective bargaining agreement contains guidelines governing the placement of employees on workers' compensation. In *Peabody Galion v. Dollar*,⁶² for example, the agreement contained a provision regulating the placement of employees suffering on-the-job injuries on leave until jobs performable by the injured employee became available.⁶³ The agreement also provided that employees on such leave who recovered sufficiently could return to their pre-injury jobs if certain requirements regarding seniority were satisfied.⁶⁴ Further, the agreement allowed any employee who felt he was denied his contractual rights as outlined in the provision to file a grievance and proceed to arbitration.⁶⁵ Because such agreements speak directly to the ramifications of on-the-job injuries, one could argue that section 301 preemption should operate. As with the just cause provisions, the focus of the retaliatory discharge inquiry differs in the final analysis from that of the injury-leave provisions. Even though the provisions make it necessary to resort to the collective bargaining agreement to determine if and when an employee qualifies for injury leave, reassignment, and

⁵⁸ See, e.g., *Norge*, 486 U.S. 399 (1988). The Court agreed with the lower court that "the state-law analysis might well involve attention to the same factual considerations as the contractual determination . . . for just cause." *Id.* at 408. The Court concluded, however, that "as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement." *Id.* at 410; see also *Pratt & Whitney*, 814 F.2d at 105 (reasoning that the employer "would have to satisfy the trier of fact in the state court only that it fired [its employee] for a reason unrelated to her filing a workers' compensation claim" and that "it would not have to establish that the grounds for [the employee's] termination amounted to 'just cause' under the collective bargaining agreement").

⁵⁹ *Pratt & Whitney*, 814 F.2d at 105.

⁶⁰ *Id.* at 105-06.

⁶¹ *Id.* at 105.

⁶² 666 F.2d 1309 (10th Cir. 1981).

⁶³ *Id.* at 1311 n.1a.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1311.

return to original position, retaliatory discharge is ultimately concerned with the employer's motive.⁶⁶

Finally, it is also arguable that it is necessary to resort to the collective bargaining agreement to fashion a remedy for the employee if a *prima facie* case of retaliatory discharge is established and not rebutted. For example, provisions in the agreement dealing with rate of pay or other economic benefits would likely serve as a basis for calculating the compensatory damages awarded in a state tort law action.⁶⁷ Because damages are not an element of the tort, however, *Hechler* would not require preemption. Indeed, the court in *Pratt & Whitney* specifically held that resorting to the contract to determine damages was too tangential to constitute dependence on the collective bargaining agreement.⁶⁸

Thus, because neither of its elements requires the interpretation of any term in a collective bargaining agreement, the tort of retaliatory discharge is sufficiently independent to avoid preemption pursuant to section 301.⁶⁹

C. Retaliatory Discharge as a Sufficiently Independent Tort—A General Approach

Prior to the Supreme Court's decision in *Norge*, several courts took a more general view of the notion of sufficient independence.⁷⁰ Rather than focus on the elements of retaliatory discharge, they focused on the broader issue of whether the collective bargaining agreement addressed the same problem as the state tort action.⁷¹ Because both the just cause provision of a collective bargaining agreement and the tort of retaliatory discharge address the problem of a nonlegitimate discharge of an employee, courts following this approach concluded that section 301 preempted the state tort action.⁷² Presumably, these courts would also find preemption, for the same

⁶⁶ See *supra* notes 57-61 and accompanying text.

⁶⁷ See, e.g., *Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F.2d 102, 106 (2d Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988).

⁶⁸ *Id.*

⁶⁹ See *supra* notes 36-53 and accompanying text.

⁷⁰ See, e.g., *Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031, 1046 (7th Cir. 1987), *rev'd*, 486 U.S. 399 (1988); *Johnson v. Hussman Corp.*, 805 F.2d 795, 797 (8th Cir. 1986).

⁷¹ *Norge*, 823 F.2d at 1046; *Johnson*, 805 F.2d at 797.

⁷² See, e.g., *Norge*, 823 F.2d at 1046 (holding that "a state court would be deciding precisely the same issue as would an arbitrator: whether there was 'just cause' to discharge the worker").

reason, in cases involving collective bargaining agreements containing injury leave provisions.⁷³

Like the preemption arguments made in challenge to the specific *Hechler* approach, this general approach must be rejected because it too ignores the distinction between a simple parallel factual analysis, which is irrelevant to section 301, and a genuine dependency on a collective bargaining agreement.⁷⁴ In so doing, the approach pushes the preemptive purpose of section 301—ensuring that federal law will be the only law used to interpret collective bargaining agreements—beyond that defined by *Lincoln Mills*, *Lucas Flour*, and *Allis-Chalmers*, and expands the preemptive scope to include substantive rights extended by a state to its workers.⁷⁵ As the Supreme Court stated in *Norge*, while outlining its view on the nature of preemption under section 301, “the mere fact that a broad contractual protection against discriminatory—or retaliatory—discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state-law violation dependent upon the terms of the private contract.”⁷⁶

D. Retaliatory Discharge and National Labor Policy

As *Lincoln Mills* and *Lucas Flour* make clear, the major purpose of preemption in this context is to protect and further national labor policy.⁷⁷ Two preemption doctrines that have been invoked to accomplish this goal are particularly relevant when retaliatory discharge is

⁷³ See *supra* notes 62-66 and accompanying text.

⁷⁴ See *Norge*, 486 U.S. at 407-09; *International Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 862 (1987) (tort of a breach of duty to ensure a safe workplace was not sufficiently independent of the collective bargaining agreement to withstand § 301's preemptive force). But see *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219-21 (1985) (tort of bad faith in handling an insurance claim “is substantially dependent upon analysis of the terms of a [collective bargaining] agreement,” and, therefore, “that claim must either be treated as a §301 claim . . . or dismissed as pre-empted by federal labor-contract law”) (citations omitted).

⁷⁵ See *Peabody Galion Div., Peabody Int'l Corp. v. Dollar* 666 F.2d 1309, 1322 (10th Cir. 1981) (statutory rights guaranteeing “substantive minimum protection to individual workers . . . are not to be abridged by contract”); see also *Norge*, 486 U.S. at 409 (“[Section] 301 preemption merely ensures that federal law will be the basis for interpreting collective bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements.”).

⁷⁶ *Norge*, 486 U.S. at 412-13.

⁷⁷ See *supra* notes 11-22 and accompanying text.

involved⁷⁸—one focuses on primary jurisdiction,⁷⁹ while the other focuses on frustration of policy.⁸⁰

The primary jurisdiction doctrine requires preemption when the conduct at issue is subject to section 7 of the NLRA,⁸¹ which deals with employees' right to organize, or section 8,⁸² which deals with unfair labor practices. Such conduct falls exclusively within the jurisdiction of the National Labor Relations Board.⁸³

The second relevant doctrine operates to preempt state law where application of the state law "would frustrate effective implementa-

⁷⁸ Exceptions to the preemption doctrines include: *Vaca v. Sipes*, 386 U.S. 171 (1967) (holding that jurisdiction of state court not preempted even though an unfair labor practice on part of union might be involved); *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 533 (1979) (excluding from preemption a state unemployment compensation program under which strikers could receive benefits because the program "provide[d] an efficient means of insuring employment security in the State").

⁷⁹ See, e.g., *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (applying the primary jurisdiction preemption doctrine to conduct involving picketing by a union at employer's place of business).

⁸⁰ See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 203 (1978) (noting that preemption may be appropriate where exercise of state jurisdiction would frustrate national labor policy); *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976) (explaining that frustration test "focus[es] upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces.'" (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971))).

⁸¹ National Labor Relations Act ("N.L.R.A.") § 7, 29 U.S.C. § 157 (1988). This section provides:

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

Id.

⁸² N.L.R.A. § 8, 29 U.S.C. § 158(a) (1988). This section provides in part:

It shall be an unfair labor practice for an employer —

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
- (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .
- (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;
- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Id.

⁸³ *Garmon*, 359 U.S. at 244-45.

tion of the Act's processes."⁸⁴ This doctrine evaluates the nature of the claimed state interest for its impact on the general administration of national labor policy.⁸⁵

Regardless of which doctrine is used, several courts have endeavored to impart a degree of flexibility to the analysis. These efforts have coalesced into a test for preemption that seeks to balance the federal and state interests involved. Pursuant to this balancing process, the presence of a compelling federal interest will usually result in preemption. When the concerns of the LMRA are peripheral, however, and the state concerns are compelling, preemption is far less likely.⁸⁶

Application of these two preemption doctrines, tempered by the balancing process, has yielded helpful preemption classifications of state law causes of action. Preempted state actions include awards of damages against a union for secondary picketing,⁸⁷ and prohibition of a union's concerted refusal to work overtime.⁸⁸ In both cases, the finding of preemption was predictable. The federal interest at issue, i.e., the determination of the economic weapons available to parties during the bargaining process, is compelling.⁸⁹ In addition, both overtime and picketing are addressed in section 8 of the NLRA.⁹⁰ Thus,

⁸⁴ *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969).

⁸⁵ See *Peabody Galion Div., Peabody Int'l Corp. v. Dollar*, 666 F.2d 1309, 1315 (10th Cir. 1981); see also *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978) (no preemption where state jurisdiction does not create an unacceptable risk of interference with conduct protected under § 7); *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers*, 427 U.S. 132, 148 (1976) (application of state law would frustrate NLRA policy); *Vaca v. Sipes*, 386 U.S. 171, 180 (1967) (frustration test requires weighing of interests).

⁸⁶ See, e.g., *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979); *Dollar*, 666 F.2d at 1315, 1317.

⁸⁷ See *Local 20, Teamsters Union v. Morton*, 377 U.S. 252 (1964). In *Morton*, an employer brought a state action against the union for engaging in secondary activities, including the inducement of employer's customers to cease doing business with employer. *Id.* at 253. Because the state "law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to . . . upset the balance of power between labor and management expressed in our national labor policy." *Id.* at 259-60. Thus, the Supreme Court held that the state law was preempted. *Id.* at 260.

⁸⁸ *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

⁸⁹ See *id.* at 149 (reasoning that relative economic strength or weakness of the parties does not justify exclusion from preemption because "use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining" (quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 495 (1960))); *Morton*, 377 U.S. at 260 (noting the "congressional determination to leave this weapon of self-help [secondary boycott] available").

⁹⁰ See N.L.R.A. § 8(b)(3), (b)(4), (b)(7), 29 U.S.C. § 158 (b)(3), (b)(4), (b)(7) (1988).

regardless of which preemption doctrine is applied, preemption seems to be a justified result in these cases.

State causes of action that have been held not to be preempted include those for unemployment compensation,⁹¹ discrimination in the workplace,⁹² violence in the workplace⁹³, and, most relevant to a discussion of retaliatory discharge, state tort actions for trespass,⁹⁴ intentional infliction of emotional distress,⁹⁵ libel,⁹⁶ malicious interference with lawful occupation,⁹⁷ and wrongful expulsion from union membership.⁹⁸ The findings in these cases were based on causes of action that either involved compelling state interests, or did not involve compelling federal interests.⁹⁹

Regardless of which of the preemption doctrines is applied to the tort of retaliatory discharge, it is clear that, as the Supreme Court ruled in *Norge*,¹⁰⁰ the tort deserves to survive the preemption challenge.

For a plethora of reasons, a state action for retaliatory discharge does not frustrate national labor policy. First, the filing of a claim for retaliatory discharge is not related to the collective bargaining process.¹⁰¹ Second, the retaliatory discharge issue historically has not been central to the relationship between labor and management.¹⁰² Third, there is no evidence that allowing state claims for retaliatory discharge to go forward will alter the nature of the relationship, or balance of power, between labor and management.¹⁰³ Fourth, retaliatory

⁹¹ See *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979); see also *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 23 (1987) (holding that a state severance pay statute was not preempted because it did not intrude upon federal statutes).

⁹² See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 412-13 (1988).

⁹³ See *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957).

⁹⁴ See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978).

⁹⁵ See *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290 (1977).

⁹⁶ See *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966).

⁹⁷ See *International Union, United Auto. Workers v. Russell*, 356 U.S. 634 (1958).

⁹⁸ See *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958).

⁹⁹ See cases cited *supra* notes 91-98.

¹⁰⁰ See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988) ("In sum, we hold that an application of state law is pre-empted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement.").

¹⁰¹ See *Peabody Galion Div., Peabody Int'l Corp. v. Dollar*, 666 F.2d 1309, 1316 (10th Cir. 1981) (reasoning that discharge of workers for filing a workers' compensation claim "has nothing to do with collective bargaining").

¹⁰² See *id.*; see also *Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F.2d 102, 106 (2d Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988).

¹⁰³ See *Dollar*, 666 F.2d at 1316; *Palm Beach Co. v. Journeymen's and Prod. Allied Servs. Local 157*, 519 F. Supp. 705, 715-16 (S.D.N.Y. 1981).

tory discharge actions do not interfere with labor peace, productivity, or any other goal central to national labor policy.¹⁰⁴ Fifth, retaliatory discharge actions do not interfere with the employer's right to discharge employees for nonretaliatory reasons.¹⁰⁵ Finally, a state action for retaliatory discharge addresses a problem to which national labor policy has yet to, and may be unable to, respond.¹⁰⁶

Next, a retaliatory discharge action does not conflict with any primary federal jurisdiction. Freedom from retaliatory discharge is not the type of substantive state right subject to preemption by those provisions of federal labor law, such as sections 7 and 8 of the NLRA, which clearly operate to preempt substantive state rights.¹⁰⁷ Indeed, Congress has neither addressed the issue of workers' compensation-related discharges,¹⁰⁸ nor indicated an intention to leave the area unregulated.¹⁰⁹

Finally, the interest of the state in preventing retaliatory discharge is significant. Workers' compensation is primarily a matter of state concern;¹¹⁰ it is as much a matter of state concern as unemployment compensation, which has been held to "protect interests 'deeply rooted in local feeling and responsibility.'"¹¹¹ Indeed, retaliatory discharge actions extend beyond unionized employees, and are applicable to all workers in a given state.¹¹² The state is likely the only forum available to address the problem of retaliatory discharge.¹¹³ In *Peabody Galion v. Dollar*, the Tenth Circuit went so far as to hold that the state interest in preventing retaliatory discharge is significant enough to avoid preemption even if it is classified as a simple economic tort.¹¹⁴ Pointing out the serious nature of the injuries inflicted on individuals by the loss of livelihood and the harm to the community and the workers' compensation system generally, the

¹⁰⁴ See *Dollar*, 666 F.2d at 1316-17; see also *Palm Beach Co.*, 519 F. Supp. at 715-16 (holding that state claim of tortious interference with business relations was preempted by federal law).

¹⁰⁵ See *Dollar*, 666 F.2d at 1317.

¹⁰⁶ See *id.* at 1316.

¹⁰⁷ See N.L.R.A. §§ 7, 8, 29 U.S.C. §§ 157, 158 (1988); see also *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 408-09 (1988) ("[T]here may be instances in which the National Labor Relations Act pre-empts state law on the basis of the subject matter of the law in question . . .").

¹⁰⁸ See *Dollar*, 666 F.2d at 1316.

¹⁰⁹ See *Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F.2d 102, 107 (2d Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988).

¹¹⁰ See *Dollar*, 666 F.2d at 1317.

¹¹¹ *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 540 (1979) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)).

¹¹² See *supra* notes 37-38 and accompanying text.

¹¹³ See *Dollar*, 666 F.2d at 1317.

¹¹⁴ *Id.* at 1318.

court concluded that the tort of retaliatory discharge, even if economic in nature, addressed problems that were "sufficiently serious to merit inclusion within the exceptions to the preemption doctrine."¹¹⁵

Thus, as the cause of action for retaliatory discharge advances a significant state interest, does not conflict with any provisions of federal labor law, and does not frustrate any component of national labor policy, it is appropriately grouped with those torts that survive section 301 preemption challenges.

E. Retaliatory Discharge and Arbitration

Along with the concerns of national labor policy generally, there are specific concerns regarding arbitration that are put in issue by the retaliatory discharge cause of action. These concerns focus on the exhaustion and exclusivity of the arbitration process as a remedy, and arise from the stated federal labor policy preference for resorting to the arbitration process whenever an arbitration provision is contained in a collective bargaining agreement.¹¹⁶ The articulated virtues of arbitration are varied, and include promoting labor peace,¹¹⁷ enhancing the bargaining power of workers,¹¹⁸ and strengthening the status of the union as the exclusive bargaining representative.¹¹⁹

Regarding exhaustion, courts will refuse to let a cause of action go forward if available arbitration procedures have not been pursued to

¹¹⁵ *Id.* at 1318-19.

¹¹⁶ See, e.g., *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 411 (1988); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962); see also *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987) ("Where the [collective bargaining agreement] provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute."); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965) ("If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement."); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960) ("Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the [collective bargaining] agreement.").

¹¹⁷ *Peabody Galion Div., Peabody Int'l Corp. v. Dollar*, 666 F.2d 1309, 1320 (10th Cir. 1981) ("Federal labor policy looks favorably on binding arbitration, based upon sound policies like promotion of labor peace and enhancement of workers' bargaining power.").

¹¹⁸ *Id.*

¹¹⁹ *Id.* ("Arbitration procedures supplement the union's status as exclusive bargaining representative by assigning it responsibility for the handling of individual grievances."); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965) ("[P]rosecuting employee grievances . . . complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract.").

conclusion.¹²⁰ Regarding exclusivity, courts will bar state causes of action if the remedy of arbitration is available, regardless of whether grievance procedures have been exhausted.¹²¹ Application of this exclusivity rule logically leads to a finding of preemption.¹²²

Generally, plaintiffs covered by collective bargaining agreements with arbitration provisions bring actions for retaliatory discharge without exhausting the arbitration procedure.¹²³ In some instances, the arbitration procedure is never even initiated.¹²⁴ In these cases, one critical question is whether the disputed discharge is subject to arbitration. If it is, the retaliatory discharge action cannot go forward because the arbitration remedy is either not exhausted or exclusive; if it is not, the arbitration concerns are irrelevant and the action can go forward unless preempted on other grounds.

As was discussed earlier, some aspects of retaliatory discharge are clearly subject to arbitration.¹²⁵ Virtually all collective bargaining agreements contain provisions limiting discharges to "just cause,"¹²⁶

¹²⁰ See *Magerer v. John Sexton & Co.*, 912 F.2d 525, 531 (1st Cir. 1990) (upholding dismissal of complaint for failure to exhaust grievance procedures); see also *Wren v. Sletten Constr. Corp.*, 654 F.2d 529, 533-36 (9th Cir. 1981) (dismissing complaint for failure to exhaust their contractual grievance and arbitration remedies). But see *Midgett v. Sackett-Chicago, Inc.*, 473 N.E.2d 1280, 1283-84 (Ill.) (employees not required to exhaust contractual remedies under a collective bargaining agreement before filing an action for retaliatory discharge), *cert. denied*, 474 U.S. 909 (1985).

¹²¹ *Dollar*, 666 F.2d at 1320 ("Arbitrated grievances may not be litigated in court when the collective bargaining agreement provides for final and binding arbitration."); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965) (succinctly articulating the importance of exclusivity).

¹²² See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 403-06 (1988) (if plaintiff's claims for retaliatory discharge are dependent upon the interpretation of the collective bargaining agreement these claims must be pre-empted and treated as § 301 claims); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985) (where a state law claim is dependent upon terms of a collective bargaining agreement, such a claim "must either be treated as a § 301 claim or dismissed as pre-empted by federal labor contract law"); *Graf v. Elgin, Joliet & E. Ry.*, 790 F.2d 1341, 1346 (7th Cir. 1986) ("Where the worker is covered by a collective bargaining contract and therefore has a potential federal remedy, judicial or arbitrable, . . . that remedy is exclusive; the worker has no state remedies."); *Thompson v. Monsanto Co.*, 559 S.W.2d 873, 876-77 (Tex. Civ. App. 1977) (holding that where an employee is covered by a collective bargaining agreement and has exercised his right for arbitration, "substantive federal law has pre-empted the field of labor policy" and an employee cannot bring suit pursuant to a state statute after an adverse decision).

¹²³ *Norge* is one example of such a fact pattern. *Norge*, 486 U.S. at 402.

¹²⁴ See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 206 (1985); *Magerer v. John Sexton & Co.*, 912 F.2d 525, 526-27 (1st Cir. 1990); *Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F.2d 102, 103-04 (2d Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988).

¹²⁵ See *supra* notes 41, 57 and accompanying text.

¹²⁶ "Approximately seventy-nine percent of all collective bargaining agreements provide that employees may not be terminated without 'just cause.'" George A. Pecoulas, Note, *Midgett v. Sackett-Chicago, Inc.: A Union Employee's Modern Day Giant Against Retaliatory Discharge*,

and most discuss disability benefits or workers' compensation procedures.¹²⁷ Nevertheless, most courts addressing this issue, including the Supreme Court in *Norge*, have concluded that retaliatory discharge claims are not preempted and thus not subject to arbitration.¹²⁸ The analysis in support of this conclusion is parallel, if not identical, to the analysis supporting the determination that the retaliatory discharge tort is sufficiently independent from the collective bargaining agreement.¹²⁹ In the arbitration context, this means that because the critical element of motive for the discharge is not arbitrable, the entire cause of action is not arbitrable.¹³⁰ Thus, an employee bringing a retaliatory discharge action is not barred for failure to exhaust the remedy of arbitration.

Another approach to the issue of exhaustion and exclusivity is to analyze the nature of the cause of action generally. This approach assumes the dispute at issue is arbitrable, but creates an exception to the exclusivity and exhaustion rules if the cause of action is designed to protect employees as individuals rather than as members of a collective.¹³¹ A number of factors are relevant to the determination of whether a cause of action is geared primarily toward the individual. First, and foremost, is the nature of the cause of action. The focus of the inquiry here is who benefits from the action.¹³² The second factor is the source of the action. If the source is the collective bargaining

19 J. MARSHALL L. REV. 147, 155 n.59 (1985) (citing 2 COLLECTIVE BARGAINING NEGOT. & CONT. (BNA) 40 (1979)). The most widely used test to evaluate the existence of "just-cause" is:

[W]hether the employee was forewarned of his actions' consequences; whether the discharge was related to the company's efficient operation: [sic] whether the company . . . determined in fact if the employee disobeyed a company policy . . . ; whether the evidence against the employee was substantial; whether the discharge order was discriminatory; and whether the discipline was reasonable in view of the gravity of the offense.

Id. at 155 n.60 (citing *Enterprise Wire Co. v. Enterprise Indep. Union*, 46 Lab. Arb. Rep. (BNA) 359, 361 (1966) (Daugherty, Arb.)).

¹²⁷ See, e.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 204 (1985).

¹²⁸ See, e.g., *Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F.2d 102, 105 (2d Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988); *Vaughn v. Pacific Northwest Bell Tel. Co.*, 611 P.2d 281, 287 (Or. 1980).

¹²⁹ See *supra* notes 54-69 and accompanying text.

¹³⁰ See, e.g., *Peabody Galion Div., Peabody Int'l Corp. v. Dollar*, 666 F.2d 1309, 1320 (10th Cir. 1981).

¹³¹ See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974); *Dollar*, 666 F.2d at 1321 (10th Cir. 1981).

¹³² See *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20-21 (1987) (cause of action based on state statute requiring a one-time payment to employees upon a plant closing); *McDonald v. City of West Branch*, 466 U.S. 284, 291 (1984) (action based on § 1983 claim); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 739 (1981) (Federal Labor Standards Act claim); *Gardner-Denver Co.*, 415 U.S. at 51 (Title VII claim); *Dollar*, 666 F.2d at 1322 (claim based on state retaliatory discharge).

agreement, the action is surely to be deemed collective; if it is statutory, the possibility exists that the action is geared toward individuals.¹³³ The third factor is the interests of the relevant parties. The closer the interests of the representing union and the individual employee, the more likely the cause of action of the individual employee is collective in nature.¹³⁴ The final factor is the type of remedy involved. The more the remedy granted by the cause of action differs from remedies provided by the collective bargaining agreement, the more likely the cause of action is geared toward the individual.¹³⁵

Prior to ruling on retaliatory discharge, courts had found causes of action for discrimination in employment and violation of the Fair Labor Standards Act to be individual in nature.¹³⁶ With the Court's opinion in *Norge*, the cause of action for retaliatory discharge was added to this list.¹³⁷

Application of the four factors used to evaluate causes of action supports classifying retaliatory discharge as an exception to the exhaustion and exclusivity rule. First, as with antidiscrimination statutes and the Fair Labor Standards Act, rights flowing from the retaliatory discharge cause of action are individual in nature. They establish minimum standards for individual workers, bestow no particular benefit on the collective, and cannot be waived by a collective bargaining agreement.¹³⁸ Second, the protection from retaliatory discharge does not stem from the collective bargaining agreement.¹³⁹ Third, as with claims of discrimination, the interest of the individual worker in bringing a claim for retaliatory discharge differs from the interest of the union. Indeed, in weighing the interests of an employee filing a grievance against the interests of its general membership, a union may decide not to vigorously process the individual grievance if it interferes with obtaining other benefits for the entire

¹³³ See, e.g., *Barrentine*, 450 U.S. at 737-41; *Gardner-Denver Co.*, 415 U.S. at 47-49; *Dollar*, 666 F.2d at 1320-23.

¹³⁴ See *Dollar*, 666 F.2d at 1322; see also *Barrentine*, 450 U.S. at 742 ("[A] union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole."); *Gardner-Denver Co.*, 415 U.S. at 58 n.19 ("In arbitration . . . the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.").

¹³⁵ See *Barrentine*, 450 U.S. at 745; *Gardner-Denver Co.*, 415 U.S. at 47-49; *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *Dollar*, 666 F.2d at 1322.

¹³⁶ See, e.g., *Barrentine*, 450 U.S. 728, 745; *Gardner-Denver Co.*, 415 U.S. 36, 51.

¹³⁷ *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988).

¹³⁸ See *supra* notes 131-32 and accompanying text.

¹³⁹ See *supra* note 133 and accompanying text.

bargaining unit.¹⁴⁰ Finally, as with discrimination and wage claims, even if a grievance for retaliatory discharge is presented, the arbitrator may lack the authority to apply law outside the collective bargaining agreement, or be powerless to grant the relief contemplated by the state statute or common law.¹⁴¹

Thus, whether analyzed pursuant to principles of exhaustion and exclusivity, or dealt with at the outset as an issue of arbitrability, finding actions for retaliatory discharge not to be preempted by section 301 does not undermine the federal interest of promoting arbitration in the labor context.

IV. THE CONTRIBUTION OF THE RETALIATORY DISCHARGE ANALYSIS TO THE GENERAL ANALYTICAL FRAMEWORK FOR SECTION 301 PREEMPTION

Courts analyzing retaliatory discharge for workers' compensation have advanced the analysis of section 301 preemption begun with *Lincoln Mills* and *Lucas Flour* and continued in *Allis-Chalmers* in two important ways. First, the substantially-independent test used to evaluate the compatibility of state tort actions with collective bargaining agreements has been refined and crystallized.¹⁴² Second, important factors used to evaluate the impact of state tort actions on arbitration pursuant to collective bargaining agreements have been articulated and developed.¹⁴³

The significance of the retaliatory discharge analysis has not gone unnoticed; *Norge* has already taken its place along side *Lincoln Mills*, *Lucas Flour*, and *Allis-Chalmers* as a seminal case in the analysis of preemption in the labor relations field generally.¹⁴⁴ Most importantly, however, the analysis can and should play a particularly critical role in three areas: preserving future state causes of action for

¹⁴⁰ See *supra* note 134 and accompanying text.

¹⁴¹ See *supra* note 135 and accompanying text.

¹⁴² See *supra* notes 54-69 and accompanying text.

¹⁴³ See *supra* notes 132-37 and accompanying text.

¹⁴⁴ Cases relying on *Norge* include: *Magerer v. John Sexton & Co.*, 912 F.2d 525, 528-30 (1st Cir. 1990); *Griess v. Consol. Freightways Corp.*, 882 F.2d 461, 462 (10th Cir. 1989); *Childers v. Chesapeake & Potomac Tel. Co.*, 881 F.2d 1259, 1262 (4th Cir. 1989); *Bettis v. Oscar Mayer Foods Corp.*, 878 F.2d 192, 195-97 (7th Cir. 1989); *Merchant v. American S.S. Co.*, 860 F.2d 204, 208 (6th Cir. 1988); *Netzel v. United Parcel Serv.*, 537 N.E.2d 1348, 1349 (Ill. App. Ct.), *appeal denied*, 545 N.E.2d 114 (Ill. 1989); *Conaway v. Webster City Prods. Co.*, 431 N.W.2d 795, 798-800 (Iowa 1988); *Bednarek v. United Food & Commercial Workers Int'l Union, Local Union 227*, 780 S.W.2d 630, 632 (Ky. Ct. App. 1989); *Finch v. Holladay-Tyler Printing, Inc.*, 586 A.2d 1275, 1279 (Md. 1991); *McDaniel v. United Hardware Distrib. Co.*, 469 N.W.2d 84, 88 (Minn. 1991).

retaliatory discharge for filing a workers' compensation claim; preserving state causes of action for retaliatory discharge for whistleblowing; and evaluating state causes of action for tortious invasion of privacy.

A. Preserving Future Causes of Action for Retaliatory Discharge for Filing Workers' Compensation Claims

At this point, the validity of state causes of action for retaliatory discharge for filing workers' compensation claims should be a non-issue. The Supreme Court has unequivocally held that such claims are not preempted by section 301,¹⁴⁵ and this holding has, appropriately, been adhered to by most subsequent courts.¹⁴⁶

Despite this precedent, two courts have recently found that section 301 does preempt an action for retaliatory discharge.¹⁴⁷ The facts of these cases were, again, typical; they involved employees covered by collective bargaining agreements, who, when fired subsequent to filing workers' compensation claims, resorted to the state courts instead of arbitration for redress.¹⁴⁸ The state statutes involved were also

¹⁴⁵ *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988).

¹⁴⁶ See *supra* note 144 and accompanying text.

¹⁴⁷ See *Magerer v. John Sexton & Co.*, 912 F.2d 525 (1st Cir. 1990); *Childers v. Chesapeake & Potomac Tel. Co.*, 881 F.2d 1259 (4th Cir. 1989); see also *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620, 624 (8th Cir. 1989) (employee's claim for wrongful discharge is preempted by § 301 when discharge claim requires inquiry into employer's scope of authority and as such employee's claim cannot be analyzed separate and apart from the collective bargaining agreement).

¹⁴⁸ In *Magerer*, the plaintiff employee missed several days of work due to work-related injuries. *Magerer*, 912 F.2d at 526. Upon returning to work, he was informed that his employment was terminated. *Id.* The employee sued for wrongful discharge "in retaliation for filing claims under the Massachusetts Workers' Compensation statute." *Id.* at 527. Plaintiff, relying primarily on *Norge*, argued that his claim, "being based on a cause of action established by state law, is wholly independent of rights and liabilities established by the collective bargaining agreement and that its resolution would not require interpretation of the agreement." *Id.* at 529. Under Massachusetts law, however, retaliatory discharge claims are subject to the terms of collective bargaining agreements. *Id.* Thus, any retaliatory discharge claims are completely preempted and are treated as claims arising under § 301. *Id.*

In *Childers*, the plaintiff employee injured herself while installing a telephone for defendant employer. *Childers*, 881 F.2d at 1260. After filing a workers' compensation claim, she was awarded temporary disability benefits. *Id.* The employee subsequently returned to work in another position. A series of claims for work-related psychiatric disability followed. *Id.* at 1260-61. Defendant employer's psychiatric and medical personnel "concluded that [the plaintiff] did not exhibit a work-related psychiatric disability . . . [and] was able to return to work and would [no longer] receive medical disability benefits." *Id.* at 1261. Plaintiff was notified of this decision but refused to return to work, at which time defendant terminated her employment. *Id.* Subsequently, plaintiff attempted to file a grievance through her union. The union refused, however, because it was untimely according to the collective bargaining agreement. *Id.* Plaintiff

typical, i.e., they outlawed retaliatory firings for workers who have filed workers' compensation claims. The statute involved in one of these cases, *Magerer v. John Sexton & Co.*, also included a general statement to the effect that if the state statute and the collective bargaining agreement are inconsistent, the collective bargaining agreement controls.¹⁴⁹ Additionally, the collective bargaining agreement involved in *Magerer* contained a management rights clause,¹⁵⁰ which grants the employer the general right to direct the work force and the specific right to discharge for just cause.¹⁵¹

In finding preemption under these circumstances, the court in *Magerer* reasoned that because the management rights clause empowers the employer to discharge for just cause, the collective bargaining agreement is inconsistent with the statute outlawing retaliatory discharge.¹⁵² Therefore, pursuant to its terms, the statute is preempted.¹⁵³

This reasoning is fatally flawed and should be rejected. As the analysis supporting the independent nature of retaliatory discharge confirms, the contractually embodied notion of discharge for cause and the statutorily created tort of retaliatory discharge are not inconsistent with one another.¹⁵⁴ Indeed, the proffered proof of inconsistency, i.e. the right of the employer to discharge for just cause, has already been specifically rejected by the Supreme Court as a basis for preemption.¹⁵⁵ To hold otherwise is to not only ignore the holding of

then filed suit in federal court alleging discharge in retaliation for filing a workers' compensation claim under the Maryland Workmen's Compensation Act. *Id.* Under the Act, an "employee's wrongful discharge action is conditioned on the outcome of the dispute resolution process fixed by the collective bargaining agreement." *Id.* at 1264. An employee cannot turn to a state law remedy for wrongful discharge, unless all contractual remedies contained in the CBA are exhausted. *Id.*

¹⁴⁹ See MASS. ANN. LAWS ch. 152, § 75B(3) (Law. Co-op. 1989) ("In the event that any right set forth in this section is inconsistent with an applicable collective bargaining agreement, such agreement shall prevail.").

¹⁵⁰ See *Magerer v. John Sexton & Co.*, 912 F.2d 525, 530 (1st Cir. 1990) (giving the employer the "right to determine 'the direction of the work forces, including the disciplining, suspension or discharge of employees for proper cause'").

¹⁵¹ See, e.g., *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29, 32 (1987) ("The agreement reserves to management the right to establish, amend, and enforce 'rules and regulations regulating the discipline or discharge of employees' and the procedures for imposing discipline."); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 (1974) ("Under Art. 4 of the collective-bargaining agreement, the company retained 'the right to hire, suspend or discharge [employees] for proper cause.'").

¹⁵² *Magerer*, 912 F.2d at 530.

¹⁵³ *Id.*

¹⁵⁴ See *supra* notes 54-69 and accompanying text.

¹⁵⁵ *Id.*

the Court, but also the realities of the arbitration process and the nature of collective bargaining agreements.¹⁵⁶

Finally, it seems anomalous that a state would enact a statute protecting workers who file workers' compensation claims, and then mandate the preemption of the statute by the operation of a universally-utilized and generally-worded management rights clause. At the very least, both the seminal cases interpreting section 301 and the language of the state statutes at issue would seem to mandate a finding of no preemption unless the collective bargaining agreement contains provisions specifically addressing the situation of retaliatory discharge in the workers' compensation context.

B. Preserving Causes of Action for Retaliatory Discharge for Whistleblowing

Apart from protecting employees who file workers' compensation claims, many states have chosen to protect workers who report violations of law.¹⁵⁷ Known as whistleblowers, these employees are typically involved in disclosing safety violations or fraudulent practices being engaged in by their employers.¹⁵⁸ Protection has been extended to these employees by both statute¹⁵⁹ and case law.¹⁶⁰

¹⁵⁶ See *supra* notes 116-30 and accompanying text.

¹⁵⁷ See 10 THEODORE KHEEL, LABOR LAW 62.05(3) (1992) (listing states and their statutes).

¹⁵⁸ See *Reed v. Municipality of Anchorage*, 782 P.2d 1155 (Alaska 1989) (plaintiff, an employee of the Anchorage Waste Water Treatment Plant, brought suit under the Whistleblower Protection Act alleging that the municipality terminated him in retaliation for reporting unsafe working conditions to the state and the Mayor of Anchorage); *Birtell v. Lockheed-California Co.*, 247 Cal. Rptr. 86, 87 (Ct. App. 1988) (plaintiff contacted an investigator with the U.S. Air Force claiming that inspections were not being done according to military specifications), *cert. denied*, 488 U.S. 1042 (1989); *Garcia v. Rockwell Int'l Corp.*, 232 Cal. Rptr. 490, 490 (Ct. App. 1986) (plaintiff brought suit alleging wrongful termination for being suspended without pay and demoted in retaliation for revealing to the National Aeronautics and Space Administration orders by his superior to mischarge his employees' time); *Wolcott v. Champion Int'l Corp.*, 691 F. Supp. 1052, 1054 (W.D. Mich. 1987) (plaintiff brought suit under Whistleblower's Protection Act alleging he was wrongfully terminated after he reported pollution law violations); *Hopkins v. City of Midland*, 404 N.W.2d 744, 745 (Mich. Ct. App. 1987) (plaintiff brought suit under the Whistleblower's Protection Act alleging that defendant failed to promote him in retaliation for his reporting of safety violations); *Lepore v. National Tool & Mfg. Co.*, 540 A.2d 1296, 1297 (N.J. Super. Ct. App. Div. 1988) (after being employed by National Tool for two years, plaintiff was subsequently demoted to an inferior position and later discharged for reporting unsafe conditions at the plant), *aff'd*, 557 A.2d 1371 (N.J.), *cert. denied*, 493 U.S. 954 (1989); see also James A. Barcia, *Update on Michigan's Whistleblowers' Protection Act*, 1988 DET. C.L. REV. 1 (1988) (explaining Michigan's Whistleblowers' Protection Act).

¹⁵⁹ See ALASKA STAT. §§ 39.90.100-39.90.150 (Supp. 1992); CAL. HEALTH & SAFETY CODE § 1569.37 (Deering 1990); COLO. REV. STAT. §§ 24-50.5-101 to 107 (1988); FLA. STAT. ANN. § 112.3187 (West 1992); HAW. REV. STAT. §§ 378-61 to -69 (Supp. 1991); ILL. ANN. STAT. ch. 127, para. 63b90.9, 63b91 (Smith-Hurd Supp. 1992); KAN. STAT. ANN. § 44-636 (Supp. 1991); ME.

As with workers who file compensation claims, protection for whistleblowers takes the form of a state tort cause of action which arises when an employee suffers retaliation for disclosing the violation. This tort also has two elements: one concerning the employer's conduct, and one concerning the employer's intent. Here, a plaintiff employee must prove that: (1) he was discharged, suspended, demoted, or otherwise disadvantaged in his employment; and (2) the intent of the employer in discharging or otherwise disadvantaging the employee was to punish the employee for having disclosed the violation.¹⁶¹

Like the protection extended employees who file workers' compensation, the protection for whistleblowers is a relatively recent but already significant phenomenon.¹⁶² And, as with the cause of action regarding workers' compensation, the state cause of action for retaliation against whistleblowers raises a preemption issue when the whistleblowing employee is also covered by a collective bargaining agreement containing provisions dealing with discharge for cause and arbitration.¹⁶³ In this situation, it must be decided whether, pursuant to section 301, the state cause of action is preempted by the just cause provision in the agreement, leaving the employee limited to the remedy provided for in the contract, i.e., arbitration.¹⁶⁴

The whistleblower cause of action and the workers' compensation cause of action are clearly analogous; the considerations that led to a finding of no preemption of the latter, i.e., the independent nature of

REV. STAT. ANN. tit. 26, §§ 831-840 (West 1988); MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 1991); MINN. STAT. ANN. § 181.932 (West Supp. 1992); N.H. REV. STAT. ANN. §§ 275-E:1 to 275-E:7 (Supp. 1992); N.J. STAT. ANN. §§ 34:19-1 to 34:19-8 (West 1988 & Supp. 1992); N.M. STAT. ANN. § 50-9-25 (Michie 1988); N.Y. LAB. LAW § 740 (McKinney 1988); OHIO REV. CODE ANN. §§ 4113.51-4113.53 (Anderson 1991); OR. REV. STAT. §§ 659.545, 659.550 (1991); PA. STAT. ANN. tit. 43, §§ 1421-1428 (1991); R.I. GEN. LAWS §§ 36-15-1 to 36-15-10 (1990); S.C. CODE ANN. §§ 8-27-10 to 8-27-50 (Law Co-op. Supp. 1991); TEX. REV. CIV. STAT. ANN. art. 6252-16a (West Supp. 1992); UTAH CODE ANN. §§ 67-21-1 to 67-21-9 (1986 & Supp. 1992); V.I. CODE ANN. tit. 10, §§ 121-126 (Supp. 1992); W. VA. CODE §§ 6C-1-1 to 6C-1-8 (1990); WIS. STAT. ANN. § 230.83 (West 1987).

¹⁶⁰ See *Birtell v. Lockheed-California Co.*, 247 Cal. Rptr. 86 (Ct. App. 1988), *cert. denied*, 488 U.S. 1042 (1989); *Wheeler v. Caterpillar Tractor Co.*, 485 N.E.2d 372 (Ill. 1985), *cert. denied*, 475 U.S. 1122 (1986); *Branch v. Azalea/Epps Home, Ltd.*, 472 N.W.2d 73 (Mich. Ct. App. 1991); *Lepore v. National Tool & Mfg. Co.*, 540 A.2d 1296 (N.J. Super. Ct. App. Div. 1988), *aff'd*, 557 A.2d 1371 (N.J.), *cert. denied*, 493 U.S. 954 (1989).

¹⁶¹ See, e.g., *Wolcott v. Champion Int'l Corp.*, 691 F. Supp. 1052, 1058 (W.D. Mich. 1987); *Eckstein v. Kuhn*, 408 N.W.2d 131, 134 (Mich. Ct. App. 1987); *Tyrna v. Adamo, Inc.*, 407 N.W.2d 47, 51 (Mich. Ct. App. 1987); *Hopkins v. City of Midland*, 404 N.W.2d 744, 751 (Mich. Ct. App. 1987).

¹⁶² See *supra* notes 157-60 and accompanying text.

¹⁶³ See, e.g., *Birtell*, 247 Cal. Rptr. 86; *Wheeler*, 485 N.E.2d 372; *Lepore*, 540 A.2d 1296.

¹⁶⁴ See, e.g., *Lepore*, 540 A.2d at 1298.

the cause of action and the four factors used to determine exceptions to the exhaustion and exclusivity rules regarding the arbitration process, would appear to mandate a finding of no preemption of the former.¹⁶⁵

Specifically, regarding the independent nature of the cause of action protecting whistleblowers, the first element of the tort, employee conduct, can clearly be resolved without reference to or interpretation of the collective bargaining agreement. As with workers' compensation, this element turns on nothing more than a factual inquiry into whether the employee has been fired. The second element, employer motive, involves an inquiry that is limited to whether the employee was discharged because he disclosed inappropriate conduct on the part of his employer. It does not require a broader inquiry into whether the discharge was for just cause, and therefore does not implicate the collective bargaining agreement.¹⁶⁶

Regarding the four factors used to determine exceptions to the exhaustion and exclusivity of arbitration, the protections against retaliation against whistleblowers benefit, first and foremost, the individual whistleblowing employee.¹⁶⁷ This right cannot be waived by operation of a collective bargaining agreement.¹⁶⁸ While the entire work force may benefit if the reported inappropriate conduct of the employer ceases or is corrected, this benefit appears to be secondary and indirect. Second, the right not to be discharged for whistleblowing stems from case law or statute, not the collective bargaining agreement.¹⁶⁹ Third, the interest of the whistleblowing employee in bringing a cause of action may be different from the interests of the union. The potential for an improved working environment that may come about after disclosure of inappropriate practices may even be less prominent than in the case of retaliatory discharge for a workers' compensation claim. Fourth, an arbitrator faced with a whistleblower's claim of retaliatory firing will most likely lack the

¹⁶⁵ See *supra* notes 54-69 and accompanying text.

¹⁶⁶ See *supra* notes 54-69 and accompanying text.

¹⁶⁷ See generally Thomas M. Devine & Donald G. Aplin, *Whistleblower Protection—The Gap Between The Law and Reality*, 31 How. L.J. 223 (1988) (noting that despite legislation, individual whistleblowers are still not fully protected); Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355 (1991) (noting the inadequacy of whistleblower statutes to protect individuals); Ronald Weisenberger, Note, *Remedies for Employer's Wrongful Discharge of an Employee from Employment of an Indefinite Duration*, 21 IND. L. REV. 547 (1988) (discussing legal protections for individual employees).

¹⁶⁸ See *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987).

¹⁶⁹ See *supra* notes 159-60 and accompanying text.

authority to apply the state law or grant the relief called for by the state cause of action.¹⁷⁰

Thus, given the independent nature of each element of the tort of retaliatory discharge for whistleblowing, and given the tort's qualifying as an exception to the exhaustion and exclusivity rules regarding arbitration, it seems clear that the state law protection afforded whistleblowers is not preempted by section 301.

C. *Evaluating Causes of Action for Tortious Invasion of Privacy*

The protections afforded individuals from invasion of privacy take many forms, vary widely in scope, and can be found at both the federal and state levels.¹⁷¹ For present purposes, the most relevant sources are those non-constitutional state law protections embodied in state right-to-privacy statutes that proscribe the invasive collection or disclosure of information.¹⁷²

A claim for this type of invasion of privacy is typically treated as a state tort claim.¹⁷³ One way of conceptualizing the action is as a tort with two components—one addressing obtaining information and one addressing disclosing information. Each component is evaluated by a reasonableness test, i.e., the interests of the parties involved are

¹⁷⁰ See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405 (1988).

¹⁷¹ See generally *Ortega v. O'Connor*, 764 F.2d 703 (9th Cir. 1985) (dealing with the constitutionality of employer's search of hospital supervisor's office and seizure of personal items taken from that office), *rev'd*, 480 U.S. 709 (1987); *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510 (D. Neb. 1987) (dealing with constitutionality of public employer's random drug and alcohol testing), *aff'd*, 844 F.2d 562 (8th Cir. 1988); *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380 (E.D. La. 1986) (dealing with constitutionality of a program requiring employees seeking promotion to submit to drug screening by urinalysis), *vacated*, 816 F.2d 170 (5th Cir. 1987), *aff'd*, 489 U.S. 656 (1989); *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985) (dealing with constitutionality of racing commission regulations requiring jockeys to submit to breathalyzer or urine tests), *aff'd*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986); *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985) (dealing with the constitutionality of policy requiring random searches of employees and their vehicles), *modified*, 809 F.2d 1302 (8th Cir. 1987); *People v. Greenwood*, 227 Cal. Rptr. 539 (Ct. App. 1986) (dealing with the constitutionality of search and seizures of garbage bags left at curbside of house), *rev'd*, 486 U.S. 35 (1988); *People v. Rooney*, 221 Cal. Rptr. 49 (Ct. App. 1985) (dealing with constitutionality of search and seizure of bags placed in the communal trash bin of a multi-unit apartment building), *cert. dismissed*, 483 U.S. 307 (1987).

¹⁷² See, e.g., ALASKA STAT. § 47.30.840 (1992); ARIZ. REV. STAT. ANN. § 36-507 (1991); HAW. REV. STAT. § 6 (1990); NEB. REV. STAT. § 20-201 to 211 (1990); N.Y. CIV. RIGHTS LAW §§ 50-52 (McKinney 1991); R.I. GEN. LAWS § 9-1-28.1 (1990); WASH. REV. CODE ANN. § 9.73.060 (West 1988).

¹⁷³ See *supra* note 171 and accompanying text.

balanced to determine if the gathering or disclosure of the information was reasonable.¹⁷⁴

While these statutes, and the torts arising therefrom, extend privacy rights to citizens of the state generally, they are particularly important to workers subject to mandatory drug testing programs.¹⁷⁵ In a typical situation, an employer will unilaterally institute a program calling for mandatory drug testing of employees. Pursuant to these programs, employees are required to submit urine samples. Employees who refuse to participate, or employees who test positive for drug or alcohol use, are subject to discharge. The programs need not give employees the right to appeal the results or have the results independently confirmed.

Employees discharged pursuant to such programs may bring causes of action for tortious invasion of privacy. As is the case with retaliatory discharge, however, a preemption problem arises when these employees are also covered by collective bargaining agreements containing provisions establishing arbitration procedures. In this situation, it must be decided whether, pursuant to section 301, the state cause of action for tortious invasion of privacy is preempted, and whether the remedy available to the employee is limited to arbitration.

While the question is admittedly close,¹⁷⁶ the *Hechler* analysis, as applied in *Norge*,¹⁷⁷ supports a finding of no preemption if the collective bargaining agreement does not specifically deal with drug testing. Specifically, regarding the independent nature of the privacy tort, the reasonableness of the information gathering and disclosing can be evaluated without reference to a collective bargaining agreement. Rather, what is required is a balancing of "the employer's

¹⁷⁴ See *supra* note 171 and accompanying text.

¹⁷⁵ See *American Postal Workers Union v. Frank*, 725 F. Supp. 87 (D. Mass. 1989); *Moxley v. Regional Transit Servs.*, 722 F. Supp. 977 (W.D.N.Y. 1989); *Brown v. Winkle*, 715 F. Supp. 195 (N.D. Ohio 1989); *Taylor v. O'Grady*, 669 F. Supp. 1422 (N.D. Ill. 1987), *vacated*, 888 F.2d 1189 (7th Cir. 1989); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986), *rev'd*, 833 F.2d 335 (D.C. Cir. 1987), *vacated sub nom. Jenkins v. Jones*, 490 U.S. 1001 (1989); Scott S. Cairns & Carolyn V. Grady, *Drug Testing In The Workplace: A Reasoned Approach For Private Employers*, 12 GEO. MASON U. L. REV. 491 (1990); Eric E. Hobbs & Thomas W. Scrivner, *Farmers, Foxes, Chickens, and Hen Houses: A Case for Limited Mandatory Random Drug Testing of Employees in the Private Sector*, 32 ST. LOUIS U. L.J. 605 (1988); Ellen Hoelscher, *When Workers Say "No" to Drug Testing: Issues in the Public and Private Sectors*, 38 WASH. U. J. URB. & CONTEMP. L. 337 (1990).

¹⁷⁶ See, e.g., Phillip K. Davidoff & Christopher C. Martin, *The Drug War in the Workplace: Employee Drug Testing Under Collective Bargaining Agreements*, 5 ST. JOHN'S J. LEGAL COMMENT. 1 (1989); Deborah Schmedemann, *Unions and Urinalysis*, 14 WM. MITCHELL L. REV. 277 (1988); Royce R. Remington, Note, *Management's Unilateral Implementation of Drug Testing Programs: Are The Unions Left Holding The Jar?* 36 CLEV. ST. L. REV. 291 (1988).

¹⁷⁷ See *supra* notes 54-61 and accompanying text.

legitimate business interest in obtaining and publishing the information against the substantiality of the intrusion on the employee's privacy resulting from the disclosure."¹⁷⁸ This is the same type of balancing test used whenever the disclosure of medical information is involved, or when personal information is involved in any context.¹⁷⁹

The few courts that have dealt with this issue, however, have found to the contrary.¹⁸⁰ Relying on management rights clauses and drawing an analogy to the situation in *Allis-Chalmers*, these courts have found that the state tort action for invasion of privacy is preempted by section 301.¹⁸¹ The analysis used by these courts should be rejected.

Regarding management rights clauses, the argument is that these clauses have already balanced the interests relevant to the invasion of privacy claim. The tort is therefore not sufficiently independent because courts must resort to the collective bargaining agreement to do the balancing test used to evaluate the elements of the invasion of privacy tort.¹⁸² This argument carries weight if the collective bargaining agreement specifically addresses mandatory drug testing. However, as is the case with retaliatory discharge for filing workers' compensation claims, claiming that a management's rights clause is a sufficient basis for preemption goes against the holding in *Norge* and ignores the realities of the collective bargaining process.¹⁸³

¹⁷⁸ See *Bratt v. International Business Machs. Corp.*, 467 N.E.2d 126, 135-36 (Mass. 1984) (footnote omitted).

¹⁷⁹ See, e.g., *In re Production of Records to Grand Jury*, 618 F. Supp. 440 (D. Mass. 1985); *Tower v. Hirschhorn*, 492 N.E.2d 728 (Mass. 1986); *Hope v. Landau*, 486 N.E.2d 89 (Mass. App. 1985), *vacated*, 500 N.E.2d 809 (Mass. 1986); *Alberts v. Devine*, 479 N.E.2d 113 (Mass.), *cert. denied sub nom. Carrol v. Alberts*, 474 U.S. 1013 (1985).

¹⁸⁰ See, e.g., *Schlacter-Jones v. General Tel.*, 936 F.2d 435 (9th Cir. 1991); *Stikes v. Chevron U.S.A.*, 914 F.2d 1265 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2015 (1991); *Tombrello v. USX Corp.*, 763 F. Supp. 541 (N.D. Ala. 1991).

¹⁸¹ See *Schlacter-Jones*, 936 F.2d at 442; *Stikes*, 914 F.2d at 1270; *Tombrello*, 763 F. Supp. at 544.

¹⁸² See *Schlacter-Jones v. General Tel.*, 936 F.2d 435 (9th Cir. 1991); *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 912 (1992); *Stikes v. Chevron U.S.A.*, 914 F.2d 1265 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2015 (1991); *Utility Workers Local No. 246 v. Southern California Edison Co.*, 852 F.2d 1083 (9th Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *International Bhd. of Teamsters, Airline Div. v. Southwest Airlines Co.*, 842 F.2d 794 (5th Cir. 1988), *cert. denied*, 493 U.S. 1043 (1990); *Maine Cent. R.R. v. United Transp. Union*, 787 F.2d 780 (1st Cir.), *cert. denied*, 479 U.S. 848 (1986); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 168 F. Supp. 702 (S.D. Ala. 1958), *aff'd*, 269 F.2d 633 (5th Cir. 1959), *rev'd*, 363 U.S. 574 (1960); ; *Lueck v. Aetna Life & Casualty Co.*, 333 N.W.2d 733 (Wis. App. 1983), *rev'd*, 342 N.W.2d 699 (Wis. 1984), *rev'd sub nom. Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

¹⁸³ See *supra* notes 145-56 and accompanying text.

Regarding the analogy to *Allis-Chalmers*, the argument is that just as a provision in a collective bargaining agreement dealing with insurance claims preempts state law claims which also deal with insurance claims, so a provision dealing with management rights preempts a state invasion of privacy claim.¹⁸⁴ This argument ignores the fact that, unlike the situation involving drug testing and privacy, the parties in *Allis-Chalmers* specifically addressed and articulated the relevant interests involved.¹⁸⁵ This critical difference between the two situations not only destroys the analogy, but supports the proposition that, unlike the insurance related state law claims in *Allis-Chalmers*, the state law privacy claim for invasion of privacy and the collective bargaining agreement are independent.

A finding of no preemption for an invasion of privacy claim is also supported by an application of the four factors used to evaluate the impact of state tort claims on the collective bargaining arbitration process. First, the protections offered through invasion of privacy claims are perhaps the quintessential protections afforded individuals, as employees or otherwise. Second, the privacy claim stems from state statute, or even the state constitution, not the collective bargaining agreement. Third, the interest in bringing an invasion of privacy claim rests uniquely with the individual, not the union. Fourth, the arbitrator will likely be powerless to grant the remedies necessary to protect privacy if an invasion is found.

On balance, absent a specific contractual provision dealing with mandatory testing, section 301 should not preempt state tort claims for invasion of privacy.

¹⁸⁴ See *Stikes v. Chevron U.S.A.*, 914 F.2d 1265 (9th Cir. 1990) (court held employee's cause of action for interference with his constitutional state right to privacy arising out of a search of his automobile constituted unreasonable intrusion which was provided for in the collective bargaining agreement and was, therefore, preempted by LMRA), *cert. denied*, 111 S. Ct. 2015 (1991); *Smith v. Colgate-Palmolive Co.*, 752 F. Supp. 273 (S.D. Ind. 1990) (court held that claim made by employees alleging fraudulent misrepresentation by employer was preempted by § 301 because the alleged misconduct conflicted with terms of the collective bargaining agreement), *aff'd*, 943 F.2d 764 (7th Cir. 1991); *Karetnikova v. Trustees of Emerson College*, 725 F. Supp. 73 (D. Mass. 1989) (court held professor's claim against employer alleging she had been denied tenure in violation of implied covenant of good faith and fair dealing was preempted by LMRA); *Taubman v. Prospect Drilling & Sawing, Inc.*, 469 N.W.2d 335 (Minn. App. 1991) (court held employee's cause of action alleging retaliatory discharge was barred because employee failed to exhaust administrative procedures provided for in collective bargaining agreement).

¹⁸⁵ *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

V. CONCLUSION

Hechler, *Norge*, and other cases have developed an analytical framework for dealing with section 301 preemption of state tort actions for retaliatory discharge of employees covered by a collective bargaining agreement who file workers' compensation claims. The framework focuses on the independence of the state tort action from the collective bargaining agreement, and considers the impact of the state tort action on the arbitration process.

Pursuant to this analytical framework, state tort actions for retaliatory discharge of employees who file workers' compensation claims, retaliatory discharge of whistleblowers, and invasion of privacy all survive section 301 preemption challenges. This is particularly true when the applicable collective bargaining agreement does not specifically address the situations covered by the state tort actions.

This framework has not been universally followed by courts dealing with these preemption issues, although it should be. The framework is sound and can make a significant contribution to the analysis of section 301 preemption and state tort causes of action in the collective bargaining context. By allowing only causes of action based on those torts that are sufficiently independent of the collective bargaining agreement and do not have an impact on the arbitration process to survive section 301 preemption challenges, the analytical framework strikes the appropriate balance between state interests and the interests of national labor policy.