

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

PAPER, ALLIED-INDUSTRIAL,	)	
CHEMICAL and ENERGY WORKERS	)	
INTERNATIONAL UNION (PACE)	)	
and its LOCAL UNION 1363	)	
	)	
Plaintiffs	)	
	)	
v.	)	Civil No. 00-57-B
	)	
SHERMAN LUMBER COMPANY, et al.	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON DEFENDANT SHERMAN LUMBER'S MOTION  
FOR SUMMARY JUDGMENT ON COUNT I, DEFENDANTS' MOTION TO  
DISMISS ON COUNTS II-X, PLAINTIFFS' MOTION TO RETAIN JURISDICTION  
AND ORDER ON PLAINTIFFS' MOTION TO STRIKE OR PERMIT REBUTTAL  
ARGUMENT

Referred to me for Recommended Decision are Defendant Sherman Lumber's Motion for Summary Judgment on Count I (Docket No. 12), Defendants' Motion to Dismiss Counts II-X (Docket No. 4), and Plaintiff's Motion to Retain Jurisdiction (Docket No. 32). In addition before me is Plaintiffs' Motion to Strike or Permit Rebuttal Argument. (Docket No. 31). For the reasons explained below, I recommend that the Court GRANT Defendant Sherman Lumber's Motion for Summary Judgment on Count I, FIND that Counts II-X are not pre-empted by the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185(a), and DENY Plaintiffs' Motion to Retain Jurisdiction. In

addition, I DENY Plaintiffs' Motion to Strike and GRANT Plaintiffs' request to make rebuttal argument.

### **Summary Judgment Standard**

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1<sup>st</sup> Cir. 1993). A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law, and the evidence is sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side. *De-Jesus-Adorno v. Browning Ferris Ind. Of Puerto Rico*, 160 F.3d 839, 841-42 (1<sup>st</sup> Cir. 1998) (quoting *National Amusements v. Town of Dedham*, 43 F.3d 731, 735 (1<sup>st</sup> Cir. 1995)).

Once the moving party has presented evidence establishing the absence of a genuine issue of material fact, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)). It is not sufficient for the nonmoving party to merely point to an allegation or to denials in their pleadings. *Leblanc v. Great American Ins. Co.*, 6 F.3d 836, 841 (1<sup>st</sup> Cir. 1993).

### **Procedural Background**

On April 3, 2000, Defendants filed a Motion to Dismiss Plaintiffs' Complaint. On April 5, 2000, I held a telephone conference with counsel and ordered that Defendants'

Motion to Dismiss on Count I, alleging that Defendant Sherman Lumber violated the Wage Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. § 2101 *et seq.*, be converted into a Motion for Summary Judgment. I gave Defendants until April 19, 2000 to supplement their motion. At the conference I also allowed the parties to conduct discovery on the "numerosity" issues raised under Count I and stated that "[i]n the event a dispute arises [during discovery], the parties shall contact the Court for a conference." Order at p.2.

As directed by my Order, Defendant Sherman Lumber filed a Motion for Summary Judgment on Count I on April 19, 2000. Plaintiffs filed their Response to the Motion on May 22, 2000, and Defendant Sherman Lumber its Reply on June 2, 2000. In its Reply Sherman Lumber attached a list of ninety-two names that, it contends, constitute all those persons who were employees at Sherman Lumber during the relevant time period under the WARN Act. On June 7, 2000, Plaintiffs filed a Motion to Strike or Permit Rebuttal contending that Sherman Lumber should have produced the list with its Motion for Summary Judgment. Also on June 7, 2000, Plaintiffs filed a motion asking this Court to retain jurisdiction over the case in the event the Court decides to Grant Sherman Lumber's Summary Judgment Motion and reject Defendants' argument that Plaintiffs' state claims are pre-empted by the LMRA.

### **Factual Background and Analysis**

#### *I. WARN Act*

Congress enacted the WARN Act to "ensure that workers and their communities receive advance notice of their loss of employment so that they may begin the search for other employment or, if necessary, obtain training for another occupation." *Local 1239*,

*Int'l Bhd. of Boilermakers v. Allsteel, Inc.*, 955 F. Supp. 78, 79 (N.D. Ill. 1996). The Act defines an employer as "any business enterprise that employs - (A) 100 or more employees, excluding part-time employees; or (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of over time)." 29 U.S.C. § 2101(a). The Act requires an employer who conducts a plant closing or mass layoff which results in an employment loss of fifty or more employees over a thirty day period, or, if the layoffs occur in several stages, an employment loss of fifty or more employees over a ninety day period, to give sixty days notice to the employees or their representatives. *Id.* § 2102(a)(1); 20 CFR § 639.5(2). When employees are terminated in several stages over the thirty or ninety day period, the employer must give notice sixty days from the time the first layoff occurred within the time period. 20 CFR § 639.5 ("When all employees are not terminated on the same date, the date of the first individual termination within the statutory 30-day or 90-day period triggers the 60-day notice requirement.") The "snapshot" day on which the sixty day period relates back to determines whether the employer meets the definition of "employer" under the statute. *Id.*

Sherman Lumber Company operates a lumber mill, flooring mill, chip mill, wholesale lumber sales business, and retail business on contiguous premises in Sherman and Stacyville, Maine. Beginning in 1999, Sherman Lumber began to lay off a large number of workers from its facilities. On this motion the parties agree that between January 3, 1999 and April 3, 1999 Sherman Lumber effected a "plant closing" or "mass layoff" that resulted in the employment loss of 50 or more employees. Both parties also agree that the first lay off that occurred within the ninety period was on January 22, 1999

and that the "snapshot" date is November 23, 1998. At issue on this motion is whether the court can state as a matter of law that Sherman Lumber employed less than 100 employees on November 23, 1998, and if Sherman Lumber did employ less than 100 employees on that date, whether that date is representative of the number of employees Sherman Lumber employed during that time period.

Plaintiffs' first argue that the regulations defining "part-time employee" uses the terms "employed" and "worked" as having two different meanings. 20 CFR 639.3(h).

The regulation defines a "part-time employee" as one:

who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required, including workers who work full-time. This term may include workers who would traditionally be understood as "seasonal" employees. The period to be used for calculating whether a worker has worked "an average of fewer than 20 hours per week" is the shorter of the actual time the worker has been employed or the most recent 90 days.

*Id.*

Upon reading the regulation I am convinced that the term "employed" and "worked" are linked and used interchangeably, as the last sentence of the regulation, clearly referring to the first in which the term "employed" is used, uses the term "worked". Other courts that have interpreted the statute and regulation have also used the terms interchangeably. *See Hollowell v. Orleans Regional Hosp.*, No. Civ.A. 95-4029, 1998 WL 283298, at \*7 (E.D. La. May 29, 1998) (" The WARN Act provides two alternate definitions for the term "part-time employee" - - one relating to the number of hours an employee works and the other relating to the number of months an employee has worked."); *Solberg v. Inline Corp.*, 740 F. Supp. 680, 684 (D. Minn. 1990) ("Part-time employees are workers employed less than six months."). It is clear to me that one

is considered a "part-time employee" under the statute if one has worked fewer than six of the previous twelve months *or* if the person worked an average of twenty hours a week.

Plaintiffs point out that under the interpretation just adopted by the Court a full-time employee hired ten months before a plant closing and laid off seven months before the closing would not be considered a full-time employee under the WARN Act. Here, Plaintiffs make the same argument as the Plaintiffs in *Solberg*, that "Congress could not have intended to include newly hired full-time employees within the definition of "part-time employee". *Solberg*, 740 F. Supp. at 685. In *Solberg*, the Court rejected the plaintiff's argument and determined that the plain language of the statute and regulation includes newly hired full-time employees that worked less than six months of the previous twelve months from the notice date within the term "part-time employee".<sup>1</sup> *Id.*

I, like the court in *Solberg*, am convinced that the plain language of the statute and regulation include those employees who have worked less than six of the previous twelve months from the "snapshot" date or averaged fewer the 20 hours per week. The language defining a "part-time employee" is clear and Plaintiffs have pointed to no case in which a court has departed from this clear interpretation. *See Greebel v. FTP Software, Inc.*, 194 F.3d 185, 192 (1<sup>st</sup> Cir. 1999) ("[t]he words of the statute are the first guide to any interpretation of the meaning of the statute.").<sup>2</sup>

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<sup>1</sup> I recognize that in *Solberg* at issue was whether a "mass layoff" occurred whereas here at issue is whether Sherman Lumber was an "employer" as defined by the act. *Solberg v. Inline Corp.*, 740 F. Supp. 680, 683 (D. Minn. 1990). However, like the definition of "employer", a "mass layoff" excludes part-time employees from the number of employee counted for purposes of the definition. Therefore, the court had to analyze the same issue that is before me – what should be included and excluded as a "part-time employee" under the Act.

<sup>2</sup> I agree with Plaintiffs that one may be a fulltime employee even if one is not working when one is laid off. For example, one who worked for seven months and then was laid off for the next five months is a full-time employee. It does not follow, however, that every person who worked at Sherman Lumber in the

In their Motion Defendant Sherman Lumber argued that it employed ninety-two employees on November 23, 1998. In their Response Plaintiffs listed eleven names as additional names not included in the ninety-two names listed by Sherman Lumber. In their Reply Defendant produced a list of the ninety-two names in which six of the eleven names mentioned by Plaintiffs were in fact listed among the ninety-two names included by Defendants. Plaintiffs then filed a motion to strike that list or in the alternative to permit rebuttal argument. Because I find that the list was in reply to Plaintiffs' argument that Defendants failed to include eleven named persons among the employees employed by Sherman Lumber on November 23, 1998, Plaintiffs' Motion to Strike is DENIED. However, I will GRANT Plaintiffs' request for Rebuttal argument.

As stated above, Sherman Lumber did, in fact, include six of the eleven named persons by Plaintiffs among the ninety-two workers that it contends it employed on November 23, 1998. That leaves five employees, four of which were summer employees and worked for only three of the previous twelve months prior to November 23, 1998. For the reasons stated above, I consider these four employees to be "part-time employees". That leaves one named employee, Timothy Robinson, who Sherman Lumber listed as having "quit" on November 20, 1998, and therefore excluded him from the employed list. Plaintiffs argue that payroll records indicate that Timothy Robinson worked at least one day during the week of November 22, 1998, most likely on November 23<sup>rd</sup>. Defendant disputes that and states that Robinson was paid nine hours of sick time during the day in question. Because there is a disputed fact regarding whether

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previous year should be considered a full-time employee. The statute prescribes certain clear limits by excluding those person who worked less than six of the previous twelve months prior to the notice date. 29 U.S.C. § 2101(a)(8).

Sherman Lumber employed Timothy Robinson during the week of November 23, 1998 I will include him as an employee of Sherman Lumber.

In their rebuttal argument Plaintiffs point out that because Sherman Lumber included Jared Wade as an employee on November 23, 1998, it should include the names of other employees not on the list. Jared Wade was a student summer employee who worked from the week of June 27, 1998 through August 29, 1998. The Sherman Lumber payroll summary states that Jared Wade "quit" on September 5, 1998. Despite the fact that Sherman Lumber chose, through inadvertence or caution, to include Jared Wade, I am satisfied that he is not a countable employee because he was employed less than six months during the twelve month period preceding November 23, 1998. Likewise, I exclude the other names listed by Plaintiffs as having a similar employment history as Jared Wade.

Plaintiffs next contend that the ninety-two employees Sherman Lumber employed on November 23, 1998, is not a representative number of employees Sherman Lumber employed during the latter half of 1998. Sherman Lumber, of course, contends that ninety-two employees is representative of the number of employees it employed during the latter half of 1998. The regulations provide that if the "snapshot" date "is clearly unrepresentative of the ordinary or average employment level, then a more representative number can be used to determine coverage." 20 CFR 639.5(a)(2). The regulation goes on to caution that "[a]lternative methods cannot be used to evade the purpose of WARN, and should only be used in unusual circumstances." *Id.* Based on the information provided to me by the parties I have concluded that Sherman Lumber employed ninety-two persons on November 23, 1998. Plaintiffs point to August 7, 1998, when Sherman

Lumber employed one hundred and ten employees and December 12, 1998, when Sherman Lumber employed one hundred employees as proof that the November 23<sup>rd</sup> number is unrepresentative.

This issue seems to be a novel one as neither party cites any case and instead point to the regulation. I am convinced that ninety-two employees is indeed a representative number of employees Sherman Lumber employed in the latter half of 1998. The regulation plainly cautions against departing from the "snapshot" date. I should consider an alternative number only if "unusual circumstances" are present that make the "snapshot" number "clearly unrepresentative". *Id.* The regulation states that "unrepresentative employment levels include cases when the level is near the peak or trough of an employment cycle or when large upward or downward shifts in the number of employees occur around the time notice is to be given." *Id.* No such unusual circumstance is offered here and I am satisfied that the November 23<sup>rd</sup> number is not "clearly unrepresentative" of the number of employees Sherman Lumber employed during the latter half of 1998.

Plaintiffs lastly point to what they contend are Sherman Lumber's failure to produce certain information during the discovery process leading up to this motion. For example, Plaintiffs direct my attention to Sherman Lumber's failure to produce information concerning independent contractors who could be considered employees under the WARN Act. *See* 20 CFR § 639.3(a)(2). In addition, Plaintiffs direct my attention to the omissions of four payroll reports and the fact that Mark Robinson received payments from Sherman Lumber, despite no record being produced reflecting

such payments, as evidence that Sherman Lumber's veracity should be questioned and therefore I should deny its motion.

To put it simply, Plaintiffs argument misses the mark. First, when I converted Count I to a Motion for Summary Judgment during the April 5, 2000 telephone conference with counsel, I permitted each side to seek discovery on the "numerosity" issue. I clearly indicated to both parties' counsel that in the event any dispute arises during this discovery period they should contact me. I even reduced that instruction to writing, "[i]n the event a dispute arises [during discovery], the parties shall contact the Court for a conference." Order at p.2. Despite that clear instruction Plaintiffs' counsel never contacted me about any discovery dispute pertaining to the payroll records or to the subcontractors.

Second, beyond my instruction Plaintiffs could have sought further protection under Fed. R. Civ. P. 56(f). Rule 56(f) permits a party to file an affidavit in lieu of a response explaining how additional discovery would create a dispute of material fact and the need for that additional discovery. *See Superior-FCR Landfill, Inc. v. County of Wright*, 59 F. Supp.2d 929, 937 (D. Minn. 1999) ("Once [Plaintiff] realized that it could not respond to the [Defendant's] motion with specific facts demonstrating the existence of a dispute of material fact without undertaking additional discovery, it should have filed an affidavit under Rule 56(f) explaining how discovery would enable it to overcome the motion."); *Robbins v. Amoco Production Co.*, 952 F.2d 901, 907 (5th Cir.1992) ("To preserve a complaint of inadequate opportunity to conduct discovery, the party opposing a motion for summary judgment must file a [Rule 56(f)] motion and non-evidentiary affidavits pursuant to Fed.R.Civ.P. 56(f), explaining why it cannot oppose the summary

judgment motion on the merits."). Plaintiffs did not file an affidavit pursuant to Rule 56(f). Rather, they attempt to rely on their lack of diligence in obtaining what they contend may be crucial information as creating a genuine issue of material fact. While Defendant's Motion for Summary Judgment requires me to construe the facts in the light most favorable to the Plaintiffs, I cannot construe Plaintiffs' assertion about what may be in the certain documents that, had it had the opportunity to obtain, may have raised a genuine issue of material fact. For the reasons stated above I recommend that the Court GRANT Defendants' Motion for Summary Judgment on Count I.

## *II. LMRA Preemption*

In their Motion to Dismiss, Defendants contend that Plaintiffs' Counts II (Maine Pay Severance Act) and III (Individual Maine Severance Pay Act Liability), and those counts derived from them are preempted by section 301 of the LMRA. 29 U.S.C. § 185(a). Defendants argue that to determine whether it violated the Maine Pay Severance Act (MSPA), 26 M.R.S.A. § 625-B, one needs to look to the Collecting Bargaining Agreement (CBA) between Sherman Lumber and Plaintiffs to determine whether a severance pay provision is present in the CBA and if a provision is present, whether that severance is equal to or greater than the severance pay provided under the MSPA.

Section 301 of the LMRA provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

From this statute "a complex preemption jurisprudence has grown in stages." *Lydon v.*

*Boston Sand & Gravel Co.*, 175 F.3d 6, 10 (1<sup>st</sup> Cir. 1999). This Court recently discussed

the applicability of preemption under section 301 in *Bishop v. Bell Atlantic*, 81 F. Supp.2d 84, 87-88 (D. Me. 1999). In that case we recognized that preemption applies "whenever resolution of a plaintiff's claim is substantially dependent on analysis of a CBA's terms" *Id.* (quoting *Lydon*, 175 F.3d at 10). We noted that "as long as the state claim can be resolved without construing the agreement itself, it is not preempted by Section 301." *Id.* (quoting *Lydon*, 175 F.3d at 10). Mere consultation of the agreement to determine whether the CBA applies to the dispute is not enough to trigger preemption. *Id.*

Here, a cursory review of the CBA reveals that it does not contain a severance pay provision. As Plaintiffs properly point out, not a single reference is even made to severance pay in the CBA. This cursory review of the CBA to determine that no severance provision exists in the CBA is insufficient to trigger preemption under Section 301 of the LMRA.

### **Motion to Retain Jurisdiction**

Plaintiffs filed a Motion to Retain Jurisdiction asking this court to exercise its discretion and retain jurisdiction in the event the Court grants Defendant Sherman Lumber's Motion for Summary Judgment on Count I and find that Counts II, III, and related counts are not pre-empted under the LMRA. Defendants later joined in the motion and asked the Court to retain jurisdiction.

Even though, if the district judge adopts my recommendations, this Court will have no independent federal basis for jurisdiction over this matter, it may, retain jurisdiction over this case if, looking at "the totality of the circumstances", it determines that that is the best course for the case to proceed. *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1177-78 (1<sup>st</sup> Cir. 1995). Based on my review of the remaining counts and

Defendants' Motion to Dismiss and Plaintiffs' Response I recommend that the Court remand this case to state court.

A review of the Motion to Dismiss and the Response to that motion indicates why those issues are best left to the state court. I will cite only a few examples. In count II Defendants argue that I should interpret the Maine Severance Pay Act (MSPA) in a certain manner. Plaintiffs respond by noting that Defendants argument is unsupported "by any case or legal precedent, and contrary to the explicit language of the MSPA." Response at p.4. Plaintiffs then argue for a contrary interpretation of the MSPA without citing any legal precedent. In Counts IV through VII, Plaintiffs argue, without citing any Maine case, for Shareholder Liability under the Maine Business Corporation Act, 13-A MRSA §101 et seq. In Count VIII, Plaintiffs assert a claim of fiduciary liability against the directors and ask this Court to adopt a theory of liability under the Maine Business Corporation Act (MBCA). These novel arguments relying on state law are best left to the sound discretion of a Maine judicial officer, not a federal judge. *See Alves v. American Med. Response of Mass.*, 76 F. Supp. 2d 119, 123-24 (D. Mass. 1999) (finding that the application of disputable points of state law raised comity concerns and warranted the removal of the action to the state court, "rather than having federal courts predict their final resolution or certify questions to the state court.").

### **Conclusion**

For the reasons stated above Plaintiffs' Motion to Strike is DENIED and Motion for Rebuttal Argument is GRANTED. I recommend that the Court GRANT Defendant Sherman Lumber's Motion For Summary Judgment on Count I and FIND that Counts II, III, and related counts are not pre-empted by the LMRA. I further recommend that the

Court DENY Plaintiffs' Motion to Retain Jurisdiction and REMAND this matter to the state court.

## NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated: July 11, 2000.

STNDRD

U.S. District Court  
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-57

PACE, et al v. SHERMAN LUMBER CO, et al  
03/27/00

Filed:

Assigned to: Judge GEORGE Z. SINGAL

Demand: \$0,000

Nature of Suit: 790

Lead Docket: None

Jurisdiction: Federal

Question

Dkt # in PENOBSCOT SUPERIOR : is CV-00-41

Cause: 29:185 Labor/Mgt. Relations (Contracts)

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