

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BARBARA J. LEMERICH,)
)
 Plaintiff)
)
 v.) Civil No. 01-124-B-C
)
 INTERNATIONAL UNION OF)
 OPERATING ENGINEERS, LOCALS)
 877 AND 4,)
)
 Defendants)

**RECOMMENDED DECISION ON
DEFENDANT’S MOTION TO DISMISS**

Plaintiff Barbara Lemerich brought the present two-count claim of unlawful sexual discrimination against International Union of Operating Engineers and Locals 877 and 4,¹ alleging violations of Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Maine Human Rights Act (“MHRA”). Before the Court is Local 877’s motion to dismiss the MHRA claim on the grounds that it is untimely and is preempted by the National Labor Relations Act and to dismiss the entire complaint for failure to comply with Rule 8(a) of Federal Rules of Civil Procedure. Further, Local 877 moves to strike Exhibit A attached to plaintiff’s complaint. (Docket No. 32.) I recommend that the Court **GRANT** in part Local 877’s motion to dismiss to the extent it asserts Count II is preempted but **DENY** the motion to the extent it asserts Count I fails to comply with Rule

¹ The International Union has already been granted summary judgment. Local 4 has not responded to the Second Amended Complaint and according to a footnote in Local 877’s memorandum Local 4 has never been properly served.

8(a) and fails to state a claim upon which relief may be granted. Further, I partially **GRANT** Local 877's motion to strike Exhibit A.

Factual Allegations

Plaintiff, Barbara Lemerich, is a resident of Maine. (Second Am. Compl. ¶ 1.) Defendant Local 877 is a union representing members in the State of Maine and elsewhere, including members employed at the HoltraChem Manufacturing Co., LLC ("HoltraChem") plant in Orrington, Maine. (Id. ¶¶ 3-4.) Lemerich was an employee of HoltraChem and a member of Local 877 during 1998 and 1999. (Id. ¶ 7.) Lemerich alleges Local 877 violated Title VII beginning on May 27, 1999, in discriminating against her on the basis of sex in their representation of her. (Id. ¶ 20.) Lemerich further alleges Local 877 violated the MHRA, 5 M.R.S.A. § 4551 et seq., beginning on the same date by engaging in unlawful sex discrimination against her in denying her the full benefits of membership. (Id. ¶ 25.) In both counts she also alleges Local 877 attempted to cause HoltraChem to discriminate against her. (Id. ¶¶ 20, 25.) She claims Local 877's discriminatory conduct was intentional and resulted in injury. (Id. ¶¶ 22, 26.) Additionally, she alleges that Local 877's discriminatory actions were committed with reckless indifference to her rights under Title VII and the MHRA. (Id. ¶¶ 23, 27.)

Prior to initiating the present action, Lemerich complied with all procedural prerequisites for filing this action in order to recover compensatory damages and attorney's fees. (Id. ¶ 8.) Specifically, she filed a complaint with the Maine Human Rights Commission and ultimately received a formal finding from the Commission that reasonable grounds exist to believe that unlawful sex discrimination occurred. (Id.) Local 877 responded to the MHRA complaint against it and appeared before the

Commission. (Id. ¶¶ 15, 17.) Attached to her second amended complaint is a copy of the investigator's report marked Exhibit A.

Lemerich incorporates by reference the investigator's findings contained within the report. (Id. ¶¶ 20, 25.) The investigator's findings assert that Local 877 opposed a raise for Lemerich, however no evidence can be found or was provided establishing any occasion in which Local 877 opposed special or different treatment for male members. (Id. Ex. A ¶ V(2)(b).) Local 877's Business Agent, Richard Draper informed Lemerich that it was possible for her to receive a raise under article 20.7 of the labor agreement. (Id. ¶ V(2)(a).) However, at a subsequent meeting, Local 877 not only refused to intercede on Lemerich's behalf when she sought the raise; they opposed her request and informed her that "the men opposed" her receiving a raise. (Id. ¶ V(2)(b) & (d).) At this time, two Local 877 members specifically opposed her raise and reported they polled Local 877 members, who all happen to be male, by asking if they felt she deserved a raise. (Id. ¶ V(2)(a).) Local 877 not only opposed Lemerich's raise, they threatened management that they would file grievances if she received a raise, despite the fact that Local 877 knew they had no right to do so. (Id. ¶ V(2)(e).)

There are two or more instances where Local 877 advocated for and obtained requested benefits for its male members. (Id. ¶ V(2)(b)-(d).) In one instance, a male Local 877 member was allowed to transfer to a less demanding job at the same pay of his more demanding position. (Id. ¶ V(2)(b).) In another instance, after a male member unsuccessfully bid for a position, Local 877 consented to HoltraChem making that member a salary-based employee. (Id.)

The Second Amended Complaint also contains allegations about the interrelationship between Local 877 and the International Union of Operating Engineers (hereinafter “the International Union”) during the time frame relevant to this action. (Second Am. Compl. ¶¶ 9-18.) Members of Local 877 are required to be members of the International Union. (Id. ¶ 10). Plaintiff also alleges in her Second Amended Complaint that Local 877 acted as an agent of the International Union. (Id. ¶ 9).

Rule 12(b)(6) Standard

When considering a Rule 12(b)(6) motion to dismiss, the Court must accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences in the claimant’s favor, and determine whether the complaint, when viewed in the light most favorable to the claimant, sets forth sufficient facts to support the challenged claims. Clorox Co. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 30 (1st Cir. 2000); LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998.) All facts are construed in the light most favorable to plaintiff, although the Court need not credit conclusory allegations or indulge unreasonably attenuated inferences. See Aybar v. Crispin-Reyes, 118 F.3d 10, 13 (1st Cir. 1997); Ticketmaster-NY, Inc. v. Alioto, 26 F.3d 201, 203 (1st Cir. 1994). A motion to dismiss should be granted only if it clearly appears that the plaintiff cannot recover on any set of facts. Roma Construction Co. v. aRusso, 96 F.3d 566, 569 (1st Cir. 1996).

Discussion

A. Timeliness of Maine Human Rights Act Claim

A brief account of the procedural background is necessary in order to address the first issue. Lemerich’s original complaint dated May 21, 2001, names only the International Union as a defendant. The International Union immediately filed a motion

for a more definite statement to which Lemerich responded by filing an amended complaint that incorporated Exhibit A, which is the investigator's report prepared during the investigation of Lemerich's claim against Local 877 before the Maine Human Rights Commission ("MHRC"). (Docket Nos. 2 & 4.) Asserting that it was not the party previously before the MHRC, the International Union filed a motion to dismiss and a motion for summary judgment. (Docket Nos. 5 & 11.) The latter was subsequently granted in favor of the International Union. (Docket Nos. 28 & 39.) Lemerich moved to amend her amended complaint and her request was granted. (Docket Nos. 7, 28, 39.) On January 3, 2002, Lemerich filed the second amended complaint that adds Local 877 as a defendant and is now the operative pleading in this case. In the present motion before the Court, Local 877 asserts that the MHRA two-year statute of limitations expired before Lemerich joined Local 877 and that the second amended complaint should not relate back to the initial May 21, 2001 complaint.

The statute of limitations for a claim pursuant to the MHRA is two years following the event of discrimination. 5 M.R.S.A. § 4613(2)(C). Here the conduct is alleged to have started May 29, 1999, but the second amended complaint was not filed until January 3, 2002. (Second Am. Compl. ¶ 25.) Local 877 argues that Lemerich amended her complaint to add Local 877 after the statute of limitations expired and that the modification should not be allowed to relate back to the inception of the initial action. Assuming *arguendo* that this was not a continuing violation and that the statute of limitations began to run May 29, 1999, the two-year statute of limitations period ended prior to the filing of the second amended complaint. "When a plaintiff amends a complaint to add a defendant, but the plaintiff does so subsequent to the running of the

relevant statute of limitations, then Rule 15(c)(3) controls whether the amended complaint may ‘relate back’ to the filing of the original complaint and thereby escape a timeliness objection.” Wilson v. U.S. Gov’t, 23 F.3d 559, 562 (1st Cir. 1994). See also Leonard v. Parry, 219 F.3d 25, 28 (1st Cir. 2000). To be protected by Rule 15(c)(3), plaintiff must demonstrate she meets the requirements contained therein. Emery v. Wood Indus. Inc., No. 98-480, 2001 WL 951577, *5 (D.N.H. Aug. 20, 2001) (placing the burden on plaintiff in motion to dismiss to show that the Rule 15(c)(3) requirements are met). Rule 15(c)(3) allows an amended pleading to relate back to the date of the original pleading in relevant part when:

... the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed. R. Civ. P. 15(c)(3).

Local 877 concedes that all requirements of 15(c)(3) have been met in this instance² except the requirement in subsection (B) above, that Local 877 “knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against them.” See Fed. R. Civ. P. 15(c)(3). On this point, Local 877 argues that relation back is not appropriate to cure any and all mistakes made by the plaintiff; the mistake must concern the identity of the proper party. Local 877

² The three requirements of Rule 15(c)(3) must be met before an amended complaint can be held to relate back to the original complaint. The first requirement is the “same transaction” requirement, which has been met here because both relevant versions of the complaint are derived from and allege the same conduct. See Leonard, 219 F.3d at 28. The second requirement mandates that notice be served in a timely manner. Fed. R. Civ. P. 15(c)(3)(A). This case does not require a detailed analysis of the identity of interest between the named party and the proper party because it was the proper party, through Local 877’s own counsel, that initially responded to the complaint. There is no dispute that this requirement has been met. The third requirement, which is the challenged requirement here, requires the defendant to have “knowledge of a mistake in identity.” See Leonard, 219 F.3d at 28; Fed. R. Civ. P. 15(c)(3)(B).

asserts that Lemerich made a deliberate decision “not to sue a party whose identity plaintiff knew from the onset.” (Def.’s Mot. to Dismiss at 6.) Specifically, Local 877 argues that because Lemerich named Local 877 in her discrimination complaint to the Maine Human Rights Commission, she knew the identity of the proper party. Further, Local 877 asserts that paragraphs two and three of her complaint show Lemerich was aware that Local 877 is not the International Union. Local 877 concludes that Lemerich made a conscious choice to name the International Union instead of Local 877 in her complaint, thus the second amended complaint should not relate back to the original complaint.

Local 877 correctly notes that Rule 15(c)(3) is not meant to relieve plaintiffs of the consequences of deliberate strategic decisions. See Leonard, 219 F.3d at 29 (citing Wells v. HBO & Co., 813 F. Supp. 1561, 1567 (N.D. Ga. 1992)). However, I do not reach the conclusion that Lemerich’s naming of the International Union in lieu of Local 877 was the result of a strategic decision. Lemerich bears the burden of establishing that she made a mistake as to the “identity” of the proper party. See Leonard, 219 F.3d at 28. Lemerich argues she was unaware of the separate status between the International Union and Local 877 as distinct legal entities. (Pl.’s Opp’n Mot. to Dismiss at 3.) She asserts that it was her belief that the International Union had authority over and directed the actions of Local 877. Relation back is not permitted where the plaintiff lacks knowledge of the proper party, but it is allowed where there is an error concerning the identity of the proper party.³ See Wilson, 23 F.3d at 563. Although it is possible that Lemerich named

³ This is not a situation where the plaintiff did not know who to name as the defendant, such as in cases where the plaintiff lists “John Doe” in the complaint because the defendant is unknown. Cf. Wilson, 23 F.3d at 563.

the International Union for strategic purposes, the language of Lemerich's original complaint supports her assertion that she made a mistake as to the legal relationship between Local 877 and the International Union which resulted in a mistake as to the identity of the proper party. It is plain from the original complaint that Lemerich was seeking to sue the entity that discriminated against her by denying her the full benefits of membership. (Compl. ¶ 14.) Local 877 points to paragraphs two and three of the initial complaint, however I do not find them dispositive. Paragraph two of her complaint merely reports that the International Union is a union representing both in-state and out-of-state members. (Id. ¶ 2). Paragraph three alleges that the International Union, acting through Local 877, represented the member-employees at HoltraChem. (Id. ¶ 3.) Later, in paragraphs nine and fourteen, the complaint alleges that the International Union discriminated against her. (Id. ¶¶ 9, 14.) Had she not misunderstood the legal relationship between the International Union and Local 877, her complaint would have been brought against Local 877. "Mistake" is defined as "a wrong or action or statement proceeding from faulty judgment, inadequate knowledge, or inattention." Leonard, 219 F.3d at 28 (citing Webster's Ninth New Collegiate Dictionary 760 (1983)). It appears that at the time Lemerich filed the initial complaint, she believed that the International Union and Local 877 consisted of one entity and therefore made a mistake concerning the identity of the proper party defendant.

Lemerich also bears the burden of establishing that Local 877 knew or should have known that but for this mistake, the action would have been brought against it. See Leonard, 219 F.3d at 28. Local 877 argues it cannot be charged with having "knowledge of a mistake in identity" because Lemerich's failure to amend her complaint after being

notified of the mistake could have lead Local 877 to believe it was not named due to strategic reasons. It is true that events subsequent to filing a complaint can “inform a defendant’s reasonable beliefs concerning whether her omission from the original complaint represented a mistake (as opposed to a conscious choice).” See id. (citing Kilkenny v. Arco Marine Inc., 800 F.2d 853, 857 (9th Cir. 1986)). However, the knowledge a plaintiff acquires after filing the original complaint has no bearing on determining the plaintiff’s state of mind at the time of the filing and in determining whether plaintiff initially made a mistake concerning identity. Id. Local 877 tries to suggest that the International Union’s Motion for More Definite Statement, filed June 21, 2001, put plaintiff on notice that Local 877 was the proper party and that somehow Local 877 was led thereafter to believe it had not been named for strategic reasons. Of course by June 21, 2001, the statute of limitations would have run in any event. The Local’s argument appears disingenuous to me in that prior to June 21, 2001, Local 877 apparently believed it had been named as a party in this action and its counsel, Vida Berkowitz, had entered an appearance in the case unauthorized by the International Union and apparently on behalf of Local 877. I do not see how Lemerich can be charged with knowledge that she had named the incorrect party, when the party itself apparently did not realize that it was not part of the lawsuit.

I find the First Circuit’s decision in Ayala Serrano v. Lebron Gonzalez, 909 F.2d 8 (1st Cir. 1990) helpful in determining whether Local 877 knew or should have known that it was the proper party. In Ayala Serrano, the plaintiff prisoner assaulted by an inmate in a state penitentiary named Puerto Rico, the Administrator of Corrections, and the Superintendent of the penitentiary as defendants in his complaint alleging civil rights

violations. Ayala Serrano, 909 F.2d at 10. The plaintiff did not name Lebron, the prison officer who was present and failed to prevent the assault. Id. After affirming the dismissal of the claims against the named defendants, the First Circuit remanded to the district court the question of whether plaintiff's amended complaint, which added Lebron as a defendant, related back to the initial complaint. Id. The district court determined that the Rule 15(c)(3) requirements had been met, therefore the complaint related back. Id. at 11. On appeal to the First Circuit, Lebron asserted that he could very well have believed that he was not named as a defendant because plaintiff's complaint involved a prison transfer, which was outside of Lebron's powers. Id. at 13. The First Circuit affirmed the district court, stating that Lebron, having been present during the incident and aware of plaintiff's injuries, knew or had reason to know that he was a proper party to the action.⁴ Id.

Here, prior to the commencement of the present action, Local 877's conduct was the subject of Lemerich's complaint to the MHRC and Local 877 represented itself in that matter. (Second Am. Compl. ¶¶ 8, 17.) I do not buy Local 877's conclusory assertion that it was not named in the complaint for strategic reasons rather than because of a mistake. That Local 877 responded to the original complaint in this case when it was not the named party speaks volumes as to the degree of mistake and confusion attendant to the initiation of this lawsuit. I find that Local 877 knew or should have known it was the proper party before the court. Thus, the requirements of Rule 15(c)(3) are met in this

⁴ In its relation back analysis, the First Circuit in Ayala Serrano also applied a fourth requirement which was derived from Schiavone v. Fortune, 477 U.S. 21, 29 (1986). A December 1, 1991 amendment to Rule 15(c) changed the result in Schiavone, thus this fourth requirement is no longer a part of the relation back analysis. See Freund v. Fleetwood Enter. Inc., 956 F.3d 354, 362-363 (1st Cir. 1992). The amendment otherwise has no effect on the First Circuit's reasoning in Ayala Serrano. See Velez v. Alvarado, 145 F.Supp.2d 146, 155 n. 6 (D.P.R. 2001).

matter and the second amended complaint should relate back to the filing of the original complaint. Accordingly, I recommend that the Count II MHRA claim not be dismissed as untimely.

B. Preemption of Maine Human Rights Act Claim

The parties agree that the National Labor Relations Act (“NLRA”) does not preempt the Title VII claim. However, Local 877 asserts that the NLRA preempts the Maine Human Rights Act claim in Count II. Congress passed the NLRA to uniformly regulate labor relations affecting interstate commerce. Tamburello v. Comm-Tract Corp., 67 F.3d 973, 976 (1st Cir. 1995), cert. denied, 517 U.S. 1222 (1996). Several different strains of preemption exist, but only two are asserted by Local 877. Although Local 877 joins the two preemption doctrines in its motion to dismiss, they will be discussed separately here because one doctrine, the Garmon preemption doctrine, relates to the court’s jurisdiction whereas the other doctrine, the duty of fair representation, relates to federal preemption of a state law claim.

1. Duty of Fair Representation

First, Local 877 argues that Lemerich’s MHRA claim is essentially a claim alleging a breach of Local 877’s duty of fair representation. The duty of fair representation, a judicially crafted doctrine, rises out of section 9(a) of the NLRA (i.e. 29 U.S.C. § 159(a)), which in relevant part states:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees... shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment ...
29 U.S.C. § 159(a).

Section 159(a) deprives member-employees of the right to negotiate certain terms of employment with their employer; the employee must negotiate through the employee's union representative. See Ryan Iron Works, Inc. v. N.L.R.B., 257 F.3d 1, 7 (1st Cir. 2001). It is well established that as the exclusive bargaining representative pursuant to § 9, a union has a statutory duty to fairly represent its members without favoritism, prejudice, or other discrimination. See, e.g., Air Wis. Pilots Protection Comm. v. Sanderson, 909 F.2d 213, 216 (7th Cir. 1990), cert. denied, 498 U.S. 1085 (1991). See also BIW Deceived v. Local S6, 132 F.3d 824, 830 (1st Cir. 1997) (citing Vaca v. Sipes, 386 U.S. 171, 177 (1967)). When a union is acting in its representative capacity on behalf of a member or members, the union owes a duty of fair representation to those members. BIW Deceived, 132 F.3d at 830 (citing Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953)). Federal law governs the duty of fair representation as a cause of action and a state law claim is preempted if the claim invokes rights derived from a union's duty of fair representation. Id. (citing Condon v. Local 2944, 683 F.2d 590, 594-95 (1st Cir. 1982)).

As Lemerich acknowledges, this Court has previously determined in Bergeron v. Henderson, 52 F.Supp.2d 149 (D. Me. 1999), that if the underlying substance of a MHRA claim for sexual discrimination is that the union breached a duty of fair representation by discriminating against plaintiff, the MHRA claim creates no new rights and is subsumed

and preempted by the NLRA's duty of fair representation.⁵ See Bergeron, 52 F.Supp.2d at 154. However, Lemerich distinguishes her MHRA sex discrimination claim from the MHRA claim preempted in Bergeron by asserting that her claim does not arise out of the union's breach of the duty of fair representation because the union's actions were not undertaken in representation of her. Instead, she asserts her claim rises out of Local 877's "active interference with her entitlement to a pay raise from her employer." (Pl.'s Opp'n to Mot. to Dismiss at 8).

In determining whether a state law claim raises any rights separate from the duty of fair representation, courts focus on the conduct at the root of the controversy, not the plaintiff's characterization of the conduct in the complaint. See Bergeron, 52 F.Supp.2d at 154. In the instant matter, the conduct Lemerich complains of is Local 877's denial of her membership benefits. (Second Am. Compl. ¶ 25). However, she explicitly spells out the substance of her complaint in the count alleging a Title VII violation where she says, "[d]efendants discriminated against [her] on the basis of sex in their representation of Plaintiff." (Second Am. Compl. ¶ 20). The substance of her MHRA sex discrimination claim is that Local 877 represents men in a manner different from its representation of her as a female. The gist of Lemerich's complaint is that the union opposed her employer

⁵ The Maine Human Rights Act in part states it is unlawful employment discrimination: For any labor organization to ... deny full and equal membership rights to any applicant for membership because of race or color, sex, physical or mental disability, religion, age, ancestry or national origin, ... or, because of those reasons, to deny a member full and equal membership rights, expel from membership, penalize or otherwise discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment, representation, grievances or any other matter directly or indirectly related to membership or employment, whether or not authorized or required by the constitution or bylaws of that labor organization or by a collective labor agreement or other contract; ...or to cause or attempt to cause an employer to discriminate against an individual in violation of this section, ...
5 M.R.S.A. § 4572(1)(C).

granting her a raise, but never opposed any male union member receiving a raise or special treatment from the employer. In fact Lemerich alleges that Local 877 advocated for, and represented, the Local member's desires in those other cases involving male union members. The complaint is very similar to Bergeron's complaint that her union supported the overtime grievances of her male co-workers for work she had actually performed. See Bergeron, 52 F.Supp.2d at 151. Thus, the conduct at the root of the controversy is Local 877's discriminatory representational conduct. As stated above, the NLRA prohibits unions from discriminating against an employee in its representational capacity, thus Lemerich's MHRA claim creates no new rights separate from those secured by the duty of fair representation. Compare Bergeron, 52 F.Supp.2d at 154. For this reason, Lemerich's MHRA claim as a matter of law is subsumed by the duty of fair representation and is thereby preempted.

2. Unfair Labor Practices

The second form of preemption asserted by Local 877 involves what has become known as the Garmon preemption. A bit of background information is necessary. When Congress enacted the NLRA it also created the National Labor Relation Board ("NLRB") and charged the Board with administering the complex regulatory structure of the NLRA. Chaulk Serv., Inc. v. Mass. Com'n Against Discrimination, 70 F.3d 1361, 1364 (1st Cir. 1995), cert. denied, 518 U.S. 1005 (1996). In granting the exclusive power to the NLRB, Congress was ultimately seeking to attain uniformity in the national labor policy. Id. In effectuating this Congressional goal, the Supreme Court established what has become known as the Garmon preemption, which precludes court interference with the NLRB's interpretation and enforcement of the regulatory scheme of the NLRA. Id. The Garmon

preemption doctrine rises out of “the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the [NLRB].” Tamburello, 67 F.3d at 976. The doctrine preempts any state-law cause of action if it involves an activity “arguably” subject to labor practices that are protected or prohibited by NLRA sections 7 or 8.⁶ See id. (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1957)). See also Chaulk, 70 F.3d at 1364. The NLRB has itself declared that a union’s breach of the duty of fair representation constitutes an unfair labor practice, adopting and applying the doctrine as developed in the federal courts. Jones v. Truck Drivers Local Union No. 299, 838 F.2d at 874 (Merritt, J., concurring in part and dissenting in part). However, the fact that a claim is arguably preempted under Garmon does not end the inquiry. There are three situations in which the Garmon preemption doctrine does not preempt a state law claim and these will be discussed later below, but first the asserted facts must be analyzed to determine if the Garmon preemption is arguably applicable.

Local 877 asserts that Lemerich’s MHRA claim involves an unfair labor practice prohibited under section 8 of the NLRA. If Lemerich’s claim falls within the scope of an unfair labor practice prohibited in § 8 of the NLRA, the NLRB has exclusive jurisdiction of the claim. See, e.g., Tamburello, 67 F.3d at 976 (stating that the NLRA vests the NLRB with primary jurisdiction over unfair labor practices (citing 29 U.S.C. § 158)). Thus, a determination must be made as to whether Lemerich’s MHRA claim involves an unfair labor practice listed in section 8.

⁶ Sections 157 and 158 of the United States Code Title 29 are commonly referred to as sections 7 and 8 due to their prior placement in the code. Section 7 lists protected practices and section 8 lists prohibited unfair labor practices.

Local 877, as the party claiming preemption, bears the burden of demonstrating that the challenged activity is arguably prohibited by the NLRA. See Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380, 396 (1986). Local 877 first argues that Lemerich's claim relates to § 8(a)(5) which precludes separate wage negotiations by an employer with an employee that is represented by a bargaining agent. As Local 877 correctly notes, § 8(a)(5) states it is an unfair labor practice by an employer to "refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of [the NLRA]." See 29 U.S.C. § 8(a)(5).

Local 877 further asserts that the conduct complained of in Lemerich's MRHA claim would also constitute bargaining in bad faith in violation of section 8(d), which imposes a requirement on the union to bargain in "good faith." Specifically, section 8(d) establishes the "obligation to bargain collectively" and in relevant part states,

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.
29 U.S.C. § 158(d).

The "duties to bargain and to do so in good faith only attach to the 'mandatory subjects of bargaining,' which are those set forth in section 8(d)." See Voilas v. General Motors Corp., 170 F.3d 367, 379 (3rd Cir. 1999). As listed in § 8(d), "wages, hours, and other terms and conditions of employment" are mandatory subjects. See 29 U.S.C. § 158(d). An employer imposing a unilateral change regarding one of these mandatory subjects violates the statutory duty to bargain under § 8(d). Voilas, 170 F.3d at 379. As a result,

the employer's violation would be a matter for the NLRB's remedial order. Id. Here, Lemerich's MHRA claim involves a mandatory subject, a wage increase, that was agreed to by only her and her employer despite the section 8(d) duty to bargain in good faith. For this reason, Lemerich's claim "arguably" involves a violation of § 8(d) by her employer.⁷ The NLRB has primary jurisdiction over such section 8 unfair labor practices, therefore Lemerich's MRHA claim is preempted under the Garmon preemption doctrine unless an exception applies to save it.

There are three exceptions to the Garmon preemption. Tamburello, 67 F.3d at 977. The first exception applies where Congress has carved out an exception to the NLRB's primary jurisdiction. Id. (citing Vaca, 386 U.S. at 179-80). No exception has been carved out for state law claims alleging sex discrimination in the context of an unfair labor practice.⁸ Chaulk, 70 F.3d at 1365 n. 2 (citing Jones v. Truck Drivers Local Union, 838 F.2d 856, 861 (6th Cir. 1988); NLRB v. Local 106, 520 F.2d 693 (6th Cir. 1975)).

The second exception applies where the conduct at issue is of only a peripheral or collateral concern to federal labor laws. Chaulk, 70 F.3d at 1364-1365. Determining

⁷ In determining whether the Garmon preemption doctrine applies to a state-law claim, the Ninth Circuit noted, "potential, rather than actual conflict between a state law claim and federal labor law is sufficient to require preemption of the state law claim. Once we determine that a claim brought under state law alleges conduct that 'arguably' is subject to section 7 or section 8 of the NLRA, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." See Bassette v. Stone Container Corp., 25 F.3d 757, 760 (9th Cir. 1994) (citing Garmon, 359 U.S. at 245)(internal quotations omitted).

⁸ As the dissent in Chaulk so reasonably points out, an exception has been carved out for sex discrimination claims brought pursuant to federal law under Title VII and as part of that exception state anti-discrimination statutes serve a major role in the enforcement scheme. Chaulk, 70 F.3d at 1375 (Lynch, J. dissenting). However, the rationale for limiting the claims to those brought pursuant to Title VII could well be to insure uniformity in the remedies provided to aggrieved employees in these types of sex discrimination wage negotiation disputes.

whether this exception applies to a specific matter involves balancing “the state’s interest in remedying the effects of the challenged conduct against both the interference with the NLRB’s ability to adjudicate the controversy and the risk that the state will approve conduct the NLRA prohibits.” Id. at 1365. This balancing test requires the court to look to the conduct at the root of the controversy, not the descriptive title of sex discrimination provided by plaintiff. Id. As previously stated, the conduct at the root of the controversy is Local 877’s discriminatory representational conduct displayed when Local 877 failed to represent Lemerich’s interests in a wage negotiation previously agreed to by her and her employer. Because § 8(d) requires the union to negotiate mandatory subjects in good faith, Local 877’s representational conduct in a wage negotiation is clearly more than a “peripheral concern” to federal labor laws. The second exception does not apply here.

The third exception is invoked where the regulated conduct touches interests “so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, courts cannot infer that Congress has deprived the states of the power to act.” Id. (quoting Garmon, 359 U.S. at 243). This exception involves consideration of a two-part test. First, the state must have a significant interest in protecting the citizen from the conduct at issue. Tamburello, 67 F.3d at 980. It is reasonable to assume Maine has a significant interest in protecting employees from sex discrimination at the hands of their union in regard to wages. See 5 M.R.S.A. § 4572(1)(C). Second, the controversy allowable in state court must be different from the controversy that could have been presented before the NLRB. Id. If the controversy is identical, there is a risk of interference with the NLRB’s jurisdiction over unfair labor

practices, thus preemption is necessary. Id. (citing Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 196-197 (1977)). A claim before the NLRB alleging a violation of § 8(a)(5) would not be an identical controversy because the NLRB would focus on whether HoltraChem refused to bargain collectively in violation of § 8(a)(2), not whether Local 877 discriminated against Lemerich on the basis of gender.

However, § 8(d) expressly requires HoltraChem and Local 877 to bargain collectively in good faith without discrimination in respect to wages. See Chaulk, 70 F.3d at 1365 n. 3 (stating that there is authority for the notion that sexual discrimination constitutes an unfair labor practice under § 8). Lemerich's MHRA claim raises the identical controversy that would be presented in an unfair labor dispute before the NLRB pursuant to a § 8(d) claim against Local 877. Thus, the third exception probably does not save Lemerich's MRHA claim from preemption either.

Lemerich attempts to avoid preemption of her MHRA claim by asserting that the preemption question is a fact-specific question that cannot be conducted here because the facts have not been fully developed through discovery. However, the question of preemption does not turn on the adequacy of the facts alleged in the complaint. As can be seen in the analysis above and in Bergeron and Chaulk, the preemption analysis essentially entails determining the subject matter of the state-law claim and whether state law provides any additional rights or duties beyond those of the NLRA. The discriminatory conduct forming the basis of Lemerich's complaint involves the union's duty of fair representation and arguably relates to a prohibited unfair labor practice under section 8. This is the essence of her claim. No additional discovery could be added to

her existing claim to remove her MHRA claim from its posture vis-à-vis the various preemption doctrines.

C. Failure to Comply with Federal Rules of Civil Procedure 8(a) and Failure to State a Claim

Local 877 requests that the Court dismiss Lemerich’s Title VII and MHRA claims for failure to comply with Federal Rules of Civil Procedure 8(a)(2). Rule 8(a)(2) requires complaints to contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” See Fed. R. Civ. P. 8(a)(2). Local 877 asserts that Lemerich’s second amended complaint contains conclusory allegations and does not afford them the fair notice of the claims asserted and the grounds upon which the claims are based. In challenging the sufficiency of the complaint, Local 877 states that “the complaint makes not even the most minimal allegations about what the supposed discrimination consists of or when it occurred... and provides no basis for determining the limits of relevance for purposes of discovery.” (Def.’s Mot. to Dismiss at 15.)

I do not agree. The level of particularity required in complaints alleging employment discrimination is the simplified pleading standard of Rule 8(a), not a heightened pleading standard.⁹ See Swierkiewicz v. Soreman N. A., ___ U.S. ___, 122 S. Ct. 992, 998 (2002). Under the simplified standard, a motion to dismiss should only be granted when it is clear that “no relief could be granted under any set of facts that could be proved consistent with the allegations.” Id. The complaint must give the opposing party adequate notice of the claim and the grounds on which the claim rests, as this is the

⁹ Rule 8(a) requires a complaint to contain “(1) a short and plain statement of the grounds upon which the court’s jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.” Fed. R. Civ. P. 8(a).

purpose of the pleading. See Torres Ramirez v. Bermudez Garcia, 898 F.2d 224, 227 (1st Cir. 1990).

Lemerich's second amended complaint alleges that Local 877 discriminated on the basis of sex by denying her the full benefits of her union membership, discriminated against her in their representation of her, and attempted to cause her employer to discriminate against her. (Second Am. Compl. ¶¶ 20, 25.) The complaint specifically states that in order to file the present action, Lemerich filed a complaint with the Maine Human Rights Commission against Local 877. (Id. ¶ 8.) Further, Local 877 responded to that MHRA complaint and represented itself in the proceeding before the MHRC. (Id. ¶¶ 15, 17.) Following both alleged statutory violations, Lemerich referenced and incorporated the investigator's findings found in Exhibit A which she attached to the complaint. (Id. ¶¶ 20, 25.) Local 877 attempts to persuade the Court against considering Exhibit A, however, it is well settled that "[m]aterial that has been submitted as part of the complaint may properly be considered by the court in determining a motion under Fed. R. Civ. P.12(b)(6)." See Sullivan v. United States, 788 F.2d 813, 816 n. 3 (1st Cir. 1986) (citing 2A Moore's Federal Practice ¶12.07 [2.-5] at 12-68; Amfac Mtg. Corp. v. Ariz. Mall of Tempe, 583 F.2d 426, 429-30 (9th Cir. 1978)). The only portion of Exhibit A incorporated into the complaint is the investigator's findings reported in section V. (See Second Am. Compl. ¶¶ 20, 25.) The numbered paragraphs in section V spell out the conduct forming the basis of Lemerich's claims before the Court. Although not the best example of Rule 8(a)(2) compliance, Lemerich's second amended complaint gives Local 877 fair notice of what Lemerich's claims are and the grounds upon which the claims are based. Having previously represented itself in a sex discrimination proceeding before the

MHRC with the same plaintiff, Local 877 can hardly assert with a straight face that plaintiff's second amended complaint, which alleges sex discrimination and specifically mentions the MHRC proceedings, does not provide them with adequate notice as to the claims asserted and the conduct that is alleged to have occurred.

Finding that the requirements of Rule 8(a)(2) have been met, I now turn to whether the complaint fails to state a claim upon which relief may be granted. The claims in Lemerich's second amended complaint allege Local 877 discriminated against her based on sex in their representation of her, that they engaged in sex discrimination by denying her the full benefits of membership, and that they caused her employer to discriminate against her. (Second Am. Compl. ¶¶ 20, 25.) According to the incorporated portion of Exhibit A, there is no evidence indicating any occasion in which Local 877 opposed special or different treatment for male members. (Id. Ex. A ¶ V(2)(b).) There are two or more instances where Local 877 advocated for and obtained requested benefits for male members. (Id. ¶ V(2)(b) & (d).) However, when it came to Lemerich's request for a raise based on increased responsibilities and more complex duties, Local 877 not only refused to intercede on her behalf; they opposed her request. (Id. ¶ V(2)(d).) Moreover, she was informed that "the men opposed" her raise. (Id. ¶ V(2)(d) & (e).) These incorporated facts in addition to the allegations in the second amended complaint, if true, would amount to a violation of Title VII and the MHRA. Thus, I conclude that the second amended complaint, viewed in the light most favorable to Lemerich for the purposes of this motion to dismiss, states a claim of unlawful sex discrimination for which relief may be granted under Title VII and the MHRA.

Based on the foregoing, neither the Title VII claim nor the MRHA claim should be dismissed for failing to comply with Rule 8(a) or failing to state a claim for which relief may be granted.

To the extent Local 877 seeks to have Exhibit A stricken for purposes outside its 12(b)(6) motion, the motion to strike should be partially granted. Local 877 challenges Exhibit A on the grounds that it is immaterial and is included only for its prejudicial value. More importantly, Local 877 asserts that unlike contracts, corporate by-laws, and judgments, Exhibit A has no legal significance and is not the kind of document normally attached to pleadings.¹⁰ I agree that attaching the document in this fashion is highly unusual, but the circumstances surrounding the various motions to amend explain why this happened. The document does have legal significance because filing a complaint with the MHRC is a prerequisite to bringing an action in court and because the investigator's findings have been accepted by the MHRC in its formal determination of discrimination. (Second Am. Compl. ¶ 8.) Lemerich's second amended complaint only refers to and incorporates the findings of the investigator, which are in numbered paragraph form in section V of the report. The remaining portion of Exhibit A has no particular relevance and should be stricken.

Conclusion

I recommend that the Court **GRANT** in part Local 877's motion to dismiss as to Count II and **DENY** its motion to dismiss as it relates to Count I because plaintiff's

¹⁰ Local 877 also complains that the investigator's report does not show that the MHRC found reasonable cause. However, Lemerich's complaint clearly states that on May 14, 2001, the MHRC unanimously accepted the investigator's report and formally found reasonable grounds exist to believe discrimination occurred. (See Second Am. Compl. ¶ 8.)

complaint complies with Rule 8(a) and states a claim upon which relief may be granted.

Finally, I partially **GRANT** the motion to strike Exhibit A as discussed above.

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) 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.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated April 19, 2002

STNDRD

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-124

LEMERICH v. INTERNATIONAL UNION, et al

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Demand: \$0,000

Nature of Suit: 442

Lead Docket: None

Jurisdiction: Federal Question

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Cause: 42:2000 Job Discrimination (Sex)

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